F Australian access regimes

In Australia, new and existing operators can seek to gain access to rail facilities through:

- private access arrangements; and
- formal mechanisms, such as:
  - provisions under the National Access Regime contained in Part IIIA of the *Trade Practices Act 1974* (Cwlth) (TPA); and
  - provisions under state-based regimes.

This appendix outlines the formal mechanisms for seeking third party access to rail services. It supports the analysis of access arrangements presented in chapter 8.

F.1 The National Access Regime

In April 1995, the Commonwealth, State and Territory Governments agreed to establish a National Competition Policy (NCP) and to work cooperatively on competition issues within their jurisdictions. The NCP has several elements, including legislation to amend the TPA and the *Prices Surveillance Act 1983* (Cwlth), as well as Intergovernmental Agreements setting out aspects of the NCP that could not readily be legislated.

The National Access Regime is contained in Part IIIA of the TPA. Under Part IIIA, a party can seek to gain access to certain infrastructure services through one of three mechanisms. They can:

- request that the National Competition Council (NCC) recommend that the Minister 'declare' access to the services of a particular infrastructure facility. If the infrastructure facility is declared, the infrastructure operator and the third party are required to try to negotiate mutually acceptable terms of access;
- seek access based on the terms and conditions of a legally binding undertaking made by the infrastructure operator and approved by the Australian Competition and Consumer Commission (ACCC); or
- seek access through an 'effective' State or Territory access regime already in existence.

The declaration and arbitration process

Under the declaration and arbitration process a party seeking access to an infrastructure service can request that the NCC recommend that the relevant Minister 'declare' access to the services of a particular infrastructure facility. Once a service is declared, the parties are required to attempt negotiations for terms and conditions of access. In the event that negotiations fail, the parties can seek legally binding arbitration.

The declaration process

Any person — parties seeking access for themselves, an infrastructure owner or operator or a Minister — may apply to the NCC to have an infrastructure service declared (TPA, s. 44F(1)).

The NCC assesses the application and makes a recommendation to the relevant Minister who then decides whether or not to declare the infrastructure services. The decision is appealable to the Australian Competition Tribunal (the Tribunal) (NCC 1996b).

Criteria for assessment

In making its recommendations, the NCC must be satisfied that a number of criteria are met before recommending that a service be declared. These are that:

- access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;
- it would be uneconomical for anyone to develop another facility to provide the service;
- the facility is of national significance, having regard to:
  - the size of the facility; or
  - the importance of the facility to constitutional trade or commerce; or
  - the importance of the facility to the national economy.
- access to the service can be provided without undue risk to human health or safety;
- access to the service is not already the subject of an effective access regime; and
- access (or increased access) to the service would not be contrary to the public interest (TPA, s. 44G(2)).

The NCC must also consider 'whether it would be economical for anyone to develop another facility that could not provide part of the service' (TPA, s. 44F(4)).

On receiving the NCC's recommendation, the Minister must also consider these matters (TPA, ss. 44H(2), 44H(4)).

There has been substantial discussion and critical analysis of these criteria both in broad terms and in their specific application to rail (for example IC 1997b; NCC 1997d; NCC 1997e; NCC 1997f).

The NCC has considered a number of applications for declaration of rail infrastructure, including declaration of:

- rail freight, track and other services in the Brisbane to Cairns rail corridor by Carpentaria Transport (NCC 1997b);
- rail track service provided by Rail Access Corporation (RAC) from Sydney to Broken Hill by Specialized Container Transport (SCT) (NCC 1997e);
- rail track service provided by RAC in the Hunter Valley by the NSW Minerals Council (NCC 1997d); and
- rail track service and freight support services provided by Westrail from Kalgoorlie to Perth by SCT (NCC 1997f).

On 24 September 1998, the NCC received an application for the declaration of rail track services provided by Hamersley Iron in the Pilbara region of Western Australia. However, Hamersley Iron applied to the Federal Court for a ruling on whether its railway is a service which can be considered for declaration under Part IIIA (NCC 1998d).

On 28 June 1999, the Federal Court ruled in favour of Hamersley, finding that the use of the private rail line used to transport iron ore from Hamersley's Pilbara mines to port was integral to the mine production process and therefore should be exempted from Part IIIA of the Trade Practices Act. On 19 July 1999, the NCC and Hope Downs Management Services (a prospective iron ore company) appealed the decision.

