

Western Australia

## **Railways (Access) Act 1998**

---

As at 08 Dec 2004

Version 02-d0-05

Extract from [www.slp.wa.gov.au](http://www.slp.wa.gov.au), see that website for further information



## **Railways (Access) Act 1998**

---

### CONTENTS

---

<b>Part 1 — Preliminary</b>		
1.	Short title	2
2.	Commencement	2
2A.	Object of the Act	2
3.	Definitions	2
3A.	Scope of access rights clarified	4
3B.	Access rights may bind person through whom title derives in certain cases	5
<b>Part 2 — Establishment of Code</b>		
4.	Minister to establish Code	6
5.	Criteria to be considered in applying Code to particular routes	7
6.	Other matters for which Code may make provision	8
7.	Code does not affect existing agreements	8
8.	Code is subject to <i>Rail Safety Act 1998</i>	9
9.	Code is subsidiary legislation	9
10.	Public comment on amendment or replacement of Code 10	
11.	Exception to section 10	11
11A.	Consultation with railway owners on amendment or replacement of Code	11
12.	Review of Code	12
<b>Part 3 — The Regulator</b>		
20.	Functions of Regulator	14
21.	Powers to obtain information	15

Contents

---

22.	Powers in respect of documents etc.	16
22A.	Power of entry	16
22B.	Obstruction and deception	16
22C.	Legal professional privilege	17
22D.	Self-incrimination	17
23.	Confidentiality	17
<b>Part 4 — Administrative and accounting arrangements</b>		
<b>Division 1 — Preliminary</b>		
24.	Definitions	19
25.	This Part prevails over the <i>Government Railways Act 1904</i>	19
<b>Division 2 — Administrative arrangements</b>		
26.	Commission to make administrative arrangements	19
27.	Delegation	20
<b>Division 3 — Segregation of access-related functions</b>		
28.	Duty to segregate	20
29.	Powers of Regulator in relation to segregation	20
30.	Matters to be covered under section 28	21
31.	Protection of confidential information	21
32.	Avoidance of conflict of interest	22
33.	Duty of fairness	22
34.	Maintenance of separate accounts and records	22
<b>Part 5 — Enforcement</b>		
34A.	Prohibitions on hindering or preventing access	23
35.	Contract enforcement not affected	23
36.	Remedies	24
37.	Injunctions	24
<b>Notes</b>		
	Compilation table	25
	Provisions that have not come into operation	26

## **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;**
- **conferring on the Economic Regulation Authority 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; No. 67 of 2003 s. 62.]*

## **Part 1 — Preliminary**

### **1. Short title**

This Act may be cited as the *Railways (Access) Act 1998*<sup>1</sup>.  
[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 Assent<sup>1</sup>.
- (2) The other provisions of this Act come into operation on such day as is, or days as are respectively, fixed by proclamation<sup>1</sup>.

### **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;
  - “**Authority**” means the Public Transport Authority of Western Australia established by the *Public Transport Authority Act 2003* section 5;
  - “**Code**” means the Code for the time being in force under section 4;
  - “**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 Authority 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 Assent<sup>1</sup>;

**s. 3A**

---

- (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;

**“Regulator”** means the Economic Regulation Authority established by the *Economic Regulation Authority Act 2003*.

- (2) If a railway (the **“new railway”**) is constructed after this Act receives the Royal Assent<sup>1</sup> 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; No. 31 of 2003 s. 152(2); No. 67 of 2003 s. 62.]*

**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) section 10(2) and (3) 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.]*

## **Part 3 — The Regulator**

*[Division 1 (s. 13-19B) repealed by No. 67 of 2003 s. 62.]*

*[Division 2 heading repealed by No. 67 of 2003 s. 62.]*

### **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 its functions under this Act and the Code.
- (3) Without limiting subsection (2), the powers given by this Part 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; amended by No. 67 of 2003 s. 62.]*

*[20A-20C. Repealed by No. 67 of 2003 s. 62.]*

**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.]*

**s. 22**

---

**22. Powers in respect of documents etc.**

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

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

*[Section 22 amended by No. 67 of 2003 s. 62.]*

**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 Part.
- (2) A person must not give information to the Regulator acting under this Part 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; amended by No. 67 of 2003 s. 62.]*

---

**s. 22C. Legal professional privilege**

---

**22C. Legal professional privilege**

Nothing in this Part 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; amended by No. 67 of 2003 s. 62.]*

**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 its powers under this Part, the Regulator must ensure that confidential information to which section 31 applies is protected from use or disclosure except —

**s. 23**

---

- (a) in the performance of its functions under this Act and the Code;
- (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; No. 67 of 2003 s. 62.]*

*[Division 3, 4 and 5 (s. 23A-23G) repealed by No. 67 of 2003 s. 62.]*

## **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 Authority”** 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; No. 31 of 2003 s. 152(3).]*

#### **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 Authority 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.

