



Western Australia

Railways (Access) Act 1998

Reprinted as at 2 February 2001

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Notes



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Reprinted under the
Reprints Act 1984 as
at 2 February 2001

Railways (Access) Act 1998

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

- **providing for the establishment of a Code governing the use of certain facilities for rail operations by persons other than their owners;**
- **establishing an office with monitoring, enforcement and administrative functions for the implementation of the Code; and**
- **specifying the kind of arrangements that railway owners are 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.**

[Long title amended by No. 13 of 2000 s.61; No. 55 of 2000 s.4.]

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Railways (Access) Act 1998*¹.

[Section 1 amended by No. 13 of 2000 s.62.]

2. Commencement

- (1) Part 6 comes into operation on the day on which this Act receives the Royal Assent¹.
- (2) The other provisions of this Act come into operation on such day as is, or days as are respectively, fixed by proclamation¹.

2A. Object of the Act

The main object of this Act is to establish a rail access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations.

[Section 2A inserted by No. 13 of 2000 s.63.]

3. Definitions

- (1) In this Act, unless the contrary intention appears —
 - “**access**” means the use of railway infrastructure;
 - “**access agreement**” means an agreement under the Code between a railway owner 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;

“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;

“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) sidings or spur lines that are excluded by subsection (3) or (4) from being railway infrastructure associated with the railway concerned;
- (i) rolling stock, rolling stock maintenance facilities, office buildings, housing, freight centres, or terminal yards and depots;

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

“railways network” means —

- (a) all the railways that were Government railways when this Act received the Royal Assent¹;
- (b) all the railways that are on land that is corridor land as defined in the *Rail Freight System Act 2000*; and
- (c) any railway declared under subsection (2) to be a part of the railways network;

s. 3A

“Regulator” means the Regulator appointed under section 13 and, except in sections 13(2), 15 and 19, includes a person acting under section 19B.

- (2) If a railway (the **“new railway”**) is constructed after this Act receives the Royal Assent ¹ and the new railway is connected to a railway that is a part of the railways network, the Minister may, by order published in the *Gazette*, declare the new railway to be a part of the railways network.
- (3) If a siding associated with a railway is managed and controlled by a different person from the person who manages and controls the use of the railway, the siding is not railway infrastructure of the railway for the purposes of this Act.
- (4) If a spur line associated with a railway is connected to premises managed and controlled by a different person from the person who manages and controls the use of the railway, the spur line is not railway infrastructure of the railway for the purposes of this Act unless the Minister, by order published in the *Gazette*, declares that it, or any of it, is railway infrastructure of the railway.

[Section 3 amended by No. 13 of 2000 s.64; No. 55 of 2000 s.5.]

3A. Scope of access rights clarified

- (1) Without limiting the kinds of rights that can arise under an access agreement, those rights may entitle a person who has access to railway infrastructure to —
 - (a) use land managed and controlled by the railway owner;
 - (b) construct and operate a rail or other connection to the railway infrastructure,for the purpose of exercising those rights.
- (2) Accordingly, the provisions of this Act about agreements and determinations to do with access extend to the matters described in subsection (1).

[Section 3A inserted by No. 13 of 2000 s.65.]

3B. Access rights may bind person through whom title derives in certain cases

- (1) If the right of the railway owner to manage and control the use of railway infrastructure is for a limited term or is subject to any other restriction imposed by the person through whom the railway owner derives those rights, the railway owner cannot give any right of access greater than the railway owner has.
- (2) Upon the premature termination of the railway owner's right to manage and control the use of railway infrastructure (whether for default or any other reason) —
 - (a) any right of access given by the railway owner continues as if it had been given by the person for the time being having the right to manage and control the use of the railway infrastructure ("**the current railway owner**"); and
 - (b) an agreement under which the right of access arises has effect, with any necessary modifications, as if the current railway owner were the person who had entered into the agreement as the railway owner,

unless within 3 months after the premature termination the current railway owner or any other party to the agreement gives to each other party notice in writing that the right of access and agreement are to terminate prematurely, in which case the right of access and agreement terminate at the time specified in the notice (being a time that is at least one month after the time when the notice was given), or the earliest time specified if more than one party gives notice under this subsection.

