

Western Australia

Railways (Access) Code 2000

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Railways (Access) Code 2000

Part 1 — Preliminary

1. Citation

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

2. Commencement

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

3. Definitions

In this Code, unless the contrary intention appears —

access means —

- (a) the use of railway infrastructure; and
- (b) where applicable, includes the exercise of other rights of the kind described in section 3A(1) of the Act;

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

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

associate, in relation to a railway owner, means —

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

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- (i) control the composition of the governing body of the unit trust, joint venture or partnership;
- (ii) cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the unit trust, joint venture or partnership; or
- (iii) control the business affairs of the unit trust, joint venture or partnership;

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

- (a) the characteristics of the route;
- (b) the length of the rolling stock comprising a train that can be operated on the route, and the speed at which it can be operated;
- (c) the requirements of —
 - (i) the railway owner's safety standards under section 9 of the *Rail Safety Act 1998*; or
 - (ii) any written law;and
- (d) the technical requirements for the relevant rolling stock;

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

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

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

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

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

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

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

proponent means an entity that has made a proposal;

proposal means a proposal under section 8;

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

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 section 3(3) or (4) of the Act from being railway infrastructure; and
- (i) rolling stock, rolling stock maintenance facilities, office buildings, housing, freight centres, and terminal yards and depots;

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

railways network means —

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- (a) all the railways that were Government railways when the Act received the Royal Assent;
- (b) all the railways that are on land that is corridor land as defined in the *Rail Freight System Act 2000*;
- (ba) the railway constructed pursuant to the TPI Railway and Port Agreement; and
- (c) any railway declared under section 3(2) of the Act to be part of the railways network;

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

related body corporate has the same meaning as it has in the Corporations Law;

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

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

route section has the meaning given to it in Schedule 2.

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

[Section 3 amended in Gazette 23 Jul 2004 p. 2989; amended by No. 77 of 2004 s. 11.]

4. Other laws not affected

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

5. Routes to which this Code applies

- (1) This Code applies only to —
 - (a) those parts of the railways network; and
 - (b) the associated railway infrastructure,

that come within the routes specified in Schedule 1.

- (1a) Subsection (1) does not prevent —
- (a) the making of a proposal that involves any extension or expansion, or both, of a route or the associated railway infrastructure, as mentioned in section 8(4); or
 - (b) the proposal of such an extension or expansion being made in the course of negotiations under Part 3, as mentioned in section 8(5).
- (1b) If a route or the associated railway infrastructure is extended or expanded pursuant to an access agreement or a determination, this Code also applies to the route and infrastructure as so extended or expanded.
- (2) This Code ceases to apply to a Government railway that is part of the railways network, and the associated railway infrastructure, referred to in subsection (1) if it ceases by or under a written law to be a railway as defined in section 2 of the *Government Railways Act 1904*.

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

6. Publication of information

- (1) As soon as is practicable after the commencement of this Code, the railway owner in relation to a part of the railways network to which this Code applies must prepare, and make available for purchase, a publication containing —
- (a) the form of the railway owner's standard access agreement; and
 - (b) the information described in Schedule 2 in respect of that part of the railways network.
- (2) The publication may be in loose-leaf form or may be constituted by a number of separate documents.

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- (3) The railway owner must review, and amend or replace, the publication as often as is necessary to ensure that the details in it remain reasonably current at all times.
- (4) The railway owner may make a reasonable charge for supplying to a person a copy of the publication or an amendment to it.

Part 2 — Proposals for access

7. Preliminary information

- (1) An entity that is interested in making a proposal in respect of a particular route may ask the railway owner in writing to provide it with —
 - (a) an initial indication of —
 - (i) the available capacity of that route;
 - (ii) the price that the entity might pay for access; and
 - (iii) the terms, conditions and obligations that the railway owner would want to be included in any access agreement;
 - (b) for each relevant route section, particulars of —
 - (i) the gross tonnes carried on that section in each of the 3 complete financial years of the railway owner preceding the day on which the request is received; and
 - (ii) the curve and gradient diagrams;
 - (c) the working timetables for the route; and
 - (d) the origin and destination of any train paths proposed by the railway owner for the route.
- (2) The railway owner must provide the information sought by an entity under subsection (1) not later than the 14th day after the day on which the request is received.
- (3) In providing the information, the railway owner must give to the entity technical information about any aspect of the railway owner's railway infrastructure that affects the design of rolling stock.

8. Proposals for access

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

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- (2) A proposal can be made —
 - (a) only in respect of a route to which this Code applies; and
 - (b) for the purpose of carrying on rail operations, and for no other purpose.
- (3) A proposal must —
 - (a) specify the route, including the railway infrastructure, to which access is sought;
 - (b) indicate the times when the access is required; and
 - (c) set out the nature of the proposed rail operations.
- (4) A proposal may specify any extension or expansion, or both, of the route or the associated railway infrastructure that would be necessary to accommodate the proposed rail operations.
- (5) The fact that an extension or expansion is not specified in a proposal as mentioned in subsection (4) does not prevent the proposal of such an extension or expansion being made in the course of negotiations under Part 3 on the ground that such an extension or expansion would be necessary to accommodate the proposed rail operations.

[Section 8 amended in Gazette 23 Jul 2004 p. 2990.]

9. Railway owner's obligations on receipt of proposal

- (1) The railway owner must within 7 days after a proposal is received —
 - (a) acknowledge receipt of the proposal;
 - (b) inform the proponent of the railway owner's requirements under sections 14 and 15; and
 - (c) provide the proponent with —
 - (i) the floor price and the ceiling price for the proposed access;
 - (ii) the costs for each route section on which those prices have been calculated; and

- (iii) a copy of the costing principles that for the time being have effect under section 46.
- [(d) deleted]*
- (2) If section 8(4) applies —
 - (a) the sums notified to the proponent under subsection (1)(c)(i) and (ii) are to be assessed for access to the route and infrastructure as it exists and not for access to any proposed extension or expansion of the route and infrastructure; and
 - (b) the railway owner must, within 30 days after the proposal is received, provide the proponent with —
 - (i) a reasonable preliminary estimate of the costs relating to any extension or expansion specified in the proposal; and
 - (ii) the railway owner's opinion as to the share of those costs that is likely to be borne by the proponent.
- (3) In any negotiations or arbitration under Part 3 the railway owner is not bound by an estimate or opinion provided to a proponent under subsection (2)(b).
- (3a) The railway owner must give the proponent a draft access agreement not later than —
 - (a) if clause 10 of Schedule 4 does not apply —
 - (i) the day that is —
 - (I) the 30th day; or
 - (II) if section 8(4) applies, the 44th day, after the day on which the proposal was received by the railway owner; or
 - (ii) if section 10 applies to the proposal and the Regulator gives approval under that section, the 23rd day after the Regulator's approval was given;

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- (b) if clause 10 of Schedule 4 applies, the 7th day after the railway owner receives from the Regulator —
 - (i) an approval under subclause (3)(a); or
 - (ii) a determination under subclause (3)(b),
of that clause.
- (4) In subsection (1)(c)(i) —
floor price and ***ceiling price*** are the sums equal to the costs referred to in clauses 7(1) and 8(1) respectively of Schedule 4 —
 - (a) as determined by the Regulator under clause 9 of that Schedule; or
 - (b) if that clause does not apply, as determined by the railway owner for the purposes of clause 10(1) of that Schedule.