The arbitration process

If a service is declared, the parties are required to negotiate terms and conditions of access. If the parties cannot reach an agreement, they may either:

- decide to refer the dispute to private arbitration; or
- seek arbitration through the ACCC (NCC 1996b).

If a private arbitrator is chosen, the arbitrator hears the dispute and the parties may then enter into a contract in accordance with the arbitrator's decision.

In this case the parties may request that the ACCC register the resultant contract. In deciding whether to register a contract, the ACCC must take into account the public interest and the interests of all those with rights to use the infrastructure service (TPA, s. 44ZW). If the ACCC decides not to register the contract, the parties may appeal to the Tribunal within 21 days of the publication of the ACCC's decision (TPA, s. 44ZX).

If the arbitrated outcome is registered by the ACCC, it is enforceable in the Federal Court as if it were an ACCC determination and cannot be enforced by any other means (TPA, s. 44ZY). If the parties do not seek registration, the arbitrated outcome can be enforced in accordance with usual contractual principles (NCC 1996b).

If the parties seek arbitration through the ACCC, the ACCC may terminate the arbitration if it thinks that the dispute is trivial, the parties have not acted in good faith or an existing arrangement should continue (TPA, s. 44Y). Otherwise the ACCC will arbitrate the dispute and make a written determination including a statement of reasons for it (TPA, s. 44V).

A party to an arbitration may apply to the Tribunal for a review of the ACCC's determination. Any application for a review must be made within 21 days of the ACCC's determination or decision. The review of a determination is a re-arbitration of the dispute in which the Tribunal may affirm or vary the ACCC's determination (TPA, s. 44ZP).

A party to an arbitration may appeal to the Federal Court on a question of law (not an issue of fact) concerning the Tribunal's decision on a determination. The appeal application must be made within 28 days of the Tribunal's decision, unless an extended period is allowed by the Court (TPA, s. 44ZR).

No applications for rail services have proceeded to arbitration.

Certification

The National Access Regime overrides other access regimes, including those established by State and Territory Governments unless such regimes are 'certified as effective'.

A State or Territory Government can ask the NCC to recommend that the relevant Commonwealth Minister decide that a regime for access to a service is an effective access regime (TPA, s. 44M). If the Commonwealth Minister decides that an access

regime is effective, the terms of access will be governed exclusively by that regime rather than the National Access Regime.

After receiving an application, the NCC recommends that the regime be either certified or not certified. If recommending certification, it must also recommend a period for which certification should remain in force.

In making its recommendation, the NCC must apply the relevant principles set out in the Competition Principles Agreement (CPA), in particular:

- the broad circumstances in which the National regime should apply to infrastructure services rather than a State or Territory regime (CPA, Clause 6.2);
- the type of infrastructure services for which a State or Territory access regime can be deemed effective (CPA, Clause 6(3)); and
- the features an access regime must exhibit to be effective (CPA, Clause 6(4)).

The NCC has proposed to avoid adopting a narrow interpretation of the relevant provisions of the CPA and will 'apply the principles so as to ensure that State or Territory access regimes reflect the policy objectives underlying the CPA' (NCC 1996b, p. 44).

The NCC has also proposed to consider the effectiveness of access regimes in the context of the need of States and Territories to ensure the continued provision of community service obligations. The NCC also intends to accommodate, in special circumstances, the provision of transitional arrangements (NCC 1996b).

After receiving the NCC's recommendation, the Commonwealth Minister must decide whether or not to certify the regime as effective. In reaching a decision, the Minister must consider the principles set out in the CPA. Moreover, the decision must specify the period for which certification, if granted, will be in force (TPA, s. 44N).

The State or Territory Minister can appeal to the Tribunal within 21 days if the Commonwealth Minister decides not to certify the regime. The Tribunal may affirm, vary or reverse the original decision and, once decided, the Tribunal's decision has the same effect as the Commonwealth Minister's decision (TPA, s. 44O).

Decisions recognising effective access regimes will be held on a public register at the ACCC (TPA, s. 44Q).