[Section 3B inserted by No. 13 of 2000 s.65.]

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 to which the Code applies.
- (2) Provision is to be made in the Code —
 - (a) for railway infrastructure to be available for use by persons other than the railway owner to carry on rail operations in accordance with —
 - (i) agreements with the railway owner; 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;
 - (c) setting out —
 - (i) provisions that are to govern the content of agreements and determinations referred to in paragraph (a);
 - (ii) rights, powers and duties that are to apply to and in relation to the negotiation, making, and implementation of agreements; and
 - (iii) duties and requirements in relation to the provision of access that are to be complied with by the railway owner;and
 - (d) for the Regulator to have supervisory and other functions for the purposes of the Code, including a function of determining certain requirements in relation to access that are to be binding on the railway owner, a

person making a proposal for access under the Code, and an arbitrator.

- (3) Provision may be made in the Code to exclude its application to interstate services and, for that purpose, to define what is an interstate service.

[Section 4 amended by No. 13 of 2000 s.66.]

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.

s. 6

- (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 a railway owner 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;
 - (ca) the functions of 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 authorise 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.

[Section 6 amended by No. 13 of 2000 s.67.]

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 a railway owner 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.

[Section 7 amended by No. 13 of 2000 s.68.]

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.

s. 10

- (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.

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.

11A. Consultation with railway owners on amendment or replacement of Code

- (1) Without limiting section 10, if the Minister considers that a proposed amendment or replacement of the Code may affect a railway owner, the Minister must consult with the railway owner and have regard to any submissions that the railway owner makes in relation to the proposal.

s. 12

- (2) If a railway owner considers that the Code, or a provision of it, has, as a result of altered circumstances, become unreasonable or inappropriate in its application to the railway owner, the railway owner may make a submission to the Minister requesting that the Code be amended or be repealed and replaced.
- (3) The Minister must consider a submission made under subsection (2) and, if requested by the railway owner, consult with the railway owner in relation to it.

[Section 11A inserted by No. 13 of 2000 s.69.]

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 to which the Code applies.
- (3) Before carrying out a review of the Code, the Regulator must call for public comment in accordance with subsection (4).
- (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.

[Section 12 amended by No. 13 of 2000 s.70.]

[Parts 3, 4 and 5 to be proclaimed ^{1a}.]

[Part 6 omitted under the Reprints Act 1984 s.7(4)(e).]

[Part 7 to be proclaimed ^{1a}.]

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Notes

- ¹ This reprint is a compilation as at 2 February 2001 of the *Railways (Access) Act 1998* and includes all amendments effected by the other Acts referred to in the following Table ^{1a}.

Table of Acts

Short title	Number and year	Assent	Commencement	Miscellaneous
<i>Government Railways (Access) Act 1998</i>	49 of 1998	30 November 1998	Act (other than Parts 3 to 7) proclaimed 12 August 2000 (see section 2(2) and <i>Gazette</i> 11 August 2000 p. 4691). Part 6 operative 30 November 1998 (see section 2(1)). Parts 3, 4, 5 and 7 to be proclaimed. ^{1a}	Short title subsequently amended (see footnote to section 1)
<i>Rail Freight System Act 2000</i> , Part 5 Division 1	13 of 2000	8 June 2000	1 July 2000 (see section 2(2) and <i>Gazette</i> 30 June 2000 p.3397)	Section 89 repealed by <i>Railways (Access) Amendment Act 2000</i> s.13
<i>Railways (Access) Amendment Act 2000</i> , Part 2	55 of 2000	28 November 2000	28 November 2000 (see section 2)	

- ^{1a} Parts 3, 4, 5 and 7 of the *Railways (Access) Act 1998* (No. 49 of 1998) to be proclaimed. They read as follows —

“

Part 3 — The Regulator

Division 1 — Office of Western Australian Independent Rail Access Regulator

[Heading inserted by No. 55 of 2000 s.6.]