[Section 9 amended in Gazette 23 Jul 2004 p. 2990-1.]

10. Regulator's approval required in certain cases

- (1) Where —
 - (a) a proposal has been made; and
 - (b) the railway owner considers that it would involve the provision of access to railway infrastructure to an extent that may in effect preclude other entities from access to that infrastructure,

negotiations on the proposal must not be entered into by the railway owner without the approval of the Regulator.
- (2) Before the Regulator gives an approval under subsection (1) he or she is to —
 - (a) cause a notice giving a general description of the proposal and referring to the railway owner's opinion under subsection (1)(b) to be published in an 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 relating to the proposal may be made to the Regulator by any person within a specified period;
 - (iii) the address to which the submissions may be delivered or posted.
- (3) The period specified under subsection (2)(b)(ii) is to be not less than 30 days after both of the notices under subsection (2)(a) have been published.
- (4) For the purpose of making a decision under subsection (1) the Regulator —
 - (a) may be informed in such manner as he or she thinks fit; but
 - (b) must have regard to —
 - (i) any submission relevant to the decision that is made in accordance with a notice under this section;
 - (ii) what the Regulator determines to be the public interest; and
 - (iii) any other matter that he or she considers relevant.

11. Time limits applicable to section 10

- (1) The railway owner must, within 7 days after a proposal is received, determine whether or not in its opinion the provisions of section 10(1)(b) apply to the proposal.

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- (2) If those provisions are determined to be applicable the railway owner must, as soon as is practicable after that determination is made —
- (a) apply to the Regulator for his or her approval under section 10(1); and
 - (b) notify the proponent of the day on which the application is made.

12. Record of proposals to be kept

- (1) The railway owner must keep a register relating to all proposals made to it under section 8.
- (2) The register must show —
- (a) a general description of the proposal;
 - (b) the name and address of the proponent;
 - (c) the day on which it was received by the railway owner;
 - (d) the day on which each step required by this Code was taken; and
 - (e) the final outcome of the proposal.
- (3) The register may be kept in electronic form, but must be capable of being reproduced in written form.

Part 3 — Negotiations

Division 1 — When duty to negotiate arises

13. Duty of railway owner to negotiate

- (1) Where a proposal is made by an entity the railway owner must negotiate in good faith with the entity with a view to the railway owner and the entity making an access agreement in respect of the route.
- (2) The duty imposed on the railway owner by subsection (1) —
 - (a) is subject to the proponent meeting the requirements of sections 14 and 15; and
 - (b) does not arise until the proponent has given notice to the railway owner under section 19(3).

14. Proponent must show it has managerial and financial ability

- (1) The railway owner is entitled to require a proponent to show that —
 - (a) either —
 - (i) its management and staff have the necessary knowledge and experience; or
 - (ii) it will be able to, and will, engage the services of another entity whose management and staff have the necessary knowledge and experience, to carry on the proposed rail operations; and
 - (b) it has the necessary financial resources —
 - (i) to carry on the proposed rail operations; and
 - (ii) if section 8(4) applies, to pay the share of costs referred to in section 9(2)(b).
- (2) In subsection (1)(b) —
financial resources, in relation to an entity, includes its ability to meet its financial obligations under an access agreement —

- (a) to the railway owner, having regard to any credit arrangements with the railway owner; and
- (b) to other persons, including excesses under policies of insurance.

[Section 14 amended in Gazette 23 Jul 2004 p. 2991.]

15. Proponent must show that its operations are within the capacity of the route or expanded route

- (1) The railway owner is entitled to require a proponent to show that, having regard to the capacity of the route and any information provided to the proponent under sections 6 and 7 —
 - (a) the proposed entry time onto and exit time from the route to which the proposal relates; and
 - (b) the speed and length of rolling stock proposed to be used in operations on the route,

either —

- (c) can be accommodated on the route; or
 - (d) if section 8(4) applies, could be so accommodated if the extension or expansion, or both, specified for the purposes of section 8(4) were undertaken by the railway owner.
- (2) If section 8(4) applies, the railway owner is also entitled to require the proponent to provide the railway owner with a preliminary assessment, based on information reasonably available to the proponent, showing that the proposed extension or expansion —
 - (a) can be carried out in a technically and economically feasible way; and
 - (b) will be consistent with the carrying on of safe and reliable rail operations on the route.

[Section 15 inserted in Gazette 23 Jul 2004 p. 2991-2.]

Division 2 — Negotiations

16. General duties of railway owner in negotiations

- (1) In the negotiation of access agreements the railway owner —
 - (a) must use all reasonable endeavours —
 - (i) to avoid unnecessary delays on its part; and
 - (ii) to meet the requirements of a proponent who has complied, and whose proposal complies, with this Code;
 - and
 - (b) must not unfairly discriminate between one proponent and another.
- (2) In the negotiation of access agreements the railway owner must not unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner including, without limitation, in relation to —
 - (a) the allocation of train paths;
 - (b) the management of train control; and
 - (c) operating standards.
- (3) In subsection (2) —

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

17. Matters that must be covered

- (1) In negotiating an access agreement the railway owner and the proponent must —
 - (a) ensure that provision is made in detail for the matters specified in Schedule 3;
 - (b) give effect to the provisions of Schedule 4;
 - (c) include in the agreement all matters agreed between them in relation to the proposal apart from provisions —

- (i) implied by law; or
 - (ii) incorporated in the agreement by reference.
- (2) Subsection (1) does not prevent other matters from being included in an access agreement.

18. Sufficiency of information under sections 14 and 15

- (1) When —
 - (a) a proponent —
 - (i) has given information to the railway owner for the purposes of sections 14 and 15; and
 - (ii) has notified the railway owner that in the proponent's opinion the information given is sufficient for those purposes;
 - but
 - (b) the railway owner is not satisfied as to all of the matters mentioned in those sections,

the railway owner must notify the proponent of its dissatisfaction not later than the 7th day after the day on which the opinion mentioned in paragraph (a)(ii) is notified to the railway owner.

- (2) If —
 - (a) the railway owner has notified the proponent of its dissatisfaction under subsection (1);
 - (b) the proponent gives further information and notifies the railway owner as mentioned in subsection (1)(a)(ii), whether once or more than once; and

(c) the railway owner is still dissatisfied,

the railway owner must notify the proponent of its dissatisfaction not later than the 7th day after the day on which the opinion mentioned in paragraph (b) is notified to the railway owner.