The NSW Government (NCC 1998a; NCC 1998b) has applied to have its rail access regime certified. However, it has not yet been certified. The Queensland Government applied for certification but withdrew the application in February 1999

(NCC 1998c).[1] The WA Government has lodged an application for certification of its rail access regime. The NT and SA Governments have lodged an application for the certification of a rail access regime for the rail line between Tarcoola and Alice Springs and the proposed rail line from Alice Springs to Darwin.

Undertakings

An infrastructure owner can avoid being open to declaration by submitting an access undertaking to the ACCC for registration. This allows the owner to control the manner in which access is granted over its facility.

Undertakings specify in advance precise terms and conditions of having access to a service, including access prices (or pricing methodologies), service standards, connection and disconnection arrangements and capacity constraints and extension of capacity. As the needs of different users — and consequently the costs of providing services to them — can vary, it may not be possible for the service provider to anticipate all these needs (and costs) in advance. Consequently, undertakings can also establish procedures and clearly defined boundaries for negotiations (such as maximum and minimum prices).

Criteria for assessment

In assessing undertakings, the ACCC's overriding objective is to 'ensure that access to facilities covered by undertakings is provided in a way that promotes competition and economic efficiency consistent with the objectives of Part IIIA [of the TPA] and the criteria it establishes' (ACCC 1997a, p. 4). Division 6 of the TPA outlines a number of criteria that the ACCC must consider in assessing undertakings.

The criteria are general in nature, focusing on the interests of the various parties as well as the public interest. According to the ACCC, the open ended nature of the criteria gives:

> … service providers considerable scope to design and implement an undertaking suitable to their circumstances and the needs of service users and potential service users. Similarly, such openness gives the Commission flexibility in analysing and assessing the undertaking and its impact on different stakeholders. (ACCC 1997a, p. 3)

However, this flexibility may create some uncertainty about the ACCC's approach. The ACCC has published a draft guide to access undertakings (ACCC 1997a) to

[1] The Queensland Government has advised the NCC that it is committed to the certification process and will continue to work with it on this matter.

assist in clarifying the framework for interpretation and application of the s. 44ZZA criteria.

In applying the guidelines, an important role for the ACCC will be to give appropriate weighting to the various concerns raised by interested parties and achieve a workable balance between the diverse interests represented by the criteria.

There have been no undertakings for rail services.

F.2 Australian Rail Track Corporation

The Australian Rail Track Corporation (ARTC) was incorporated in February 1998, commencing operations on 1 July 1998. It is fully owned by the Commonwealth Government through shareholder representatives of the Commonwealth Department of Transport and Regional Services, and the Commonwealth Department of Finance and Administration.

Its formation was an integral part of the rail reform process and sought to establish an organisation that could provide a 'one stop shop' service to rail users on the interstate network between Perth, Alice Springs, Adelaide, Melbourne, Sydney and Brisbane. The one stop shop approach concept arises from an Intergovernmental Agreement (IGA) between the Commonwealth and mainland States. The IGA was adopted by the Australian Transport Council in November 1997. The IGA envisaged that each state track authority would facilitate the one stop shop through the exclusive provision of selling rights to ARTC and the development of common access terms and conditions across the interstate network.

The ARTC publishes reference prices and standard terms and conditions for obtaining access to the track which it owns or manages. It currently owns the interstate track in South Australia, plus the extensions to Broken Hill, Alice Springs and to Kalgoorlie, and has a lease over the interstate track in Victoria. The ARTC in conjunction with the track owners (the NSW, Queensland and WA Governments) is negotiating wholesale arrangements for reselling track access. A draft wholesale agreement is close to finalisation and consultation with train operators will take place by the end of 1999.

The ARTC is in the process of developing an industry code for interstate access that provides a framework for considering access issues regardless of whether the ARTC is the track owner or manager. The industry code will incorporate relevant aspects of the wholesale arrangements.

F.3 State-based access regimes

Each jurisdiction has developed or is developing an access regime for rail. Some of these are rail specific and others are more general, applying to major infrastructure.

New South Wales

The *New South Wales (NSW) Rail Access Regime* was established under s. 19B of the *Transport Administration Act 1988* (NSW) and commenced operation in August 1996.

The regime operates in conjunction with the *Commercial Arbitration Act 1984* (NSW), *Transport Administration Act 1988* (NSW), *Rail Safety Act 1993* (NSW), *State Owned Corporations Act 1989* (NSW) and *Independent Pricing and Regulatory Tribunal Act 1992* (NSW).

