

**December 05 | Victorian Rail Access Regime**

## **Commission Instruments Paper**

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## PREFACE

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The *Transport Legislation (Further Amendment) Act 2005*<sup>1</sup> which was passed by Parliament in June 2005 amends the *Rail Corporations Act 1996* to provide a new framework for the Victorian Rail Access Regime (VRAR). This Paper continues the Commission's role in implementing the new VRAR framework and follows the *Issues Paper* released in May 2005 and the *Draft Commission Instruments Consultation Paper* released in September 2005.

Having benefited from stakeholder responses on questions raised in the *Issues Paper* and *Consultation Paper*, the Commission has prepared this Paper to accompany the final Commission Instruments (*Commission Instruments Paper*).

The final Commission Instruments comprise:

- Account Keeping Rules;
- Ring Fencing Rules;
- Capacity Use Rules;
- Network Management Rules; and
- Negotiation Guidelines.

The purpose of this *Commission Instruments Paper* is to explain the Commission's reasoning and processes in developing the final Instruments

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<sup>1</sup> Sections 5 and 9(7), 9(8) and 9(9) of the *Transport Legislation (Further Amendment Act) 2005* have not yet been proclaimed and will come into operation on 1 January 2006 if not proclaimed earlier.

## EXECUTIVE SUMMARY

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The Government has developed a new Victorian Rail Access Regime (VRAR) with the objective of promoting competitive access to the Victorian rail network. Legislation introducing the new VRAR passed through Parliament in June 2005 and gives the Commission a key role in assessing and approving access arrangements and in developing a number of rules and guidelines (Commission Instruments) intended to ensure that the proposed VRAR is both effective and efficient.

In September 2005 the Commission released the Commission Draft Instruments Consultation Paper, seeking general stakeholder feedback on each of the draft Commission Instruments, comprising:

- *Account Keeping Rules* which will require access providers to keep and maintain accounting records and to prepare accounts in relation to access activities and other activities of the access provider – see discussion in section 2 of this Paper, and the Rules in Annexure A;
- *Ring Fencing Rules* which will require an access provider to separate its access activities from its other activities, to specify the manner in which the access provider is to effect that separation and which will require an access provider who provides declared transport services to itself or to related bodies corporate, to provide those services on an arm's length basis – see discussion in section 3 of this Paper, and the Rules in Annexure B;
- *Capacity Use Rules* which will regulate an access provider's activities of assessing and allocating the capacity of a rail network and allocating train paths, which will require access providers and users to surrender certain unutilised or under utilised train paths and which will require access providers to prepare certain protocols for the allocation of the capacity of a network – see discussion in section 4 of this Paper, and the Rules in Annexure C;
- *Network Management Rules* which will regulate an access provider's rail network management activities, such as train service scheduling and planning, train control services, management of the interaction of rail infrastructure and rolling stock and management of incidents that affect the operation of a rail network, and which may require access providers to prepare protocols for the management of a rail network – see discussion in section 5 of this Paper, and the Rules in Annexure D; and
- *Negotiation Guidelines* which will specify the information that an access provider must provide to an access seeker (including information in relation to the management of the capacity of a rail network, the availability of train paths and timetabling), the procedure by which an access seeker may apply for the provision of a declared rail transport service, the procedure and method as to how (and the associated timeframes in which) an access provider will assess applications for access, and which may specify the fees or levies that an access provider may charge in relation to applications and may address interconnection – see discussion in section 6 of this Paper, and the Rules in Annexure E.

The Commission encouraged input from stakeholders in developing the Draft Commission Instruments. The Commission received six submissions including from Queensland Rail (QR), Pacific National (PN), GrainCorp, Connex, VicTrack and ARTC.

Following its consideration of the issues raised in these submissions, the Commission has finalised the Commission Instruments.

By publishing this *Commission Instruments Paper* together with the final Commission Instruments, the Commission intends to give providers of declared rail transport services advance notice of the contents of the final Commission Instruments before they are obliged by section 38W of the RCA to each prepare and submit an access arrangement. Under subsection 38N(5), a Commission Instrument does not have effect until it is published in the Gazette.

# 1 INTRODUCTION

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## 1.1 The new rail access framework

On 2 July 2004 the Minister for Transport announced a reform of the Victorian rail access regime (VRAR) to “ensure on-rail competition”. The objectives of the reforms are to ensure fair and reasonable access to rail infrastructure services and to promote competition between above-rail freight service providers, thereby achieving greater use of the rail network and efficient investment in rail infrastructure.