(3) If a proponent —

(a) has received notice under this section that the railway owner is not satisfied as to —

(i) the matters mentioned in sections 14 and 15; or

(ii) any particular matter;

and

(b) considers that the notice is not justified,

the proponent may notify the railway owner that there is a dispute between them as to whether the requirements of sections 14 and 15 have, or any particular requirement has, been met.

19. Notice of readiness to commence negotiations

(1) The railway owner must give to a proponent notice in writing of its readiness to begin negotiations —

(a) as soon as is reasonably practicable; and

(b) in any case not later than the 30th day,

after the requirements of sections 14 and 15 have been met.

(2) For the purposes of subsection (1), the requirements of sections 14 and 15 have been met when —

(a) the railway owner has given notice in writing to the proponent that all of those requirements have been met; or

(b) to the extent that any requirement is not covered by such a notice, a determination has been made by an arbitrator under Division 3 that the requirement has been met.

- (3) The proponent must not later than the 7th day after the day on which it is given notice under subsection (1) —
 - (a) notify the railway owner in writing of its readiness to begin negotiations; and
 - (b) nominate a day on which the negotiations will begin, which day cannot be before any day agreed to by the proponent for the purposes of clause 11(2) of Schedule 4.

20. Negotiation period

- (1) The railway owner and the proponent must begin negotiations on the day nominated under section 19(3)(b).
- (2) Immediately before the negotiations are begun the railway owner and the proponent must jointly fix a day (***the termination day***) after which the negotiations —
 - (a) will cease if, by the end of that day, they have not entered into an access agreement; or
 - (b) will continue only if a later termination day is fixed jointly by the railway owner and the proponent.
- (3) The initial termination day fixed under subsection (2) is to be not later than the 90th day after the day nominated under section 19(3)(b).
- (4) The railway owner and the proponent may extend the negotiations more than once by fixing later termination days under subsection (2)(b).

21. Regulator may give opinion on price sought for access

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

- (2) On application being so made, the Regulator is to form an opinion in terms of the application and notify that opinion to the applicant and the railway owner.
- (3) For the purpose of forming his or her opinion the Regulator —
 - (a) must give the applicant and the railway owner an opportunity to make submissions and present material;
 - (b) may otherwise be informed in such manner as he or she thinks fit;
 - (c) may exercise any power conferred on him or her by Division 2 of Part 3 of the Act; and
 - (d) may otherwise proceed as he or she thinks fit.
- (4) An opinion given under this section is for the information of the applicant and does not have any effect for the purposes of the Act or this Code.

Division 3 — Arbitration of disputes

22. Definitions

In this Division —

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

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

23. Availability of mediation etc.

Nothing in this Part limits the application of section 27 of the *Commercial Arbitration Act 1985* to a dispute to which this Division applies.

24. Panels of persons who may be appointed as arbitrators

- (1) The Regulator —
 - (a) is to establish panels of the names of persons from which persons are to be appointed under section 26(2) to act as arbitrators; and

- (b) may at any time —
 - (i) include the names of additional persons on; or
 - (ii) remove the names of persons from,
a panel that has been established.
- (2) The Regulator may —
 - (a) include the name of a person on; or
 - (b) remove the name of a person from,
a panel under this section only on the recommendation of the Chairman for the time being of the Western Australian Chapter of the Institute of Arbitrators and Mediators Australia.
- (3) As often as is necessary, the Regulator is to —
 - (a) request the Chairman referred to in subsection (2) to make a recommendation; and
 - (b) specify a day before which the recommendation is to be made,
and if the recommendation is not made before the specified day the Regulator may effect any necessary inclusion or removal of a name without complying with subsection (2).
- (4) The name of the Regulator cannot be included on a panel under this section.

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

- (1) For the purposes of this Division an entity is in dispute with the railway owner if —
 - (a) the entity has made a proposal for access by it;
 - (b) the proposal complies, and the entity has complied, with this Code; and
 - (c) any of the situations in subsection (2) exist.
- (2) The situations referred to are —

- (a) the railway owner has refused to negotiate on the proposal as required by section 13;
- (b) the proponent has notified the railway owner under section 18(3) that there is a dispute between them; or
- (c) the entity and the railway owner have entered into negotiations on the proposal but —
 - (i) have not before the termination day fixed under section 20(2) reached agreement on the provisions to be contained in an access agreement; or
 - (ii) have before that day jointly made a determination in writing that the negotiations have broken down.

26. Arbitration of disputes under *Commercial Arbitration Act 1985*

- (1) An entity (*the other party*) that is in dispute with the railway owner may, by notice in writing to the Regulator, refer the dispute to arbitration.
- (2) On receipt of a notice under subsection (1), the Regulator is to appoint one or more persons whose names are on a panel established under section 24 to act as arbitrators to hear and determine the dispute.
- (3) Subject to this Division, the *Commercial Arbitration Act 1985* applies to an arbitration under this Division.
- (4) A dispute to which this Division applies cannot be referred to arbitration, or otherwise dealt with, under the *Commercial Arbitration Act 1985* except in accordance with this Division.

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

- (1) Subsection (2) applies if —

- (a) an appointment is required to be made under section 26 in respect of a dispute;
 - (b) the proposed rail operations concerned are part of operations that come within some other access regime recognised under the *Trade Practices Act 1974* of the Commonwealth; and
 - (c) the issues in dispute are —
 - (i) likely to be the same as or similar to issues requiring to be arbitrated under the other access regime; or
 - (ii) issues directly affecting both access regimes.
- (2) Where this subsection applies, the Regulator must, so far as is practicable, appoint under section 26 a person or persons who in his or her opinion is or are qualified and acceptable for appointment to conduct an arbitration both under this Code and the other access regime.

28. Preliminary conference to be held

- (1) Where a dispute has been referred to arbitration, the arbitrator must arrange a preliminary conference between the parties to the dispute, to be presided over by the arbitrator.
- (2) The purpose of the conference is for the arbitrator and the parties to reach an agreement on a timetable for —
 - (a) the taking of particular steps in the conduct of the arbitration; and
 - (b) the making of a determination.
- (3) The conference is to take place not later than 10 days after the day on which the arbitrator is appointed.

- (4) If the arbitrator considers that it is not likely that an agreement will be reached as mentioned in subsection (2) within a reasonable time, the arbitrator is to give such directions to the parties as he or she thinks fit as to the matters referred to in that subsection.
- (5) Nothing in this section limits section 37 or 46 of the *Commercial Arbitration Act 1985*.

29. Matters to be taken into account by arbitrator

- (1) In hearing and determining a dispute the arbitrator —
 - (a) must give effect to —
 - (i) the Act and this Code; and
 - (ii) matters determined by the Regulator;
 - (b) where paragraph (a) or (c) of section 25(2) applies, must take into account the matters set out in clause 6(4)(i), (j) and (l) of the Competition Principles Agreement; and
 - (c) may take into account any other matter that the arbitrator considers relevant.
- (2) The Competition Principles Agreement is defined in section 3 of the Act and, for information, the clauses referred to in subsection (1)(b) are set out in Schedule 5.
- (3) In subsection (1)(a)(ii) —
matters determined by the Regulator means —
 - (a) the train management guidelines under section 43;
 - (b) the statements of policy under section 44;
 - (c) the costing principles under section 46;
 - (d) the over-payment rules under section 47;
 - (e) determinations under clauses 3 and 9 of Schedule 4; and
 - (f) approvals and determinations under clause 10(3) of that Schedule.