In June 1997, the NSW Government approached the NCC to consider the effectiveness of the *New South Wales Rail Access Regime* in accordance with the CPA.

The NCC made a draft recommendation outlining changes to the regime agreed by the NSW Government and additional changes required before it could recommend it be certified as effective.

In February 1999, the NSW Government gazetted an amended *New South Wales Rail Access Regime*. In March 1999, the NCC provided a recommendation to the Commonwealth Minister for Financial Services and Regulation and is awaiting a decision. The Minister has requested further information from the NSW Government.

New South Wales Rail Access Regime

The RAC is responsible for managing access to the NSW rail network.

The key features of the NSW regime are contained in provisions in the *New South Wales Rail Access Regime* and include:

- a requirement that prices for general usage be negotiated between a 'floor' and 'ceiling' (Schedule 3, (i));
- a separate pricing regime for coal freight which operates until June 2000 (Schedule 3, (ii));

- a requirement for RAC to negotiate with an access seeker 'in good faith' for the purposes of entering the agreement (s. 3.1) and in relation to new investment (s. 3.2);
- a requirement for RAC to provide specified information to the access seeker (s. 8, Schedule 5);
- a requirement that RAC must not engage in the business of rail operations 'for reward' (s. 7.3);
- a compulsory dispute resolution process with a nominated arbitrator (Independent Pricing and Regulatory Tribunal, IPART) (s. 6.2);
- a requirement that the agreement not inhibit RAC or access seeker providing information regarding access, new investment or the agreement to the arbitrator, any relevant regulatory agency or the Minister (s. 4.6); and
- both an operator or access purchaser (end user) has the capacity to enter into an access agreement (s. 3.1).

Coverage

The regime applies to railway and associated infrastructure owned by or vested in RAC so it covers all train services, both interstate and intrastate.

Operation

The RAC will only permit access to the network through an agreement, except where required by law (s. 4.1).

Under the regime, 'access seekers' negotiate access with RAC.[2] There is an obligation for RAC to negotiate with an access seeker in good faith (s. 3.1 and s. 3.6). RAC must provide information to the access seeker relevant to its request regarding the regime including the pricing policy, the network configuration, recurrent costs, capital costs, the cost methodology, system usage, operational information, under-utilised capacity and information of any determinations published by the arbitrator in relation to the regime (s. 8.3, Schedule 5).

Section 6 establishes the arbitration processes of the regime. IPART, or an alternative arbitrator appointed by IPART, will act as arbitrator and Part 4A of the

[2] An access seeker could be a current or prospective rail operator, a current or prospective rail purchaser (who has contracted, or can potentially contract, with a rail operator to operate/move rollingstock) or the ARTC (Schedule 7).

Independent Pricing and Regulatory Act 1992 (NSW) will govern the arbitration (s. 6.2). IPART will also publish the determination and any information before the arbitrator that it considers appropriate (s. 6.3 and s. 6.4).

The regime contains pricing principles for general usage and coal freight (Schedule 3). Under these principles, access prices for general usage are negotiated subject to a 'floor' and 'ceiling' test.

- The floor test requires that:
  - any access revenue must at least meet the direct costs imposed by the access seeker(s); and
  - all sectors should recover their incremental costs, including incremental fixed costs (Schedule 3 (i)).
- The ceiling test requires that any access revenue must not exceed the full economic cost of the sector(s) for which access is required on a stand alone basis (Schedule 3 (i)). It is calculated on a combinatorial basis so that no combined group of users pays more than the relevant ceiling for that group.

In addition, RAC's total revenue must not exceed the stand alone full economic cost of the entire network (Schedule 3 (i)).

Access prices for coal freight are on an origin-destination basis and are subject to an 'adjustment component' on some sectors.

- On those sectors where no adjustment is made, the access price is negotiated consistent with the principles for general usage (Schedule 3 (ii)).
- On those sectors where an adjustment is made, the access price is the ceiling price plus an adjustment component reflecting a share of the amount that rail freight haulage revenue exceeded costs (access and rail operations) on that line in 1996-97. The relevant share will be reduced to 50 per cent in 1998-99 and 25 per cent in 1999-2000 (Schedule 3 (ii)).