Within a public consultation process, the Department of Infrastructure (DOI)<sup>2</sup> developed the Government’s preferred approach of moving away from the ‘negotiate-arbitrate’ framework previously in existence toward a more ‘ex ante’ model. Under the new framework the access provider is required to maintain an approved “access arrangement” that sets out the terms and conditions (including reference prices) for third party access to the declared rail transport services provided by that access provider. An access arrangement will remain in place for three to five years, and the Commission will have a dispute resolution role.

Legislation was passed by Parliament in June 2005 amending the *Rail Corporations Act 1995* (RCA) to establish the new VRAR framework.<sup>3</sup> In September 2005, the Rail Network Pricing Order 2005 was also gazetted. Declaration Orders will be made in December 2005.

The development of Commission Instruments represents a further step in the development and implementation of the new VRAR. The Commission Instruments have the overall purpose of ensuring that an access provider acts in a non-discriminatory way toward above-rail access seekers, and that there is transparency and equity in the provision of below-rail services.

The new regime is designed to enhance competition and efficiency and will be overseen and enforced by the Commission. Inter-alia, the new regime will:

- cover below-rail services provided to freight and V/Line Passenger operators using the Victorian intra-state regional and metropolitan railway infrastructure;
- also cover most sidings, yards and some designated terminals, owned or controlled by an access provider;
- specifically oblige access providers to facilitate interconnection of new third party sidings and terminals to existing rail infrastructure;
- provide for access providers to recover efficient costs of service delivery, including allowing certain access providers to recover certain capital expenses incurred by that access provider in respect of particular rail infrastructure or in respect of interconnection or expansions; and
- prohibit anti-competitive and discriminatory practices and enable the Commission to regulate to require the allocation of rail capacity on a non-discriminatory basis — including ‘use it or lose it’ rules.

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<sup>2</sup> See <http://www.doi.vic.gov.au/freight>

<sup>3</sup> See the *Transport Legislation (Further Amendment) Act 2005* which can be found at: [http://www.dms.dpc.vic.gov.au/Domino/Web\\_Notes/LDMS/PubStatbook.nsf?OpenDatabase](http://www.dms.dpc.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf?OpenDatabase) Section 5 and subsections 9(7), 9(8) and 9(9) have not yet been proclaimed.

## 1.2 Approach

### 1.2.1 Developing the Commission Instruments

In constructing and implementing the Commission Instruments, the Commission needed to balance a range of statutory objectives, and also take into account the differing points of view held by different stakeholders.

A particular challenge has been to balance the costs of imposing a new set of regulatory obligations upon access providers against the benefits of making it easier for access seekers and potential access seekers to use relevant rail infrastructure. Another challenge for the Commission was to obtain all the information it required to assist it in getting that balance right. The wide public consultation process undertaken by the Commission in developing the Commission Instruments has assisted it to meet these challenges.

### 1.2.2 The Commission's process and approach

The Commission received a mix of stakeholder views in response to its *Consultation Paper*,<sup>4</sup> and these views are highlighted in the remainder of the document. However, in summary there were few instances where stakeholders strongly disagreed with the Draft Commission Instruments and the preliminary views set out by the Commission.

## 1.3 Purpose

This *Commission Instruments Paper* explains the Commission's approach in making the final Commission Instruments.

As noted above, the final Commission Instruments have been developed on the basis set out in the *Draft Consultation Paper*, following consideration of stakeholder responses and further analysis by the Commission. In the sections that follow, the Commission has detailed the major considerations it has had regard to when determining the final Commission Instruments.

## 1.4 Commission role

Under the revised VRAR the Commission will have a number of regulatory roles, including:

- (i) the making of the Commission Instruments;
- (ii) the ability to determine a pricing methodology consistent with the *Rail Network Pricing Order 2005*;
- (iii) the approval of access arrangements (and the ability to impose access arrangements if necessary); and
- (iv) the arbitration of disputes notified to it in relation to non-reference services.

The Commission Instruments impose distinct obligations and requirements. First, once the Commission Instruments are gazetted, an access provider must comply with them. Second, proposed access arrangements must be consistent with the Commission Instruments.