13. Western Australian Independent Rail Access Regulator

- (1) An office of the Western Australian Independent Rail Access Regulator is established.

- (2) The Regulator is to be appointed by the Governor.
- (3) The office of Regulator is not an office in the Public Service and is not to be included in the Senior Executive Service provided for by the *Public Sector Management Act 1994*.
- (4) The Regulator is to be the chief employee under the *Public Sector Management Act 1994* of the entity that includes the Regulator while it is a public sector body under that Act.

[Section 13 inserted by No. 55 of 2000 s.6.]

14. Appointment of Regulator

- (1) When there is a vacancy or impending vacancy in the office of Regulator, the Minister is required to —
 - (a) inform the Commissioner of that vacancy or impending vacancy; and
 - (b) request the Commissioner to act under this section to enable the filling of that vacancy or impending vacancy.
- (2) On submitting the request to the Commissioner, the Minister may advise the Commissioner of any matters that the Minister wishes the Commissioner to take into account in nominating a person or persons suitable for appointment to the office of Regulator.
- (3) The Commissioner is to notify the vacancy or impending vacancy in such manner as the Commissioner thinks sufficient to enable suitably qualified persons to apply for appointment.
- (4) The Commissioner is to cause applicants to be examined, but nothing in this section requires the examination of all applicants.
- (5) To assist in the examination of applicants, the Commissioner is to form a selection panel that is to be chaired by the Director General of Transport and is to include at least 2 other persons chosen by the Commissioner.
- (6) The Commissioner may seek advice from such sources as the Commissioner considers relevant and may invite such other persons as the Commissioner thinks fit to assist him or her to decide on the person or persons suitable for appointment to the office of Regulator, and any person so invited may sit on the selection panel when it is examining applicants and may take part in the deliberations of the Commissioner on the matter.
- (7) If the Commissioner decides on a person or persons suitable for appointment to the office of Regulator, the Commissioner is to nominate that person or those persons and forward to the Minister the name or names of the person or persons nominated, together with full particulars of the qualifications of that person or those persons.

- (8) If the Minister accepts the person, or one of the persons, nominated by the Commissioner, the Minister is to recommend to the Governor that the person accepted be appointed.
- (9) If the Minister rejects the person, or both or all of the persons, nominated by the Commissioner, the Minister may request the nomination of another person by the Commissioner and is to deal with any further nomination as if it were made under subsection (7).
- (10) If the Commissioner does not nominate any person suitable for appointment or a nomination or further nomination by the Commissioner is rejected, the Minister —
- (a) may recommend to the Governor that —
 - (i) in the absence of a nomination by the Commissioner, a named person; or
 - (ii) a named person other than a person nominated by the Commissioner,as the case requires, be appointed to the office of Regulator; and
 - (b) is to cause notice of the making of that recommendation, together with the reasons for recommending the named person, to be published in the *Gazette* as soon as practicable.
- (11) In this section —
- “Commissioner”** means the Commissioner for Public Sector Standards under the *Public Sector Management Act 1994*;
- “Director General of Transport”** means the Director General of Transport under the *Transport Co-ordination Act 1966*.

[Section 14 inserted by No. 55 of 2000 s.6.]

15. Term of office

The Regulator is to be appointed for a term of office of not less than 3 years and not more than 5 years and is, on the expiration of a term of office, eligible for reappointment.

[Section 15 inserted by No. 55 of 2000 s.6.]

16. Resignation

- (1) The Regulator may resign from office by a signed notice of resignation addressed to the Minister.
- (2) A resignation takes effect on the day on which notice is received by the Minister or on a later day specified in the notice.

[Section 16 inserted by No. 55 of 2000 s.6.]