The cost definitions and methodology for asset valuation and permitted rates of return on assets will be published in the Gazette and by IPART (Schedule 3 (iii)).

The regime also 'establishes "passenger priority" provisions for the use of the network' (sub. DR128, p. 9). These provisions ensure that passenger trains have priority over freight trains when negotiating access to the network.

Victoria

The access arrangements in Victoria differ depending on the network being considered — intrastate, or interstate and urban network.

Intrastate and urban networks

The *Rail Corporations (Amendment) Act 1998* (Vic) established a regime to allow for access to certain rail (and tram) infrastructure in Victoria.

Under the regime, rail infrastructure operators (or lessees) must provide access, on fair and reasonable terms, to 'declared' rail services.

The Victorian Government has sold Victoria's rail freight operations together with a long term lease over the non-urban intrastate track and its workshops. However, Victorian Rail Track Access Corporation (VicTrack) will retain ownership (landlord responsibilities) for the non-urban intrastate track and country passenger stations (sub. 82).

The key features of the Victorian regime are contained in provisions in s. 38 of the Act and include:

- a requirement that users have 'fair and reasonable' access to declared services (s. 38B);
- the Minister can recommend that a rail transport service be 'declared' to be subject to the regime (s. 38C);
- a requirement for the access provider to provide specified information to the access seeker (s. 38E);
- a compulsory dispute resolution process with a nominated arbitrator (s. 38F);
- a requirement that the terms and conditions not vary simply because of the identity of the access seeker (s. 38E); and
- a requirement that no person should be prohibited or hindered from exercising their reasonable right to access on declared services (s. 38N).

Coverage

Under the Victorian regime, services can be 'declared' to be subject to the access regime on the recommendation of the Minister. In making a recommendation, the Minister must be satisfied that it is necessary to do so to promote competition or increase efficiency or the level of services to the public (s. 38C).

It is intended that the Minister will declare rail freight services in October 1999 and passenger services in January 2000.

Operation

Under the regime, an access seeker negotiates directly with an infrastructure 'operator' (the access provider). According to the Victorian Government, franchised passenger rail services will have priority over freight services in obtaining access to the rail network, unless this results in 'serious and unreasonable' interference in freight business (sub. 82, p. 14).

The access provider has several obligations to meet in negotiation, including the requirement to 'use all endeavours to meet the requirements of a person seeking access to declared rail transport services'. The access provider must also provide information to the access seeker. The terms and conditions of access cannot vary simply because of the identity of the persons seeking access (s. 38E).

If a dispute arises, the matter can be referred to the Office of the Regulator General (ORG) (s. 38F). In its determination, the ORG may:

- require that access to the service be granted;
- specify the terms and conditions of access; or
- specify the extent that the determination overrides earlier determinations on the matter (s. 38F).

A determination by the ORG cannot be challenged, appealed against or reviewed (s. 38Q).

Interstate network

Access to interstate rail operations in Victoria is through the ARTC which has been granted a five year lease for the control of standard gauge track (sub. 82).

Queensland

The *Queensland Competition Authority Act 1997 (QCA Act)* sets out a process for gaining access to services provided by significant infrastructure in Queensland.

The Queensland regime for access to rail services commenced operation in March 1998. It is part of the broader access regime under the *QCA Act* and followed

amendments to the *QCA Act* contained in the *Queensland Competition Authority Amendment Regulation (No. 1) 1998*.

In June 1998, the Queensland Government approached the NCC to consider the effectiveness of the Queensland rail access regime in accordance with the CPA, for the purposes of the TPA. This application was subsequently withdrawn in February 1999.

Framework

The *QCA Act* sets out a process for gaining access to services provided by significant infrastructure, including certain rail services. The key features include:

- the creation of the QCA to administer the access regime established under the *QCA Act* (Part 2);
- a declaration process to determine whether services ought to be subject to the access regime (Part 5, Divisions 2 and 3);
- a requirement for an access provider (in this case, Queensland Rail, (QR)) to negotiate with an access seeker and, in doing so, to satisfy the seeker's reasonable requirements in relation to information required for negotiation (Part 5, Division 4);
- 'access undertakings', which provide a framework setting out conditions under which the infrastructure owner undertakes to provide access (Part 5, Division 7);
- a compulsory dispute resolution process with a nominated arbitrator (Part 5, Division 5); and
- a prohibition on preventing or hindering access when an access agreement has been reached (Part 5, Division 5).