*[Section 26 amended by No. 31 of 2003 s. 152(4).]*

**27. Delegation**

- (1) A person to whom the Authority, under the *Public Transport Authority Act 2003* section 19, delegates a function under this Act must be an officer of the Authority.
- (2) A function performed by the person in accordance with the delegation is to be taken to have been performed by the Authority.

*[Section 27 inserted by No. 31 of 2003 s. 152(5).]*

**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.

**s. 36**

---

**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.]*

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

**Notes**

<sup>1</sup> This is a compilation of the *Railways (Access) Act 1998* and includes the amendments made by the other written laws referred to in the following table <sup>1a</sup>. The table also contains information about any previous reprints.

**Compilation table**

<b>Short title</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>
<i>Government Railways (Access) Act 1998</i> <sup>2</sup>	49 of 1998	30 Nov 1998	Pt. 6: 30 Nov 1998 (see s. 2(1)); balance other than Pt. 3-5 and 7 (as amended by No. 13 of 2000): 12 Aug 2000 (see s. 2(2) and <i>Gazette</i> 11 Aug 2000 p. 4691); Pt. 3-5 and 7 (as amended by No. 13 and 55 of 2000): 1 Sep 2001 (see s. 2(2) and <i>Gazette</i> 28 Aug 2001 p. 4795)
<i>Rail Freight System Act 2000</i> Pt. 5 Div. 1 <sup>3</sup>	13 of 2000	8 Jun 2000	1 Jul 2000 (see s. 2(2) and <i>Gazette</i> 30 Jun 2000 p. 3397)
<i>Railways (Access) Amendment Act 2000</i> Pt. 2	55 of 2000	28 Nov 2000	28 Nov 2000 (see s. 2)
<b>Reprint of the <i>Railways (Access) Act 1998</i> as at 2 Feb 2001</b> (includes amendments listed above except those to the <i>Government Railways (Access) Act 1998</i> Pt. 3-5 and 7; those Parts are also not included)			
<b>Reprint of the <i>Railways (Access) Act 1998</i> as at 12 Oct 2001</b> (includes amendments listed above)			
<i>Machinery of Government (Planning and Infrastructure) Amendment Act 2002</i> s. 63	7 of 2002	19 Jun 2002	1 Jul 2002 (see s. 2 and <i>Gazette</i> 28 Jun 2002 p. 3037)
<i>Public Transport Authority Act 2003</i> s. 152	31 of 2003	26 May 2003	1 Jul 2003 (see s. 2(1) and <i>Gazette</i> 27 Jun 2003 p. 2384)
<i>Economic Regulation Authority Act 2003</i> s. 62 <sup>4</sup>	67 of 2003	5 Dec 2003	1 Jan 2004 (see s. 2 and <i>Gazette</i> 30 Dec 2003 p. 5723)

<sup>1a</sup> On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.

---

**Provisions that have not come into operation**

Short title	Number and Year	Assent	Commencement
<i>Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004</i> Pt. 3 Div. 1 <sup>5</sup>	77 of 2004	8 Dec 2004	To be proclaimed (see s. 2(2))

<sup>2</sup> Now known as the *Railways (Access) Act 1998*; short title changed (see note under s. 1).

<sup>3</sup> The *Railways (Access) Amendment Act 2000* s. 13 repealed the *Rail Freight System Act 2000* s. 89.

<sup>4</sup> The *Economic Regulation Authority Act 2003* s. 63(1), which gives effect to Sch. 3, reads as follows:

“

**63. Transitional and saving provisions**

- (1) Schedule 3 has effect to make transitional and saving provisions in respect of the amendments made in Schedule 2 Divisions 8, 12 and 18.

”

Schedule 3 reads as follows:

“

**Schedule 3 — Transitional and saving provisions for amendments in Schedule 2 Divisions 8, 12 and 18**

[s. 63(1)]

**1. Definitions**

In this Schedule —

“**commencement day**” means the day on which this Schedule comes into operation;

“**former official**” means —

- (a) the Coordinator of Water Services referred to in section 4 of the *Water Services Coordination Act 1995* as in effect immediately before the commencement day;
- (b) the Gas Pipelines Access Regulator; or
- (c) the Rail Access Regulator;

“**Gas Pipelines Access Regulator**” means the Western Australian Independent Gas Pipelines Access Regulator referred to in

---

**Defined Terms**

---

section 27 of the *Gas Pipelines Access (Western Australia) Act 1998* as in effect immediately before the commencement day;

**“Rail Access Regulator”** means the Western Australian Independent Rail Access Regulator referred to in section 13 of the *Railways (Access) Act 1998* as in effect immediately before the commencement day.

**2. Interpretation Act 1984 to apply**

This Schedule does not limit the operation of the *Interpretation Act 1984*.