30. Question may be referred to Regulator

- (1) Without limiting the powers of the arbitrator under the *Commercial Arbitration Act 1985*, the arbitrator may refer a question that arises in the course of the hearing of a dispute to the Regulator and request his or her opinion, advice or comments on the question.
- (2) In determining the dispute the arbitrator may give such weight as he or she thinks fit to any opinion, advice or comments given by the Regulator in response to such a request.

31. Determination of dispute

- (1) The arbitrator is to determine the dispute by making a written determination, which is to be taken to be an award within the meaning of the *Commercial Arbitration Act 1985*.
- (2) A determination cannot require or allow the doing or omission of anything that is contrary to or inconsistent with the *Rail Safety Act 1998*.
- (3) Nothing in this Code is to be read as providing that a determination must require the railway owner to allow the other party to use railway infrastructure.

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

Where the determination is made for the purposes of a dispute referred to in section 25(2)(b), the determination may declare that the requirements of sections 14 and 15 have been met, or any particular requirement has been met, as the case may require.

33. Determinations in other cases

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

- (a) may deal with any matter relating to use by the other party of railway infrastructure, including matters that were not the basis for the party's request for arbitration; and
 - (b) may contain any direction to the railway owner or the other party that is necessary for the purposes of paragraph (a).
- (3) Without limiting subsection (2), the determination may do one or more of the following —
- (a) require the railway owner to allow the other party to use railway infrastructure;
 - (b) require the other party to use, and pay for, railway infrastructure;
 - (c) specify the terms and conditions on which the other party may use railway infrastructure;
 - (d) subject to subsection (4), require the railway owner to extend or expand a route or the associated railway infrastructure, or to do both.
- (4) The determination must not require the railway owner to extend or expand a route or the associated railway infrastructure unless the arbitrator determines that the proponent —
- (a) has the necessary financial resources to pay any costs relating to the extension or expansion for which the proponent is liable; and
 - (b) is able to secure such payment in a way that the arbitrator considers satisfactory.

[Section 33 amended in Gazette 23 Jul 2004 p. 2992.]

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

- (1) The railway owner must, subject to Part V of the *Commercial Arbitration Act 1985*, give effect to a determination unless the

other party to the arbitration has made an election under subsection (2).

- (2) Except as provided by subsection (5), the other party to an arbitration is not required to give effect to a determination if, within 14 days after the day on which it is notified of the determination, it elects not to do so.
- (3) Such an election is to be made by notice in writing given to the arbitrator and the railway owner.
- (4) Unless it makes such an election, the other party must, subject to Part V of the *Commercial Arbitration Act 1985*, give effect to a determination after —
 - (a) the expiration of the period of 14 days referred to in subsection (2); or
 - (b) an earlier day on which it gives notice in writing to the railway owner and the arbitrator that it waives its right to make an election under subsection (2).
- (5) Subsection (2) does not apply to any provision of a determination that consists of a direction as to, or an award of, costs under section 34(1) or (4) of the *Commercial Arbitration Act 1985*, and any such provision binds the other party in the same way as it binds the railway owner.

[Section 34 amended in Gazette 23 Jul 2004 p. 2992-3.]

35. Termination of arbitration

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

- (a) the other party's referral under section 26(1) was vexatious;
- (b) the subject-matter of the dispute is trivial, misconceived or lacking in substance;
- (c) the other party has not engaged in negotiations in good faith.

Part 4 — Access agreements

Division 1 — General

36. General matters relating to access agreements

- (1) An access agreement must relate to —
 - (a) the proposal made by the proponent; or
 - (b) some modification of that proposal agreed to by the railway owner and the proponent.

- (2) An access agreement cannot be made —
 - (a) in respect of a route and the associated railway infrastructure unless this Code applies to that route and infrastructure;
 - (b) for access other than for the purpose of carrying on rail operations; or
 - (c) so as to confer on an entity exclusive rights to use or occupy any route, whether temporarily or otherwise, including by way of sale, lease or assignment.

- (3) Subsection (2)(a) does not, where —
 - (a) section 8(4) applies; or
 - (b) an extension or expansion is proposed in the course of negotiations under Part 3, as mentioned in section 8(5),

prevent the making of an access agreement that involves the extension or expansion, or both, of a route or the associated infrastructure.

[Section 36 amended in Gazette 23 Jul 2004 p. 2993.]

37. Access agreements may differ

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

38. Agreement not affected by later amendments to Code

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

Division 2 — Notice and registration of access agreements and determinations

39. Registration of agreements and determinations

- (1) The railway owner must give a copy of an access agreement to the Regulator as soon as is practicable after the agreement is entered into.
- (2) Where a determination is made by an arbitrator, the railway owner must give a copy of the determination to the Regulator as soon as is practicable after the determination is received by it.
- (3) The Regulator is to register —
 - (a) access agreements; and
 - (b) determinations to which section 33 applies,received by him or her under this section.
- (4) Registration is effected by recording the following particulars in a register —
 - (a) the nature of the instrument, that is whether it is an agreement or a determination;
 - (b) the names of the parties involved;
 - (c) the part of the railways network and the associated railway infrastructure to which it relates;
 - (d) the day on which it was entered into or made;
 - (e) the period for which it will be in force.
- (5) The Regulator is to make the register available for inspection by any person during office hours.

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

Part 5 — Certain approval functions of Regulator

40. Interpretation

- (1) Nothing in this Part limits the function of the Regulator under Part 3, Division 2 of the Act to monitor compliance by the railway owner with the provisions of this Code.
- (2) For the avoidance of doubt it is declared that a Part 5 instrument relating to a part of the railways network and the associated infrastructure is binding on the person who is for the time being the railway owner in respect of that part.

- (3) In subsection (2) —

Part 5 instrument means —

- (a) the train management guidelines;
- (b) the statements of policy;
- (c) the costing principles; and
- (d) the over-payment rules,

for the time being approved or determined under sections 43, 44, 46 and 47 respectively.

41. Matters to be considered by Regulator

For the purposes of performing his or her functions under section 29(1) of the Act or section 43 or 44 of this Code, the Regulator —

- (a) may be informed in such manner as he or she thinks fit; but
- (b) must have regard to —
 - (i) submissions made in accordance with a notice under section 42(1) or 45(1), as the case may be;
 - (ii) what the Regulator determines to be the requirements of the public interest; and
 - (iii) any other matter that he or she considers to be relevant.