<sup>4</sup> Stakeholder responses and other relevant information can be found on the Commission's website: <http://www.esc.vic.gov.au/rail6.html>



Although the sections of the RCA that relate to the making of Commission Instruments (Division 2 of Part 2A of the RCA) have not yet been proclaimed, the Commission's intention is to fulfil the requirements for the making of the Commission Instruments prior to their commencement. As noted earlier, Division 2 of Part 2A of the RCA will come into operation on 1 January 2006 if not proclaimed earlier. However the Commission cannot implement the Final Commission Instruments until those provisions come into operation.

As soon as practicable after making a Commission Instrument, the Commission must publish it on its website and in the Government Gazette. The Instrument will take effect from the date it is published in the Government Gazette (see section 38N of the RCA, as amended).

The Commission will be able to amend the Commission Instruments at any time. If it elects to amend an instrument it must also follow the process outlined in section 38N of the RCA, as noted above.

## **1.5 Consultation Process**

In September 2005 the Commission released the Commission Draft Instruments (hereafter "Draft Instruments"). The Draft Instruments sought responses from stakeholders on a range of issues in relation to each Instrument.

Submissions were received from the Australian Rail Track Corporation ("ARTC"), GrainCorp, Queensland Rail – Network Access ("QR"), Pacific National ("PN"), VicTrack and Connex. These are available on the Commission's website at: <http://www.esc.vic.gov>.

## 2 ACCOUNT KEEPING RULES

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### 2.1 Background

Section 38R of the RCA requires the Commission to make Account Keeping Rules which, among other things, require the access provider to:

- prepare, maintain and keep separate accounts and accounting records for access activities and for other (unregulated) activities;
- provide accounts and accounting records to the Commission;
- prepare, maintain and keep records of internal transfer terms, and to provide these to the Commission; and
- prepare, maintain and keep records of the allocation of the costs it incurs in operating its business as between its various activities and provide these to the Commission.

The Commission has made the Account Keeping Rules, reproduced at Annexure A, to satisfy the statutory requirement in section 38R, and by reference to its objectives in section 38F of the RCA (Objectives).

### 2.2 Purpose

The requirement to keep separate accounts for regulated activities is generally applied in regulatory frameworks for regulated industries, as it enables the regulator to have access to information it needs to carry out its statutory role. In the context of the VRAR, the accounting separation of access activities from other activities also complements the Ring Fencing Rules, which require the operational separation of the access activities business unit.

The Commission intends that the requirement to establish a cost allocation policy for approval by the Commission will ensure that cost allocation policies are fair and reasonable. In turn, this should assist in ensuring that prices are fair and reasonable.

Further, the Commission considers that the requirement to provide regulatory accounting information to the Commission on an annual basis will assist it to satisfactorily carry out its regulatory functions. The information to be provided to the Commission is designed to support its regulatory roles, including the ability to ensure that pricing is consistent with the requirements of the *Rail Network Pricing Order* 2005 (“Pricing Order”).

The Account Keeping Rules include, among other things, the provision of:

- information that will enable the Commission to ensure that the prices charged to third parties are not higher than internal transfer terms for comparable services;
- information on contributions toward capital or maintenance expenditure made by an access seeker, a user or the Government (and the purpose of any such contributions made by the Government), to enable the Commission to assess compliance with section 4.1(e) of the Pricing Order;
- other information that will assist the Commission in its roles of resolving access disputes and approving access arrangements, including:

- details of costs incurred in operating, maintaining, renewing and augmenting the rail network;
- the allocation of costs both between freight and passenger services and between pricing zones and the identification of directly attributable costs to non-reference services; and
- measured service standards achieved for the rail network.

## 2.3 Approach

In framing the information reporting obligations under the Account Keeping Rules, the Commission has had regard to the information reporting requirements under comparative regulatory frameworks, such as those applying to the Victorian ports.

Once implemented, it is intended that the Account Keeping Rules, will:

- ensure that the Commission has the information it needs to perform its regulatory functions, including resolving access disputes and approving proposed access arrangements; and
- provide certainty to the regulated businesses, the industry and the Commission by establishing an approved cost allocation policy and standard information reporting requirements.

The Account Keeping Rules require the access provider to:

- prepare, maintain and keep separate accounts and accounting records for access activities from unregulated activities and to keep these for a minimum of five years (section 2.1);
- annually provide financial and business information to the Commission, and provide other information on request; and
- require the access provider to submit to the Commission for its approval at the time of submitting its access arrangement:
  - forms or templates to be used in the presentation of the information and accounts to the Commission; and
  - a cost allocation policy (with which the annual cost allocation statement must be consistent).