The *QCA Act* allows the responsible Ministers (the Premier and the Treasurer) to 'tailor' the access regime by making an 'access code' that applies to a class of infrastructure (Part 5, Division 6). However, according to Queensland Transport 'there is no intention to make an access code for rail infrastructure at this point' (sub. 75, p. 6).

Coverage

Under the Act, services can be 'declared' to be subject to the access regime either:

- by the relevant Ministers (the Premier and the Treasurer) on the recommendation of the QCA, where the Ministers must also be satisfied that certain threshold criteria have been met (Part 5, Division 2); or

- by regulation, without the application of threshold criteria (Part 5, Division 3).

Rail services have been 'declared' by regulation under the *Queensland Competition Authority Amendment Regulation (No. 1) 1998*. The declared services are railway and associated infrastructure managed by QR, or a successor or subsidiary of QR (s. 4). The regime excludes the standard gauge interstate rail infrastructure in Queensland (s. 2).

Operation

Part 5, Division 4 of the QCA Act provides that once a service is declared, there is an obligation on the access provider to negotiate with an access seeker (s. 99) and, in so doing, attempt to satisfy the access seeker's reasonable requirements in relation to information required for negotiation (s. 101). In addition, both parties are obliged to negotiate in good faith (s. 101).

The QCA Act provides for the owner of a declared service to submit a draft undertaking to the QCA for its approval. QR has submitted to the Authority an access undertaking covering certain services relating to the use of the rail transportation infrastructure it owns. The draft undertaking addresses the following issues:

- scope and administration;
- ring-fencing guidelines;
- negotiation framework;
- pricing principles;
- capacity management; and
- interface considerations.

Box F.1 briefly outlines the matters that may be included in an undertaking.

In deciding whether to accept a draft undertaking, the QCA will consider the legitimate business interests of the owner, the interests of persons who may seek access and the public interest. The QCA may also consider any other matter it desires (s. 138(2)). Before approving a draft undertaking, the QCA is required to publish and consider submissions on it and be satisfied that the undertaking is consistent with any access code for the service (s. 138(3)).

Box F.1 **Access undertakings**

The content and degree of specification of undertakings will vary from service to service. The QCA Act indicates that the type of matters to be included in an undertaking *may* include (s. 137(2)):

- how charges for access to the service are calculated;
- information to be provided to access seekers and to the QCA;
- time frames for providing information in the conduct of negotiations about access to the service;
- how excess capacity is allocated;
- arrangements relating to the operation of secondary markets;
- accounting requirements for owners and users in relation to the service or parts of the service;
- arrangements for separating operations, including the separation of commercial activity;
- terms relating to extending the facility;
- requirements for the safe operation of the facility;
- methods for calculating charges for access to the service where users have contributed to the cost of establishing or maintaining the facility;
- provisions to be included in access agreements in relation to the service; and
- the process for the review of the undertaking.

Source: QCA Act 1997 (Qld).

The QCA commenced a formal public consultation process in April 1999 as part of its assessment of QR's draft undertaking. The QCA is considering submissions received in response to the paper.

The QCA will consult on issues relevant to the development of below rail access charges (for example, asset valuation, rate of return, contributed assets, the structure of reference tariffs, etc.) through a series of specific papers. In addition, the QCA has yet to receive from QR a number of documents associated with the undertaking, including ring-fencing guidelines, scheduling and train control protocols and cost allocation arrangements. The QCA will consult on these matters once QR provides details of its proposed approach. These factors will affect the timing of the release of the QCA's Draft Determination.

Once the QCA has approved an access undertaking, the undertaking sets a benchmark for parties in negotiations (although parties are free to depart from its

terms if they agree to do so), because the outcome of any dispute resolution undertaken by the Authority must be consistent with the undertaking (s. 119(1)).

Parties have an enforceable right to ensure that the QCA is independent and that it does not exhibit bias in its process or decisions through the *Judicial Review Act 1991* (Qld). The QCA also has in place procedures to ensure procedural fairness, so that its role as a regulator (in recommending whether a service should be declared) does not compromise its role and independence as an arbitrator.