42. Public comment before approval given to segregation arrangements

- (1) Before the Regulator approves any arrangement or variation as mentioned in section 29(1) of the Act he or she is to —
- (a) cause a notice describing the requirements of sections 28 and 29(1) of the Act, and containing a general description of the proposed arrangement or variation, to be published in an 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 detailed description of the proposed arrangement or variation may be obtained;
 - (ii) a statement that written submissions relating to the proposed arrangement or variation may be made to the Regulator by any person within a specified period;
 - (iii) the address to which the submissions may be delivered or posted.
- (2) The period specified under subsection (1)(b)(ii) is to be not less than 30 days after both of the notices under subsection (1)(a) have been published.

43. Railway owner to comply with approved train management guidelines

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

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- (2) The railway owner is to comply with the train management guidelines for the time being approved or determined by the Regulator under this section.
- (3) As soon as is practicable after the commencement of this Code the railway owner is to prepare and submit to the Regulator a statement of the principles, rules and practices (***the train management guidelines***) that are to be applied and followed by the railway owner —
 - (a) in the performance of the functions referred to in subsection (1); but
 - (b) only so far as that performance relates to requirements imposed on the railway owner by or under the Act or this Code.
- (4) The Regulator may —
 - (a) approve the statement submitted by the railway owner either with or without amendments; or
 - (b) if he or she is not willing to do so, determine what are to constitute the train management guidelines.
- (5) The train management guidelines may be amended or replaced by the railway owner with the approval of the Regulator.
- (6) The Regulator may, by written notice, direct the railway owner —
 - (a) to amend the train management guidelines; or
 - (b) to replace them with other train management guidelines determined by the Regulator,

and the railway owner must comply with such a notice.

44. Certain approved statements of policy to be observed

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

- (2) As soon as is practicable after the commencement of this Code each railway owner is to prepare and submit to the Regulator a statement of the policy that it will apply (*a statement of policy*) in —
- (a) the allocation of train paths; and
 - (b) the provision of access to train paths that have ceased to be used.
- (3) The Regulator may —
- (a) approve a statement of policy submitted by the railway owner either with or without amendments; or
 - (b) if he or she is not willing to do so, determine what is to constitute the statement of policy.
- (4) A statement of policy may be amended or replaced by the railway owner with the approval of the Regulator.
- (5) The Regulator may, by written notice, direct the railway owner —
- (a) to amend a statement of policy; or
 - (b) to replace a statement of policy with another statement of policy determined by the Regulator,
- and the railway owner must comply with such a notice.

45. Public comment on draft statements under sections 43 and 44

- (1) Before the Regulator approves a statement prepared by a railway owner under section 43(3) or 44(2), he or she is to —
- (a) cause a notice giving a general description of the statement to be published in an issue of —
 - (i) a daily newspaper circulating throughout the Commonwealth; and
 - (ii) a daily newspaper circulating throughout the State;
- and

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- (b) include in the notice the following information —
 - (i) the places at which a copy of the statement may be obtained;
 - (ii) a statement that written submissions relating to the statement may be made to the Regulator by any person within a specified period;
 - (iii) the address to which the submissions may be delivered or posted.
- (2) The period specified under subsection (1)(b)(ii) is to be not less than 30 days after both of the notices under subsection (1)(a) have been published.

46. Costing principles

- (1) As soon as is practicable after the commencement of this Code each railway owner is to prepare and submit to the Regulator a statement of the principles, rules and practices (***the costing principles***) that are to be applied and followed by the railway owner —
 - (a) in the determination of the costs referred to in clauses 7 and 8 of Schedule 4; and
 - (b) in the keeping and presentation of the railway owner's accounts and financial records so far as they relate to the determination of those costs.
- (2) The Regulator may —
 - (a) approve the statement submitted by the railway owner either with or without amendments; or
 - (b) if he or she is not willing to do so, determine what are to constitute the costing principles.
- (3) The costing principles may be amended or replaced by the railway owner with the approval of the Regulator.
- (4) The Regulator may, by written notice, direct the railway owner —

- (a) to amend the costing principles; or
- (b) to replace them with other costing principles determined by the Regulator,

and the railway owner must comply with such a notice.

- (5) The costing principles must be consistent with the requirements of the Corporations Law relating to financial administration, and are of no effect to the extent of any inconsistency.

47. Over-payment rules

- (1) As soon as is practicable after the commencement of this Code each railway owner is to prepare and submit to the Regulator a statement of the rules (*the over-payment rules*) that are to apply where breaches of clause 8 of Schedule 4 occur on the part of that owner that could not reasonably be avoided.
- (2) The rules referred to in subsection (1) must give effect to the following basic requirements —
 - (a) the excess referred to in clause 8(4) of Schedule 4 in respect of an operator or group of operators must at all times be within a limit, being a percentage of the relevant costs, from time to time notified in writing to the railway owner by the Regulator;
 - (b) at the expiry of each successive period of 3 years from the commencement of access by an operator or group of operators there must be no such excess in respect of that operator or group of operators.
- (2a) The over-payment rules may make provision for a scheme under which amounts are to be determined that the railway owner is to pay to any relevant operator for the purpose of giving effect to subsection (2)(b).
- (3) The Regulator may —
 - (a) approve the statement submitted by the railway owner either with or without amendments; or

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- (b) if he or she is not willing to do so, determine what are to constitute the over-payment rules.
- (4) The over-payment rules may be amended or replaced by the railway owner with the approval of the Regulator.
- (5) The Regulator may, by written notice, direct the railway owner —
 - (a) to amend the over-payment rules; or
 - (b) to replace them with other over-payment rules determined by the Regulator,and the railway owner must comply with such a notice.
- (6) The Regulator may in writing direct the railway owner to pay to an operator any amount determined under a scheme referred to in subsection (2a).
- (7) The railway owner must comply with —
 - (a) the provisions of the over-payment rules; and
 - (b) a direction given to the owner by the Regulator under subsection (6).

[Section 47 amended in Gazette 23 Jul 2004 p. 2993.]

Part 6 — General

48. Railway owner must supply certain information if requested

If —

- (a) the information described in section 9(1)(c) has been provided to a proponent by a railway owner in respect of a route section; and
- (b) another entity requests the railway owner to provide it with that information,

the railway owner must —

- (c) comply with the request; and
- (d) if the information does not remain current, indicate the time at which the information was correct.

49. Inquiries and reports by Regulator

- (1) It is a function of the Regulator to inquire into, and to report and make recommendations to the Minister on —
 - (a) matters relating to the operation of the Act or this Code; or
 - (b) the manner in which the Act or this Code might be amended.
- (2) Subsection (1) applies to any matter that —
 - (a) is referred to the Regulator by the Minister for inquiry; or
 - (b) in the opinion of the Regulator should be brought to the notice of the Minister.

50. Dissemination of information by Regulator

- (1) It is a function of the Regulator to disseminate information that relates to the carrying out of the Act, this Code or of matters provided for by them.

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- (2) Without limiting subsection (1), it applies to information that the Regulator considers would guide or assist persons who are involved in negotiations under Part 3 or may become so involved.
- (3) Nothing in subsection (1) authorises the Regulator to disclose information that is confidential without the consent of each person to whom the protection of confidentiality belongs.