The annual reporting of information to the Commission includes the following specific requirements:

- the annual provision of financial and business records to the Commission (sections 2.2 to 2.5), including:
  - statements of financial performance and position;
  - a cost allocation statement;
  - disaggregated information on maintenance and capital works;
  - service standards performance indicators; and
  - details of the source of revenues from access activities.

- the financial statements, cost allocation statement, and maintenance and capital works information provided annually to the Commission must be audited and certified, and all of the annual reporting information must be submitted within four months of the end of the financial year (section 2.7);
- the provision of other information to the Commission either regularly or on request (section 3.2);
- whenever an access provider provides declared rail transport services to itself or a related body corporate it must record in writing and disclose to the Commission a record of the internal transfer terms (“internal transfer terms” are defined in section 4 of the RCA to mean the terms and conditions upon which an access provider provides a declared rail transport service to itself or a related body corporate) (section 4 of the Rules).

The Account Keeping Rules also require that the details of the reporting framework and the cost allocation approach be further specified and approved by the Commission. Specifically:

- Section 2.6 of the Account Keeping Rules contains a requirement that each access provider prepare, for the Commission’s approval, forms for reporting the information requirements contained in sections 2.2 to 2.5. These forms must be submitted for approval by the Commission at the same time as the proposed access arrangement is submitted.
- Section 5 of the Account Keeping Rules contains the requirement that each access provider prepare a cost allocation policy (explaining the methodology and stating the principles governing cost allocation between specified business units and specified activities, among other things) and submit this for approval by the Commission at the same time as the proposed access arrangement is submitted.

In addition, Section 6.2 of the Account Keeping Rules provides that the Commission can waive requirements under the Rules where the Commission considers this would be consistent with the Commission’s statutory obligations and that compliance is not necessary to achieve the purpose of the Rules.

## 2.4 Consultation

Many aspects of the framework described in section 2.4 above were included in the Draft Account Keeping Rules which were published for stakeholder comment in September 2005. Changes that have been made to the drafts (following the Commission’s consideration of submissions) are outlined at 2.6 below.

Most submitters (including GrainCorp, Connex and QR) considered the Draft Account Keeping Rules to be fair and reasonable. For example, ARTC stated that:

*“level of detail proposed to be prepared, kept and submitted...represents a reasonable balance between the considerations of transparency, availability of third party access on fair and reasonable terms, and the administrative and regulatory impost on the access provider”*(p.6)

GrainCorp agreed that it:

*“does not place an expectation on the access provider that are unreasonable nor harsh”  
(p.1)*

And Connex believed that:

*“the approach for the access provider to submit accounting forms (which adequately separate revenue and cost items into regulatory or third party access related and non regulatory categories) to the Commission for approval is appropriate”.(p. 3)*

Some specific stakeholder issues concerning the Draft Account Keeping Rules, and the Commission’s comments are briefly summarised below.

### **Scope of financial information and confidentiality**

Pacific National expressed concern about the requirement to provide information about the ‘whole of business’. It also stated that it would seek to ensure the confidentiality of financial information – especially that relating to activities that are not within the access regime. Other submitters, such as ARTC and QR have expressed similar views. For example, ARTC stated that “it does not consider it necessary for the access provider to provide this information to the market, and believes that seeking regulatory approval or endorsement of pricing should be sufficient to engender market confidence.”

Connex submitted that Clause 2.5(a) of the Draft Accounting Rules (requiring the access provider to provide detailed information, including billing units and revenues, in connection with the use of declared rail transport services) is too intrusive, given the franchise approach to the services it provides.

VicTrack submitted that there is overregulation in requiring access providers not only to have their financial accounts audited, but also to have the Commission approve these ‘forms of accounts’.

*In relation to each of these issues respectively:*

*The Commission does not intend to disclose information in relation to non-regulated activities that it receives from access providers.*

*The Commission considers that prices and quantities information is required to enable it to carry out its regulatory functions, including: to understand the derivation of revenue; to assess revenue outcomes against the revenue cap; and to establish that the access provider complies with the statutory requirements preventing price discrimination between like-for-like services.*

*The requirement that forms for reporting information to the Commission (or “templates”) be established is intended to provide certainty to both the access provider and the Commission in relation to the specific items of information that must be reported each year. The auditing of information provides assurance to the Commission in relation to the accuracy of the information contained in the templates. The Commission does not consider that these requirements represent any duplication, or that they are unreasonable.*

### **Timeframe for annual reporting**

QR suggested that a reasonable timeframe for finalisation and auditing of the below-rail statements is six months after the end of the financial year, rather than four months as required

under the Draft Account Keeping Rules. However, most other submitters considered the four month period to be reasonable.