There are three triggers for a review of an approved undertaking. First, an undertaking itself may define a review event. Second, an infrastructure owner is free to request the QCA to reconsider or amend an access undertaking (s. 142). Third, a review may be triggered by a change in a provision of the QCA Act or an access code (given that access undertakings need to be consistent with the Act and such codes) (s. 139). Any changes resulting from a review of an undertaking would not affect existing access agreements.

South Australia

The access arrangements in South Australia differ depending on the network being considered — intrastate (Australian Southern Railroad's regional network) or the interstate (ARTC network). It is intended that a separate regime may apply to the SA/NT network (Tarcoola to Darwin).

Intrastate network

The *Railways (Operations and Access) Act 1997* (SA) *(RA Act)* imposes access obligations on infrastructure owners who control the intrastate network and includes:

- a means of assigning the functions of the regulator (s. 9);
- a means for the regulator to establish pricing principles for the provision of railway services (s. 27);
- a requirement for the access provider to provide industry participants with information regarding the terms and conditions on which it is prepared to make the infrastructure available to others (s. 28);
- a requirement for the access provider to provide access seekers with information, subject to a reasonable charge for providing such information (s. 29);
- a dispute resolution process for seeking access based on conciliation or arbitration (Part 6); and

- a prohibition on preventing or hindering access to railway services including negative conduct such as a failure or refusal to act, or delay (s. 24).

Coverage

Under the *RA Act*, operators and railway services can be 'declared' to be subject to the regime by proclamation (s. 7). Proclamation applies to certain railway infrastructure, including yards and sidings, terminals and stations on the intrastate network (HORSCCTMR 1998b).

Operation

Under the *RA Act*, 'industry participants' (access seekers) negotiate access directly with the 'operators' of the railway service (access providers). [3]

The access seeker submits a proposal to the access provider regarding the nature and extent of the access and the proposed terms and conditions for the provision of access (s. 31). Following this, the access provider must negotiate with the participant in 'good faith' with a view to reaching agreement on whether the requirements could reasonably be met and if so, the terms and conditions for the provision of access (s. 32).

The access provider must also provide the access seeker with information reasonably requested by the applicant about the extent that the infrastructure is currently being utilised, the extent that it would be feasible to add or extend the infrastructure to meet the access seeker's requirements and the general terms and conditions to provide a service of a specified description (s. 29). This information must be provided on a nondiscriminatory basis (s. 32).

Part 6 of the Act sets out the dispute resolution procedures in instances when agreements cannot be reached. If the regulator becomes involved, it may attempt to settle the dispute by conciliation but if this fails the regulator must appoint an arbitrator (s. 36). In hearing and determining a dispute, the arbitrator has a statutory duty to act as quickly as the proper investigation of the dispute allows (s. 42) and must take into account certain matters defined in the Act (s. 38). The Minister may participate in the arbitration proceedings by calling for evidence and making representations on the questions subject to the arbitration (s. 41).

[3] An 'industry participant' is an operator, or a person who operates or proposes to operate railway rollingstock on the railway network (s. 4). An 'operator' is a person who provides, or is in a position to provide railway services in relation to the railway network (s. 4).

Currently, the regulator is proclaimed to be the Executive Director of Transport South Australia. The arbitrator must be a person who is properly qualified and independent (s. 37).

The regulator may establish pricing principles for fixing a 'floor' and 'ceiling' price for the provision of railway services in general or railway services of a particular class.

- The floor price reflects 'the lowest price at which the operator could provide the relevant services without incurring a loss' (s. 27).
- The ceiling price reflects 'the highest price that could fairly be asked by an operator for provision of the relevant services' (s. 27).

The principles do not prevent the access seeker and operator reaching a negotiated access contract on terms that do not reflect the pricing principles. However, an arbitrated price cannot be less than the floor price and cannot exceed the ceiling price (s. 27).

Interstate network

Access to interstate rail operations in South Australia, including the Tarcoola to Alice Springs line is through the ARTC which owns the track.

Northern Territory/South Australia Access Regime for Rail Services

The Commonwealth Government has undertaken to transfer the Tarcoola to Alice Springs line to the eventual developer of a new line from Alice Springs to Darwin. The access regime will only come into place if the Alice Springs to Darwin rail line is constructed.