17. Suspension of Regulator

- (1) If the Governor is satisfied that the Regulator —
- (a) is physically or mentally incapable of performing the functions of office;
 - (b) has shown incompetence or neglect in performing those functions; or
 - (c) has been guilty of misbehaviour,
- the Governor may suspend the Regulator from office.
- (2) In subsection (1)(c) —
- “misbehaviour”** includes conduct that renders the Regulator unfit to hold office as Regulator whether or not the conduct relates to any function of the office.

[Section 17 inserted by No. 55 of 2000 s.6.]

18. Removal of Regulator

- (1) After being suspended from office under section 17 the Regulator is entitled to be restored to office unless —
- (a) a statement of the grounds of suspension is laid before each House of Parliament during the first 7 sitting days of that House following the suspension; and
 - (b) each House of Parliament, during the session in which the statement is so laid, and within 30 days of it being so laid, passes an address praying for the removal of the Regulator from office.
- (2) If the Regulator —
- (a) is suspended from office under section 17; and
 - (b) is not restored to office under subsection (1),
- the office of Regulator becomes vacant.

[Section 18 inserted by No. 55 of 2000 s.6.]

19. Remuneration and conditions of office

- (1) The remuneration and allowances and, subject to this Part, the other conditions of office of the Regulator are to be determined by the Governor.
- (2) Subsection (1) has effect subject to the *Salaries and Allowances Act 1975* if that Act applies to the Regulator.
- (3) The remuneration and allowances and conditions of office of the Regulator must not be varied while the Regulator is in office so as to become less favourable to the Regulator.

[Section 19 inserted by No. 55 of 2000 s.6.]

19A. Oath of office

- (1) Before beginning to perform the functions of office, the Regulator is to take an oath or make an affirmation that he or she will perform those functions faithfully and impartially.
- (2) The oath or affirmation is to be administered by a Judge.

[Section 19A inserted by No. 55 of 2000 s.6.]

19B. Acting Regulator

- (1) The Governor may appoint a person to act in the office of Regulator under this section and a person so appointed has, while so acting, all the functions of the Regulator.
- (2) A person appointed under subsection (1) may act in the office of the Regulator —
 - (a) if the Regulator is temporarily unable to perform official duties;
 - (b) if the Regulator is suspended from office under section 17;
 - (c) if the office of the Regulator is temporarily vacant; or
 - (d) in relation to a particular matter, if the Regulator is disqualified from acting in relation to that matter.
- (3) Subject to this Part, the terms and conditions of appointment of the person appointed under subsection (1) are to be as determined from time to time by the Governor.
- (4) A person acting under subsection (1) for the reason mentioned in subsection (2)(d) may perform functions of the Regulator in relation to the matter for which he or she is appointed even though the Regulator is at the same time performing other functions of the office.
- (5) An act or omission of a person acting under subsection (1) is not to be questioned on the ground that the occasion for his or her acting had not arisen or had ceased.

[Section 19B inserted by No. 55 of 2000 s.6.]

Division 2 — Functions

[Heading inserted by No. 55 of 2000 s.7.]

20. Functions of Regulator

- (1) The Regulator —
 - (a) is responsible for monitoring and enforcing compliance by railway owners with this Act and the Code; and

- (b) also has the functions given by particular provisions of this Act and the Code.
- (2) The Regulator may exercise the powers given by this Part for the purpose of performing his or her functions under this Act and the Code, and may do all things that are necessary or convenient to be done for or in connection with the performance of those functions.
- (3) Without limiting subsection (2), the powers given by this Division extend to financial information relating to a railway owner's own use of railway infrastructure to which the Code applies.
- (4) In performing functions under this Act or the Code, the Regulator is to take into account —
 - (a) the railway owner's legitimate business interests and investment in railway infrastructure;
 - (b) the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;
 - (c) the economic value to the railway owner of any additional investment that a person seeking access or the railway owner has agreed to undertake;
 - (d) the interests of all persons holding contracts for the use of the railway infrastructure;
 - (e) firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;
 - (f) the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure;
 - (g) the economically efficient use of the railway infrastructure; and
 - (h) the benefit to the public from having competitive markets.