*The Commission has retained the four month reporting period, as this aligns with general financial reporting requirements.*

### **Timeframe for providing additional information**

Pacific National contended that the “Commission being allowed to request additional information in addition to the information set out in the Account Keeping Rules is too onerous. This requirement is likely to make the process costly.” Some submitters felt that the 14 day timeframe for responding to such requests “in any form or format” to be too short. For example, Connex argued for 30 days rather than the proposed 14 days. On the other hand, GrainCorp considered that this timeframe is achievable and does not impose a burden to the access provider.

*The Commission has amended the requirement so that additional information is now required to be provided to the Commission “within a reasonable timeframe of being requested to do so by the Commission (such reasonable time to be determined by the Commission)”.*

### **Cost allocation policy**

Submitters such as GrainCorp, QR and ARTC specifically supported the requirement for the Commission to approve each access provider’s cost allocation policy. Further, QR argued that the cost allocation policy should be “detailed so that each item of significant below-rail expenditure should be separated for the purposes of applying a cost allocation approach.” and that it should be published. However, there were concerns that the Commission’s approval processes should be subject to public consultation.<sup>5</sup>

*The Commission will conduct its approval process for the Cost Allocation Policy in accordance with its Charter of Consultation and Regulatory Practice.*

### **Limitation of rules**

ARTC contended that “*maintenance and capital work should also be subject to independent auditing as this information is equally important to the Commission in order to undertake its functions*” and that it “*sees no compelling reason not to subject the information to independent audit*”.(p.7)

Pacific National was concerned about the ability of the Commission to reject a cost allocation policy for many reasons.

*The Commission has amended section 2.7 to require the auditing of maintenance and capital works information also.*

*The Commission will have regard to its objectives and the purpose of the cost allocation policy when approving (or rejecting) a proposed cost allocation policy.*

<sup>5</sup> Consultation on approval processes was also raised in the context of other instruments.

## 2.5 Changes made to draft version of instrument

Section	Amendment
2.1(c) (General obligation)	1. Access providers required to keep accounts and accounting records for minimum of five years.
2.3(a) (Cost allocation statement)	2. Cost allocation statement must identify allocation of costs: <ul style="list-style-type: none"> <li>• between declared rail transport services and other services;</li> <li>• with respect to declared rail transport services, between declared rail transport services other than terminal services and terminal services;</li> <li>• with respect to declared rail transport services other than terminal services, between services provided within each pricing zone and between freight services and passenger services; and</li> <li>• between non-reference services (passenger and freight).</li> </ul>
2.4(b) (Maintenance and capital works — access activities)	3. Access provider's maintenance and capital works statement must also provide details of operations expenditure in relation to rail infrastructure, including expenditure on "other maintenance" and total expenditure on maintenance".
2.5 (Prices and revenues)	4. The information that an access provider is required to prepare, keep and maintain about the source of revenues that it derives from its access activities must identify prices charged etc with respect to each reference service (rather than by reference to each pricing zone).
5.1 (Cost allocation policy)	5. The cost allocation policy must identify and explain the methodology and principles governing: <ul style="list-style-type: none"> <li>• firstly, the allocation of costs between the access provider's business units;</li> <li>• secondly, in respect of the access activities business unit, cost allocation between access activities and other activities;</li> <li>• thirdly, in respect of access activities, cost allocation between access activities other than terminal services and terminal services;</li> <li>• fourthly, in respect of access activities other than terminal services, cost allocation between freight services and passenger services; and</li> <li>• fifthly, in respect of access activities other than terminal services, cost allocation between non-reference services</li> </ul>

Section	Amendment
	(passenger and freight).



## 3 RING FENCING RULES

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### 3.1 Background

Section 38S of the RCA requires the Commission to make Ring Fencing Rules, which must require:

- an access provider to separate its access activities from its other activities as if they were carried out by a different business entity;
- the manner in which separation is to be effected; and
- that if an access provider provides declared rail transport services to itself or a related body corporate, it must do so on an arm's length basis.