In March 1999, the SA and NT Governments submitted a rail access regime for the Tarcoola to Darwin line to the NCC for certification. The NCC has released an issues paper and has yet to make its draft recommendation.

Coverage

The regime would establish access arrangements for rail services provided by existing track between Tarcoola and Alice Springs and the proposed track between Alice Springs and Darwin. It applies to railway track, stations and platforms, signalling systems, train control and communication systems and 'such other facilities as may be prescribed' (NCC 1999, p. 9).

Operation

The legislation — AustralAsia Railway (Third Party Access) Bill (SA) and AustralAsia Railway (Third Party Access) Bill (NT) — supporting the regime (including an Access Code) was introduced to the SA and NT parliaments in early 1999 and has yet to be passed. However, the access regime will only come into effect when construction of the rail line commences.

Access to rail services will be negotiated with the track owner. The NT and SA Governments have sought submissions from the private sector to design, construct, finance, operate and maintain a new railway linking the existing railway between Tarcoola and Alice Springs with the deepwater port at East Arm, Darwin.

The Access Code establishes rules governing third party access to rail infrastructure from Tarcoola to Darwin. Part 1, Division 2 of the Code sets out the powers and functions of the regulator. Part 2, Division 1 establishes the Access Seeker's right to negotiate an access with the Access Provider and Divisions 2 and 3 establish dispute resolution procedures. Division 5 establishes the pricing principles for calculating access charges.

The access pricing approach adopted by the Code is based on the Competitive Imputation Pricing Rule (CIPR). CIPR access prices are market based and 'set at a level where the Railway owner earns the same net income from the transport of freight on the Railway whether or not the freight is transported by the Railway owner' or by a third party (Northern Territory and South Australian Governments 1999, p. 11).

Western Australia

Access to Government rail infrastructure services for interstate operators has been granted since 1997 following an amendment to the *Government Railways Act 1904* (WA).

Western Australia is developing a formal regime for access to government railways through the *Government Railways (Access) Act 1998* (WA) and subsidiary legislation in the form of a Code. The Act was assented on 30 November 1998 but is not yet proclaimed.

The regime does not cover the private iron ore railways in the Pilbara area. The companies involved (Hamersley Iron, BHP Iron Ore and Robe River Mining Company) are subject to individual agreements with the WA Government.

Western Australia has submitted the regime to the NCC for certification as an effective regime. The NCC is assessing the submission.

Government railways

The *Government Railways (Access) Act 1998* (WA) imposes access obligations on the infrastructure owner of the intrastate network. The key features of the Act include:

- provisions for the establishment of a Rail Access Code to govern the use of Government railways by persons other than the Western Australian Government Railways Commission (Westrail) (Part 2);
- provisions designating a regulator with monitoring and enforcing functions relating to the implementation of the code (Part 3);
- provisions specifying the kind of administrative arrangements (ring-fencing) that Westrail is to have in place for the purposes of implementation (Part 4); and
- amending the *National Rail Corporation Agreement Act 1992* to enable National Rail Corporation to compete for intrastate services on equal footing with other operators (Part 6).

The Act was based on Westrail continuing as a government-owned integrated rail service. Amendments will be made to take account of the sale of the Westrail freight business.

Coverage

The Government Railways Access Code 1999 establishes which parts of the railway network (track and associated infrastructure) are available for access. In the code submitted to the NCC for approval all operating lines in the Westrail network have been included.

Operation

Under the regime, the Government Railways Rail Access Code will:

- establish the railway network and infrastructure opened to access;
- outline the negotiation process, including avenues for dispute resolution;
- specify the matters to be considered in access agreements;
- identify the information requirements of the Regulator; and

- outline the pricing principles to be applied (sub. 60).[4]

The Director General of Transport is the regulator of the regime (s. 14).

Tasmania

A rail specific access regime does not exist in Tasmania. However, Tasrail (the infrastructure owner) is required to enter into negotiations with other operators wishing to use its infrastructure through obligations contained in its contract of sale. The Tasmanian Government suggested that:

> … access arrangements between Tasrail and a number of State operators have been negotiated successfully and on terms agreeable to both parties. Anecdotal evidence from tourist and heritage rail suggests that set costs and conditions of access have been established … (Tasmanian Government, sub. 81, p. 1).

[4] The Government Railways Access Code is still being developed.