51. Enforcement

Provision for the enforcement of the obligations imposed by this Code is made in Part 5 of the Act.

52. Transitional provisions

- (1) The first determinations under clause 3(1)(a) of Schedule 4 are to be made by the Regulator —
 - (a) as at 30 June 2001; or
 - (b) at the discretion of the Regulator, as at an earlier day fixed by him or her.
- (2) If an earlier day is so fixed, the next determinations under paragraph (a) of clause 3(1) of Schedule 4 are, despite that paragraph, to be made as at 30 June 2002.
- (3) Until the Regulator publishes in the *Gazette* notice of a determination under subparagraph (i) of clause 3(1)(a) of Schedule 4, the weighted average cost of capital for the railway infrastructure referred to in that subparagraph is 5.1%.
- (4) Until the Regulator publishes in the *Gazette* notice of a determination under subparagraph (ii) of clause 3(1)(a) of Schedule 4, the weighted average cost of capital for the railway infrastructure referred to in that subparagraph is 8.2%.
- (5) Until the costing principles are in force under section 46 it is sufficient compliance with subparagraph (iii) of section 9(1)(c) for the railway owner to provide the proponent with a statement prepared by the railway owner showing the principles that have

been applied by the railway owner in determining the costs referred to in that subparagraph.

53. Further transitional provision

Until the Regulator publishes in the *Gazette* notice of a determination under subparagraph (ia) of clause 3(1)(a) of Schedule 4, the weighted average cost of capital for the railway infrastructure referred to in that subparagraph is such percentage as the Regulator fixes by notice published in the *Gazette* under this section.

[Section 53 inserted by No. 77 of 2004 s. 12.]

Schedule 1 — Routes to which this Code applies

[s. 5]

Standard Gauge Routes

1. The track between Avon and Kalgoorlie, including the loop and the arrival road adjacent to that track at West Kalgoorlie.
2. The track between Forrestfield South and Kewdale.
3. The track between Kalgoorlie and Leonora.
4. The track between West Kalgoorlie West and West Kalgoorlie South.
5. The track between West Kalgoorlie and Esperance.
6. The track between Kambalda and Redmine.
7. The track between Cockburn North and Robb Jetty.
8. All tracks servicing the facilities of Co-operative Bulk Handling Limited on the standard gauge network except private sidings that are excluded by paragraph (h) of the definition of “railway infrastructure” in section 3.
9. All spur line tracks servicing customer facilities on the standard gauge network except private sidings that are excluded by paragraph (h) of the definition of “railway infrastructure” in section 3.

Narrow Gauge Routes

10. The track between Kwinana and Mundijong Junction.
11. The track between Mundijong Junction and Picton Junction.
12. The track between Cockburn North and Robb Jetty.
13. The track between Picton Junction and Lambert.
14. The track between Boyanup and Capel.
15. The track between Picton Junction and Picton East.
16. The track between Picton Junction and Inner Harbour Junction.
17. The track between Picton Junction and Bunbury Terminal.
18. The track between Pinjarra and Alumina Junction.

19. The track between Alumina Junction and Pinjarra South.
20. The track between Brunswick Junction and Premier.
21. The track between Brunswick North and Brunswick East.
22. The track between Worsley and Hamilton including Worsley East to Worsley North.
23. The track between Avon and Albany.
24. The track between York and Quairading.
25. The track between Narrogin and West Merredin.
26. The track between Yilliminning and Kulin.
27. The track between Wagin and Newdegate including Wagin East to Wagin South.
28. The track between Lake Grace and Hyden.
29. The track between Katanning and Nyabing.
30. The track between Katanning East and Katanning South.
31. The track between Tambellup and Gnowangerup.
32. The track between West Merredin and Kondinin.
33. The track between West Merredin and Trayning.
34. The track between Avon Yard and McLevie.
35. The track between Goomalling and Mukinbudin.
36. The track between Amery and Kalannie.
37. The track between Burakin and Beacon.
38. The track between Millendon Junction and Geraldton.
39. The track between Dongara and Eneabba South.
40. The track between Narngulu and Maya.
41. The track between Toodyay West and Miling.

42. All tracks servicing the facilities of Co-operative Bulk Handling Limited on the narrow gauge network except private sidings that are excluded by paragraph (h) of the definition of “railway infrastructure” in section 3.
43. All spur line tracks servicing customer facilities on the narrow gauge network except private sidings that are excluded by paragraph (h) of the definition of “railway infrastructure” in section 3.

Dual Gauge Routes

44. The track between Midland and Avon.
45. The track between Midland and Kwinana and the western leg of the Woodbridge Triangle from Signal 94 to Woodbridge South.
46. The track between Cockburn North and Cockburn East.
47. The track between Cockburn North and Cockburn South.
48. All spur line tracks servicing customer facilities on the dual gauge network except private sidings that are excluded by paragraph (h) of the definition of “railway infrastructure” in section 3.

Urban Network

49. The narrow gauge double tracks between Perth and —
 - (a) Currambine;
 - (b) Fremantle;
 - (c) Armadale; and
 - (d) Midland.
50. The dual gauge track between Robb Jetty and Leighton and the spur line between Leighton and North Fremantle.
51. The narrow gauge mainline track between Armadale and Mundijong Junction.

TPI Railway and Port Agreement Route

52. All tracks that are part of the railway constructed pursuant to the TPI Railway and Port Agreement.

[Schedule 1 inserted in Gazette 23 Jul 2004 p. 2993-5; amended by No. 77 of 2004 s. 13.]

Schedule 2 — Information to be made available

[s. 6]

Definition

The railways network is divided into sections for management and costing purposes. In this Schedule the reference to *route section* is a reference to the sections of the railways network as so divided.

Information

1. A map of the routes listed in Schedule 1 showing the configuration of the tracks on each route.
2. For each route section, details of —
 - (a) the length;
 - (b) the ruling grades;
 - (c) the operating gauge;
 - (d) the track design characteristics;
 - (e) the indicative running times for various types of standard trains;
 - (f) the maximum axle loads and speed restrictions that apply; and
 - (g) the indicative maximum train lengths.
3. The permissible gauge outlines that enable the required dimensions of rolling stock to be determined.

Schedule 3 — Matters for which provision to be made in access agreement

[s. 17(1)(a)]

1. The period for which access is provided and arrangements for renewals.
2. The routes, including the railway infrastructure, to which access is provided.
3. The services to be provided by the operator.
4. The allocation of train paths that have ceased to be used by the operator.
5. Prices and charges.
6. Route control and management.
7. Train control, operations and consultation procedures.
8. Other services to be provided by the railway owner.
9. Certification of the operator's staff and contractors —
 - (a) as being competent to carry out functions in rail operations; and
 - (b) to ensure compliance with the railway owner's safety standards under section 9 of the *Rail Safety Act 1998*.
10. The standards and other requirements to be met in respect of rolling stock.
11. Performance standards to be met by the railway owner and the operator.
12. The powers of the railway owner in relation to —
 - (a) the inspection of;
 - (b) the obtaining of information about; and
 - (c) the testing of,
the operator's rolling stock and other equipment.
13. Emergencies and service interruptions.
14. Environmental standards.
15. Indemnities and insurances.