The Commission has made the Ring Fencing Rules, reproduced at Annexure B, to satisfy the statutory requirement in section 38S, and its objectives in section 38F of the RCA (Objectives).

The Commission acknowledges that access seekers may have confidentiality concerns when they provide business information to a vertically-integrated access provider. It should be noted that Division 7 of Part 2A of the RCA establishes a set of requirements governing how access providers must treat confidential information provided by an access seeker or user, and how access seekers and users must treat confidential information given to them by an access provider, and how parties may use such information. Under section 38ZZZB of the RCA an access provider must, when it submits its access arrangement, also:

*submit for the Commission's approval a system of business rules for:*

- (a) the use or handling of information supplied to the access provider in confidence by an access seeker or user, including the use or handling of that information by an officer, employee or agent of the access provider; and*
- (b) the disclosure of information supplied to the access provider in confidence by an access seeker or user, including the disclosure of that information by an officer, employee or agent of the access provider*

As these requirements are established in the legislation, they are not addressed in the Ring Fencing Rules.

### 3.2 Purpose

Ring fencing rules are intended to facilitate non-discriminatory access for train operators to declared rail tracks and terminals, in a context where the provider of those services is vertically integrated.

Ring fencing requires that a vertically integrated entity establish and maintain the organisational separation of its below-rail and above-rail businesses, and involves the establishment of procedures to prevent flows of information and personnel from the below-rail business to the above-rail business and vice versa.

The importance of ring fencing rules in achieving the aim of competition in above-rail freight haulage services is emphasised by QR:

*An effective set of ring-fencing rules is critical in engendering market confidence where the access provider is vertically integrated. The intensity of the interface between above- and below-rail businesses makes rail unique relative to other regulated industries.<sup>6</sup>*

In addition to organisational separation, the Ring Fencing Rules and statutory provisions require a vertically-integrated rail operator's below-rail business to:

- operate at arm's length from its above-rail business, and
- provide access to third parties on terms and conditions that are no more or less favourable than those available to its affiliated above-rail business; and
- protect the commercially sensitive information of third party users, and not allow this information to pass to its above-rail business.

### 3.3 Approach

#### Application

The Ring Fencing Rules are intended to apply only to access providers who are vertically integrated with respect to the provision of declared rail transport services.

Under the forthcoming Declaration Orders, the declared rail transport services include all freight services and services to V/Line passenger on the intra-state rail lines, as well as Dynon terminal services.

Three entities will become access providers on 1 January 2006 (or some earlier date, if proclaimed earlier) with the commencement of Division 2 of Part 2A of the RCA and of the commencement of the Declaration Orders. These three entities are Pacific National, Connex and VicTrack. Of these entities, only Pacific National is vertically integrated with respect to the declared rail transport services, since it is also a freight train operator. VicTrack and Connex do not operate any freight trains, and V/Line is a Government-owned business which does not provide below-rail services.

For these reasons, clause 1.4 of the Ring-Fencing Rules confines the application of these Rules to the lessee under the Primary Infrastructure Lease – that is, Pacific National.

#### Summary

The Ring Fencing Rules comprise:

- over-arching or general rules with which the access provider must comply (at all times); and
- specific obligations on the access provider to:
  - establish policies, procedures and systems to ensure that it complies with the general obligations under the Ring Fencing Rules; and
  - prepare and submit for approval by the Commission, a separation arrangement which explains how the access provider will give effect to the separation

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<sup>6</sup> QR Submission p.15

requirement, and certifies that the required policies, procedures and systems have been (or will be) put in place.

### **Over-arching Rules**

The over-arching rules (in Sections 2 and 3 of the Ring-fencing Rules) include the requirement to (organisationally) separate the rail infrastructure business from other business activities (such as the operation of train services). Exceptions are made for:

- “shared services” which support both access activities and other activities, including corporate head office functions such as corporate finance, accounting and administration, human resources, information technology services and the Chief Executive Officer;
- “related access activities”, which are activities appropriately carried out by the below-rail business, but which are not access activities, such as managing Government projects involving the upgrading of rail infrastructure (for example, the Regional Fast Rail project) and providing rail infrastructure maintenance activities to third parties.

The manner of separating the access provider’s activities also includes rules governing:

- the separation of staff work areas;
- the movement of staff between business units, including physical access to work areas;
- constraints on IT access;
- limitations to times at which temporary or permanent transfers of staff may be made between business units;
- requirements relating to the provision of services to the below-rail business by other business groups of the access provider, or vice versa, on an arm’s length basis; and
- non-discriminatory information sharing.