[Section 20 inserted by No. 55 of 2000 s.8.]

20A. Independence of Regulator

- (1) Except as provided in subsection (2), the Regulator is independent of direction or control by the Crown or any Minister or officer of the Crown in the performance of the Regulator's functions.
- (2) The Minister may give directions in writing to the Regulator to the extent allowed by subsection (3), and the Regulator is to give effect to any such direction.

- (3) Directions under subsection (2) may relate only to general policies to be followed by the Regulator in matters of administration, including financial administration.
- (4) Nothing in this section affects the operation of section 8(2) of the *Public Sector Management Act 1994*.
- (5) Within 14 days after a direction is given under subsection (2), the Regulator is to cause the text of the direction to be published in the *Gazette*.
- (6) The text of a direction given under subsection (2) is to be tabled in both Houses of Parliament not later than 14 sitting days of the day on which the direction was given and included in the annual report submitted by the Regulator under section 66 of the *Financial Administration and Audit Act 1985*.

[Section 20A inserted by No. 55 of 2000 s.8.]

20B. Delegation

The Regulator may by instrument delegate the performance of any function, not including the power given by this section, to a person who is, in the Regulator's opinion, competent to perform that function.

[Section 20B inserted by No. 55 of 2000 s.8.]

20C. Conflict of interest

- (1) The Regulator must inform the Minister in writing of —
 - (a) any direct or indirect interest that the Regulator has or acquires in any business, or in any body corporate carrying on business, in Australia or elsewhere; or
 - (b) any other direct or indirect interest that the Regulator has or acquires that conflicts or may conflict with the Regulator's duties.

Penalty: \$10 000.

- (2) The Minister may —
 - (a) direct the Regulator to resolve a conflict between a direct or indirect interest and a duty of the Regulator in relation to a particular matter; and
 - (b) if the conflict is not resolved to the Minister's satisfaction, disqualify the Regulator from acting in relation to the matter.

[Section 20C inserted by No. 55 of 2000 s.8.]

21. Powers to obtain information

- (1) The Regulator may by notice in writing require a railway owner —
 - (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 railway owner.
- (2) A railway owner must comply with a notice under subsection (1).
Penalty: \$100 000.
Daily penalty: \$20 000.
[Section 21 amended by No. 13 of 2000 s.73.]

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.

22A. Power of entry

- (1) The Regulator may, for the purposes of this Act, enter any premises that are used in connection with the operation of a part of the railways network to which the Code applies and inspect the premises or anything in or on the premises.
- (2) A railway owner must facilitate any entry and inspection under subsection (1).
Penalty: \$100 000.
[Section 22A inserted by No. 13 of 2000 s.74.]

22B. Obstruction and deception

- (1) A person must not hinder or obstruct the Regulator exercising any power conferred by this Division.
Penalty: \$100 000.
- (2) A person must not give information to the Regulator acting under this Division that the person knows to be false or misleading in a material particular.
Penalty: \$100 000.

[Section 22B inserted by No. 13 of 2000 s.74.]

22C. Legal professional privilege

Nothing in this Division prevents a railway owner from refusing to —

- (a) send a statement or otherwise give information; or
- (b) produce or send a book, document or record,

because the information would be, or the book, document or record contains, information in respect of which the railway owner claims legal professional privilege.

[Section 22C inserted by No. 13 of 2000 s.74.]

22D. Self-incrimination

An individual is not excused from complying with a requirement under section 21 on the ground that to do so might incriminate the individual or render the individual liable to a penalty, but —

- (a) a statement or return sent or given by the individual that was made or brought into existence to comply with the requirement; or
- (b) the fact that a book, document, or record produced or sent by the individual to comply with the requirement was produced or sent,

is not admissible in evidence in any civil or criminal proceedings against the individual other than proceedings for perjury or for an offence against this Act arising out of the false or misleading nature of the information given.

[Section 22D inserted by No. 13 of 2000 s.74.]