16. Variation and termination of the agreement.
17. Breaches and defaults arising from the agreement.
18. Determination of liability arising from incidents.
19. The resolution of disputes arising in the carrying out of the agreement.
20. Investigations and inquiries.
21. Confidentiality requirements or restrictions on the use or dissemination of information.
22. Assignment of rights and obligations.
23. Security for the payment of amounts becoming payable under the agreement.

Schedule 4 — Provisions relating to prices to be paid for access

[s. 17(1)(b)]

Division 1 — Preliminary

1. Definitions

In this Schedule —

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

incremental costs, in relation to an operator or a group of operators, means —

- (a) the operating costs; and
- (b) where applicable —
 - (i) the capital costs; and
 - (ii) the overheads attributable to the performance of the railway owner's access-related functions whether by the railway owner or an associate,

that the railway owner or the associate would be able to avoid in respect of the 12 months following the proposed commencement of access if it were not to provide access to that operator or group of operators;

operating costs in relation to railway infrastructure includes —

- (a) train control costs, signalling and communications costs, train scheduling costs, emergency management costs, and the cost of information reporting; and
- (b) the cost of maintenance of railway infrastructure calculated on the basis of cyclical maintenance costs being evenly spread over the maintenance cycle,

and if, for particular infrastructure, modern equivalent assets are determined to be appropriate for the purposes of clause 2(4)(c)(ii), the operating costs in relation to that infrastructure are to be the costs that would be incurred were that infrastructure replaced using those modern equivalent assets;

total costs means the total of all —

- (a) operating costs;
- (b) capital costs; and
- (c) the overheads attributable to the performance of the railway owner's access-related functions whether by the railway owner or an associate.

[Clause 1 amended in Gazette 23 Jul 2004 p. 2995-6.]

2. Definition of "capital costs"

- (1) In this Schedule —
capital costs means the costs comprising both the depreciation and risk-adjusted return on the relevant railway infrastructure.
- (2) For the purposes of this clause, railway infrastructure does not include the land on which the infrastructure is situated or of which it forms part.
- (2a) Despite subclause (2), railway infrastructure is to be taken, for the purposes of this clause, to include a cutting or embankment that is made after the commencement of this Code for any reason, but the value of any such cutting or embankment as railway infrastructure is not to include the value of the land of which it forms part.
- (3) The costs referred to in the definition in subclause (1) are to be determined as the equivalent annual cost or annuity for the provision of the railway infrastructure calculated in accordance with subclause (4).
- (4) The calculation is to be made by applying —
 - (a) the Gross Replacement Value (*GRV*) of the railway infrastructure as the principal;
 - (b) the Weighted Average Cost of Capital (*WACC*) as the interest rate; and
 - (c) the economic life which is consistent with the basis for the GRV of the railway infrastructure (expressed in years) as the number of periods,where —

GRV is the gross replacement value of the railway infrastructure, calculated as the lowest current cost to replace existing assets with assets that —

- (i) have the capacity to provide the level of service that meets the actual and reasonably projected demand; and
 - (ii) are, if appropriate, modern equivalent assets;
- and

WACC is the target long term weighted average cost of capital appropriate to the railway infrastructure.

[Clause 2 amended in Gazette 23 Jul 2004 p. 2996.]

3. Regulator to determine weighted average cost of capital

- (1) For the purposes of clause 2(4)(b), the Regulator is to —
 - (a) determine, as at 30 June in each year, the weighted average cost of capital for each of —
 - (i) the railway infrastructure associated with the urban network described in items 49, 50 and 51 in Schedule 1;
 - (ia) the railway infrastructure associated with that part of the railways network described in item 52 in that Schedule; and
 - (ii) the railway infrastructure associated with the railways network described in the other items in that Schedule;
 - and
 - (b) publish notice of each such determination in the *Gazette* as soon as is practicable after it is made.
- (2) Subclauses (3), (4) and (5) apply to the determinations under subclause (1) that are required to be made as at 30 June —
 - (a) in the year 2003; and
 - (b) in every 5th year after that year.
- (3) Before the Regulator makes a determination mentioned in subclause (2) he or she is to —

- (a) cause a notice describing the requirements of subclause (1) to be published in an 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) a statement that written submissions relating to the determination may be made to the Regulator by any person within a specified period;
 - (ii) the address to which the submissions may be delivered or posted.
- (4) The period specified under subclause (3)(b)(i) is to be not less than 30 days after both of the notices under subclause (3)(a) have been published.
- (5) In making a determination under this clause the Regulator must have regard to any submission relating to the determination made in accordance with the notice.

[Clause 3 amended in Gazette 23 Jul 2004 p. 2996; amended by No. 77 of 2004 s. 14.]

4. Nature of costs

The costs referred to in this Schedule are intended to be those that would be incurred by a body managing the railways network and adopting efficient practices applicable to the provision of railway infrastructure, including the practice of operating a particular route in combination with other routes for the achievement of efficiencies.

Division 2 — Provisions relating to access price negotiation

5. Definition

In clauses 7(2) and 8(3) —

other entities means entities to which access is provided otherwise than under this Code.

6. Prices to be negotiated

- (1) Subject to this Schedule, the prices to be paid to the railway owner for the provision of access to operators are to be determined by negotiation under the provisions of this Code.
- (2) If any extension or expansion of the route or the associated railway infrastructure is to be provided for by an access agreement, the parties must, in negotiating the price to be paid for the provision of access, take into account —
 - (a) the costs to be borne by the railway owner or the proponent in respect of the extension or expansion; and
 - (b) any economic benefit to the railway owner or the proponent resulting from the extension or expansion.

[Clause 6 amended in Gazette 23 Jul 2004 p. 2996.]

7. Floor price test

- (1) An operator that is provided with access to a route and associated railway infrastructure must pay for the access not less than the incremental costs resulting from its operations on that route and use of that infrastructure.
- (2) The total of —
 - (a) the payments to the railway owner by —
 - (i) all operators; and
 - (ii) all other entities,
that are provided with access to a route, or part of a route, and associated railway infrastructure (*the route*); and
 - (b) the revenue that the railway owner's accounts and financial statements show as being attributable to its own operations on the route,

must not be a sum that is less than the total of the incremental costs resulting from the combined operations on the route of all operators and other entities and the railway owner.

8. Ceiling price test

(1) An operator that is provided with access to a route and associated railway infrastructure must pay for the access not more than the total costs attributable to that route and that infrastructure.

(2) For the avoidance of doubt it is declared that the calculation of total costs under subclause (1) —

(a) is for the whole of the route and associated railway infrastructure; and

(b) is to be the same for all operators,

regardless of the extent of the operations or use of the route and infrastructure by any particular operator.