**3. Decisions of Gas Pipelines Access Regulator**

Without limiting the operation of clause 6, a decision made by the Gas Pipelines Access Regulator as the local Regulator for the purposes of the Gas Pipelines Access (Western Australia) Law that was in effect immediately before the commencement day continues, on and after that day, as if made by the Authority as the local Regulator for the purposes of that Law.

**4. Decisions of Rail Access Regulator**

Without limiting the operation of clause 6, a decision made by the Rail Access Regulator as the Regulator for the purposes of the Code (as defined in the *Railways (Access) Act 1998*) that was in effect immediately before the commencement day continues, on and after that day, as if made by the Authority as the Regulator for the purposes of that Code.

**5. Licences under Part 3 of the Water Services Coordination Act 1995**

Without limiting the operation of clause 6, an operating licence that was in effect under Part 3 of the *Water Services Coordination Act 1995* immediately before the commencement day continues, on and after that day, as an operating licence in effect under that Part as amended by Schedule 2 Division 18.

**6. Continuing effect of things done**

On and after the commencement day any act, matter or thing done or omitted to be done before that day by, to, or in respect of, a former official (to the extent that that act, matter or thing has any force or effect) is to be taken to have been done or omitted by, to, or in respect of, the Authority.

**7. Completion of things begun**

On and after the commencement day anything lawfully commenced by a former official may, so far as it is not contrary to

this Act or any other written law that gives functions to the Authority, be carried on and completed by the Authority.

**8. Proceedings etc.**

Any proceedings or remedy that immediately before the commencement day might have been brought or continued by or available against or to a former official, may, on and after that day, be brought or continued and are available, by or against or to the Authority.

**9. Records**

On and after the commencement day the Authority is to take delivery of all papers, documents, minutes, books of account and other records (however compiled, recorded or stored) relating to the operations of each former official.

**10. Bank accounts**

- (1) The moneys standing to the credit of the account referred to in section 45 of the *Gas Pipelines Access (Western Australia) Act 1998* immediately before the commencement day are to be transferred to the account referred to in section 21 as soon as is practicable after that day.
- (2) The moneys standing to the credit of the account referred to in section 23D of the *Railways (Access) Act 1998* immediately before the commencement day are to be transferred to the account referred to in section 21 as soon as is practicable after that day.

**11. References to former official in agreements and instruments**

Any agreement or instrument subsisting immediately before the commencement day —

- (a) to which a former official is a party; or
- (b) which contains a reference to a former official,

has effect after the commencement day as if —

- (c) the Authority were substituted for the former official as a party to the agreement or instrument; and
- (d) any reference in the agreement or instrument to the former official were (unless the context otherwise requires) amended to be or include a reference to the Authority.

**12. References to former official in written law**

A reference to a former official in an enactment in force immediately before the commencement day may, where the



context so requires, be read as if it had been amended to be a reference to the Authority.

**13. Immunity to continue**

Despite the amendments made in Schedule 2 Divisions 8, 12 and 18, where a former official had the benefit of any immunity in respect of an act, matter or thing done or omitted before the commencement day, that immunity continues in that respect for the benefit of the Authority.

**14. Saving**

The operation of any provision of this Schedule is not to be regarded —

- (a) as a breach of contract or confidence or otherwise as a civil wrong;
- (b) as a breach of any contractual provision prohibiting, restricting or regulating the assignment or transfer of assets, rights or liabilities of the disclosure of information;
- (c) as giving rise to any remedy by a party to an instrument or as causing or permitting the termination of any instrument, because of a change in the beneficial or legal ownership of any asset, right or liability;
- (d) as causing any contract or instrument to be void or otherwise unenforceable; or
- (e) as releasing or allowing the release of any surety.

”.

<sup>5</sup> On the date as at which this compilation was prepared, the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* Pt. 3 Div. 1 had not come into operation. It reads as follows:

“

**Part 3 — Provisions about access to the railway constructed under the Agreement**

**Division 1 — Amendment of the *Railways (Access) Act 1998***

**7. *Railways (Access) Act 1998* amended**

The amendments in this Division are to the *Railways (Access) Act 1998*.

**8. Section 3 amended**

Section 3(1) is amended as follows:

- (a) by inserting in the appropriate alphabetical position —

“

“**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.

”;

- (b) in the definition of “railways network” by deleting “and” after paragraph (b) and inserting —

“

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

”.

**9. Section 11B inserted**

After section 11A the following section is inserted —

“

**11B. Exception to sections 10 to 11A**

- (1) Sections 10 to 11A do not apply if, in making an amendment to the Code, the Minister states that the amendment is made under this section for the purpose of the application of the Code to the railway constructed pursuant to the TPI Railway and Port Agreement.
- (2) Subsection (1) does not apply to an amendment made after the expiration of the period of 3 years after the day of the coming into operation of the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* section 13.

”.

”.