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.

Penalty: \$100 000.

[Section 23 amended by No. 13 of 2000 s.75.]

Division 3 — Staff and consultants

[Heading inserted by No. 55 of 2000 s.9.]

23A. Staff

Public service officers are to be appointed or made available under Part 3 of the *Public Sector Management Act 1994* to enable the Regulator to perform his or her functions.

[Section 23A inserted by No. 55 of 2000 s.9.]

23B. Consultants

The Regulator may engage persons under contracts for services to provide such professional, technical or other assistance as the Regulator considers necessary for the performance of his or her functions.

[Section 23B inserted by No. 55 of 2000 s.9.]

23C. Use of government staff and facilities

(1) The Regulator may, by arrangement with the relevant employer, make use, either full-time or part-time, of the services of any officer or employee —

- (a) in the Public Service;
- (b) in a State agency or instrumentality; or
- (c) otherwise in the service of the Crown in right of the State,

other than an officer or employee of a party to an access agreement.

(2) The Regulator may, by arrangement with the department, agency or instrumentality, make use of any facilities of —

- (a) a department of the Public Service; or
- (b) a State agency or instrumentality,

that is not a party to an access agreement.

(3) An arrangement under subsection (1) is to provide, without limiting its other provisions, that while the Regulator is making use of the services of an officer or employee —

- (a) the Regulator has authority to control and supervise the officer to the exclusion of any person who would normally have any such authority; and
- (b) the salary and allowances of the officer are to be paid out of moneys available to the Regulator for that purpose.

- (4) Subject to subsection (3), an arrangement under subsection (1) or (2) is to be made on such terms as are agreed to by the parties to the arrangement.

[Section 23C inserted by No. 55 of 2000 s.9.]

Division 4 — Financial provisions

[Heading inserted by No. 55 of 2000 s.9.]

23D. Bank account

- (1) The Regulator is to have an account at a bank approved by the Treasurer.
- (2) The account is to be called the “Western Australian Independent Rail Access Regulator Account”.
- (3) The account is to be —
- (a) credited with all funds received by, made available to, or payable to the Regulator, including moneys appropriated by Parliament; and
 - (b) charged with all expenditure incurred under this Part to enable the functions of the Regulator to be performed, including the remuneration and allowances referred to in section 19.

[Section 23D inserted by No. 55 of 2000 s.9.]

23E. Borrowing from Treasurer

The Regulator may borrow from the Treasurer such amounts as the Treasurer approves and on such terms and conditions relating to repayment and payment of interest as the Treasurer imposes.

[Section 23E inserted by No. 55 of 2000 s.9.]

23F. Application of *Financial Administration and Audit Act 1985*

- (1) The provisions of the *Financial Administration and Audit Act 1985* regulating the financial administration, audit and reporting of statutory authorities apply to and in respect of the Regulator and the Regulator’s operations.
- (2) Despite subsection (1), any requirement under the Treasurer’s Instructions (issued under section 58 of the *Financial Administration and Audit Act 1985*) that the Regulator prepare performance indicators is to be limited to the Regulator’s management functions (including financial management).
- (3) Despite subsection (1), section 42 of the *Financial Administration and Audit Act 1985* does not apply in respect of the Regulator, but the expenditure that may be incurred under this Part in any one

financial year is limited to the amount specified by the Minister under this subsection for that year.

[Section 23F inserted by No. 55 of 2000 s.9.]

Division 5 — General

[Heading inserted by No. 55 of 2000 s.9]

23G. Immunity

- (1) No personal liability attaches to —
- (a) the Regulator;
 - (b) a person acting under section 19B;
 - (c) a delegate of the Regulator; or
 - (d) a person acting under the direction or authority of the Regulator,

for an act or omission in good faith in the performance, or purported performance, of official functions.

- (2) A liability that would, but for subsection (1), lie against a person, lies instead against the Crown.

[Section 23G inserted by No. 55 of 2000 s.9.]