(3) The total of —

(a) the payments to the railway owner by —

(i) all operators; and

(ii) all other entities,

that are provided with access to a route, or part of a route, and associated railway infrastructure (*the route*); and

(b) the revenue that the railway owner's accounts and financial statements show as being attributable to its own operations on the route,

must not be a sum that is more than the total costs attributable to the route.

(4) It is not a breach of this clause for —

(a) payments to the railway owner mentioned in subclause (1) to exceed the total costs referred to in that subclause; or

(b) the total sum mentioned in subclause (3) to exceed the total costs referred to in that subclause,

if the over-payment rules approved or determined under section 47 are complied with.

[Clause 8 amended in Gazette 23 Jul 2004 p. 2996-7.]

9. Determination of costs by Regulator

- (1) The Regulator may, if he or she considers that it is likely that a proposal will be made to the railway owner in respect of a route, determine —
 - (a) the costs referred to in clause 7 in respect of the operations and use of infrastructure that the proposal would involve; and
 - (b) the costs referred to in clause 8 attributable to the route and associated infrastructure.
- (2) The Regulator is to notify the railway owner whenever he or she proposes to exercise the power conferred by subclause (1), and the railway owner is to make an initial determination of the costs and provide details of that determination to the Regulator.
- (3) Before the Regulator makes a determination under subclause (1) he or she is to —
 - (a) cause a notice of his or her intention to do so to be published in an 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) a statement that written submissions relating to the determination may be made to the Regulator by any person within a specified period;
 - (ii) the address to which the submissions may be delivered or posted.
- (4) The period specified under subclause (3)(b)(i) is to be not less than 30 days after both of the notices under subclause (3)(a) have been published.
- (5) In making a determination of costs under this clause the Regulator must have regard to —
 - (a) the initial determination made by the railway owner under subclause (2); and

(b) any submission relating to the determination made in accordance with the notice published under subclause (3).

(6) The Regulator is to notify the railway owner of the costs determined under subclause (1).

10. Determination of costs where clause 9 does not apply

(1) Where —

- (a) a proposal has been made; and
- (b) clause 9 does not apply,

the railway owner is to determine the costs referred to in clauses 7 and 8 that are relevant to that proposal in accordance with the costing principles for the time being approved or determined by the Regulator under section 46.

(2) The railway owner is to notify the Regulator of the costs determined under subclause (1) (including the costs for each route section) at the same time as it provides the proponent with the information specified in section 9(1)(c).

(3) The Regulator is to either —

- (a) approve the railway owner's determination; or
- (b) if he or she is not willing to do so, determine the relevant costs,

and the Regulator is to give that approval or make that determination not later than the 30th day after —

- (c) the day on which he or she receives notice under subclause (2); or
- (d) if —
 - (i) an application is made under section 11(2); and
 - (ii) an approval is given for the purposes of section 10(1),the day on which that approval is so given.

(4) The costs so approved or determined by the Regulator in respect of a proposal are the costs that are to apply under clauses 7 and 8 for the purposes of the proposal.

[Clause 10 amended in Gazette 23 Jul 2004 p. 2997.]

11. Public submissions may be sought

- (1) The Regulator may, in such manner as he or she thinks fit —
 - (a) give public notification of the matters he or she is called upon to approve under clause 10(3); and
 - (b) give persons an opportunity to make submissions on them.
- (2) This clause does not authorise the Regulator to breach the time limit specified in clause 10(3) except to the extent that the proponent has agreed in writing to that time limit being extended to a later day.

12. Review and redetermination of costs

- (1) This clause applies if the Regulator considers that there has been, or may have been, a material change in any of the circumstances that existed at the time when he or she approved or determined costs under clause 9 or 10 in respect of a proposal.
- (2) Where this clause applies the Regulator may —
 - (a) carry out a review of the costs in question; and
 - (b) if he or she considers that there is justification for doing so, make a fresh determination of those costs.
- (3) The Regulator may, in such manner as he or she thinks fit —
 - (a) give public notification of a proposed review under subclause (2); and
 - (b) give persons an opportunity to make submissions on the determination of the costs in question.

13. Guidelines to be applied

In the negotiation of prices for the provision of access, the railway owner is to implement the following guidelines —

- (a) there should be consistency in the application of pricing principles to rail operations carried on or proposed to be carried on in respect of a route whether by the railway owner or an associate or by another entity;
- (b) the consistency referred to in paragraph (a) requires that if the access of different entities relates to the same market, any difference between the respective prices to be paid by them

for access must only reflect a difference between them in the costs or risks associated with the provision of the access;

- (c) prices should reflect as far as is reasonably practicable —
 - (i) the standard of the infrastructure concerned and the operations proposed to be carried on by the proponent;
 - (ii) the relevant market conditions; and
 - (iii) any other identified preference of the proponent;
- (d) any apportionment of costs for the purposes of this Schedule should be fair and reasonable;
- (e) prices should be structured in a way that will encourage the optimum use of facilities;
- (f) prices should allow a railway owner to recover over the economic life of the railway infrastructure concerned the costs of the owner in respect of any extension or expansion to accommodate the requirements of an operator.

[Clause 13 amended in Gazette 23 Jul 2004 p. 2997.]

[Schedule 4 amended in Gazette 23 Jul 2004 p. 2995-7.]

Schedule 5 — Relevant provisions of Competition Principles Agreement

[s. 29(2)]

Clause 6(4)(i)

In deciding on the terms and conditions for access, the dispute resolution body should take into account —

- (i) the owner's legitimate business interests and investment in the facility;
- (ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;
- (iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;
- (iv) the interests of all persons holding contracts for use of the facility;
- (v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;
- (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;
- (vii) the economically efficient operation of the facility; and
- (viii) the benefit to the public from having competitive markets.

Clause 6(4)(j)

The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to —

- (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;
- (ii) the owner's legitimate business interests in the facility being protected;

- (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

Clause 6(4)(l)

The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

Notes

¹ This is a compilation of the *Railways (Access) Code 2000* and includes the amendments made by the other written laws referred to in the following table.

Compilation table

Citation	Gazettal	Commencement
<i>Railways (Access) Code 2000</i>	8 Sep 2000 p. 5123-81	1 Sep 2001 (see s. 2 and <i>Gazette</i> 28 Aug 2001 p. 4795)
<i>Railways (Access) Amendment Code 2004</i> ²	23 Jul 2004 p. 2988-97	23 Jul 2004 (see s. 2)
<i>Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004</i> Pt. 3 Div. 2 assented to 8 Dec 2004		1 Jul 2008 (see s. 2(2) and <i>Gazette</i> 17 Jun 2008 p. 2543)

² The *Railways (Access) Amendment Code 2004* s. 3(2) reads as follows:

“

- (2) Sections 9, 14 and 15 and Schedule 4 clause 10(2) and (3) of the principal Code apply in relation to a proposal under that Code received by the railway owner before the commencement of this Code as if sections 7, 8, 9 and 15(7) of this Code had not been made.

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