Part 4 — Administrative and accounting arrangements

[Heading amended by No. 13 of 2000 s.76.]

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 or employee of a railway owner who is in any way concerned in the performance of access-related functions.

[Section 24 amended by No. 13 of 2000 s.77.]

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

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

[Section 25 amended by No. 13 of 2000 s.78.]

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) A railway owner must make arrangements to segregate its access-related functions from its other functions.
- (2) A railway owner must have appropriate controls and procedures to ensure that the measures in place under subsection (1) —
 - (a) operate effectively; and
 - (b) are complied with.

[Section 28 amended by No. 13 of 2000 s.79.]

29. Powers of Regulator in relation to segregation

- (1) Before a railway owner 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 a railway owner on any matter which relates to the way in which the railway owner's obligations under section 28 are to be carried out, with a view to the Regulator and the railway owner reaching agreement on the matter.
- (3) The Regulator may give directions in writing to a railway owner with respect to a matter to the extent that agreement is not reached

under subsection (2), and the railway owner is to comply with any such direction.

- (4) If a railway owner fails to comply with —
- (a) an arrangement, or varied arrangement, approved under subsection (1);
 - (b) an agreement reached under subsection (2); or
 - (c) a direction given under subsection (3),

the railway owner commits an offence.

Penalty: \$100 000.

[Section 29 amended by No. 13 of 2000 s.80.]

30. Matters to be covered under section 28

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

[Section 30 amended by No. 13 of 2000 s.81.]

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 or employees of the railway owner 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 a person using or disclosing it to be confidential.

[Section 31 amended by No. 13 of 2000 s.82.]

32. Avoidance of conflict of interest

The arrangements under section 28 must be such as to ensure that a relevant officer does not have a conflict between his or her duties —

- (a) as a person concerned in the performance of access-related functions, on the one hand; and

- (b) as a person involved in other business of the railway owner, on the other.

[Section 32 amended by No. 13 of 2000 s.83.]

33. Duty of fairness

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

[Section 33 amended by No. 13 of 2000 s.84.]

34. Maintenance of separate accounts and records

A railway owner 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 railway owner'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.

[Section 34 amended by No. 13 of 2000 s.85.]

Part 5 — Enforcement

34A. Prohibitions on hindering or preventing access

- (1) The railway owner in relation to a part of the railways network to which the Code applies must not engage in conduct aimed at hindering or preventing —
 - (a) access by any person to that part of the railways network for the purpose of carrying on rail operations to which the Code applies;
 - (b) the making of access agreements or any particular agreement in respect of that part of the railways network; or
 - (c) the access to which a person is entitled under an access agreement or a determination made by way of arbitration.
- (2) A person who has access under an access agreement must not engage in conduct aimed at hindering or preventing access by another person to any part of the railways network to which the Code applies.

- (3) Subsections (1) and (2) do not apply to conduct that the railway owner, or a person referred to in subsection (2), is entitled to engage in under this Act, the Code or some other written law or under an access agreement.

Penalty: \$100 000.

Daily penalty: \$20 000.

[Section 34A inserted by No. 13 of 2000 s.86.]

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 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).

[Section 36 amended by No. 13 of 2000 s.87.]

37. Injunctions

- (1) The Supreme Court may grant an injunction in such terms as the Court thinks fit if it is satisfied that a person —
- (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
 - (b) a person to whose proposal under the Code for access the conduct or proposed conduct relates.

[Section 37 amended by No. 13 of 2000 s.88.]

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 *Government² Railways (Access) Act 1998³*; 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*⁴,
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.
”.
- ² Section 91(1)(a) of the *Rail Freight System Act 2000* will amend this by deleting “*Government*”.

Railways (Access) Act 1998

³ Section 91(1)(b) of the *Rail Freight System Act 2000* will amend this subsection by inserting a further paragraph as follows —

“ (ca) the *Rail Freight System Act 2000*; ”.

⁴ Section 93 of the *Rail Freight System Act 2000* will amend this by deleting “*Government*”.