The rules relating to arm’s length dealing in relation to declared rail transport services require the access provider to formalise the provision of such services within an access agreement, a copy of which is to be provided to the Commission for its information.

The rules relating to arm’s length dealing in relation to any other services (i.e. that an access provider provides to itself) also require the provision of such services to be formalised within an agreement, and that it be more cost effective for such services to be provided by another business unit of the access provider, rather than an external service provider.

### **Policies, Procedures and Systems**

The Ring Fencing Rules place the onus on the access provider to demonstrate it has achieved compliance with the Ring Fencing Rules by requiring the development of policies, procedures and systems that are adequate to ensure that the access provider will comply with the general or “overarching” obligations in the Rules. In doing so, the policies, procedures and systems must address the specific areas identified under section 4 of the Ring Fencing Rules.

The Commission does not have the role of approving these policies, procedures, and systems but the access provider must certify that these policies, procedures, and systems have been established as part of a separation arrangement to be approved by the Commission. The

Commission may also require an audit of compliance at any time, which includes auditing of the required policies, procedures and systems.

### Separation Arrangement

The Ring Fencing Rules require the access provider to submit a proposed separation arrangement to the Commission, for its approval, at the same time as it submits its draft access arrangement for approval. The proposed separation arrangement must explain how the access provider will comply with the requirements of the Ring Fencing Rules, including:

- a description of the access provider’s organisational and business structure (including a description of the activities and functions of each business unit);
- itemisation of all the services provided to the access activities business unit by other business units or related bodies corporate (other than “shared services”), and how each of these arrangements complies with the arm’s length requirements in the Rules;
- a statement confirming that all of the required policies, procedures and systems are either in place, or will be in place within a six month period;
- a statement confirming the establishment of a staff register (i.e. a register detailing the names and positions of the access provider’s staff and the business units in which they are employed);
- a description of how the separation arrangement meets the requirements of the Account Keeping Rules, and details of the system for handling confidential information.

## 3.4 Framework of the Instrument

- Section 2 of the Ring Fencing Rules creates the obligation to establish an access activities business unit, which is functionally separate from other business units of the access provider, as if they were separate entities. These requirements include:
  - the organisational separation of the access activities business unit from other activities business units and, subject to certain exceptions, includes a requirement that all access activities are carried out by the access activities business unit – which only carries out access activities or related activities (section 2.2);
  - separation of work areas, and appropriate access controls to keep staff separate (section 2.3);
  - separation of staff (i.e. staff members cannot be simultaneously involved in access activities and other activities) and limitations to the transfer of staff between the access activities business unit and other business units (section 2.4);
  - information technology access controls;
  - provision of services by the access activities business unit to the other activities business units, or vice versa, is only permitted provided that:

- to do so is cost effective;
  - the arrangement is formalised in a written agreement; and
  - provided on an arm's length basis (sections 2.6 and 2.7); and
- information provided by the below-rail business to its affiliated above-rail business must also be available to access seekers and users (section 2.9), although some limited exceptions apply.
- Section 3 of the Ring Fencing Rules requires that if declared rail transport services are provided by an access provider to itself or a related body corporate, it must be done on an arm's length basis, including a requirement for the relevant agreement, arrangement or understanding to be documented in writing and provided to the Commission within five business days of execution or completion.
- Section 4 of the Ring Fencing Rules requires the establishment and maintenance of policies, procedures and systems that are sufficient to ensure that the access provider is, and remains, compliant with the rules established in sections 2 and 3.
- Section 5 of the Ring Fencing Rules requires the access provider to submit a proposed separation arrangement to the Commission for approval which:
  - explains in detail how the access provider will comply with the Ring Fencing Rules, including a description of how the organisation will be structured, and the relevant functions and activities of each business unit;
  - includes a statement confirming the establishment of all of the required policies, procedures and systems, including a register of the access provider's staff, and this statement is to be signed by a Director of the business; and
  - a listing of the services (other than "shared services") proposed to be provided to the access activities business unit by another business unit or a related body corporate of the access provider.
- Section 5.8 requires the access provider to provide the Commission with an annual report of compliance with the Ring Fencing Rules (accompanied by an auditor's report about that annual report).
- Section 5.9 provides that the Commission can require an access provider to conduct an audit of compliance with the Ring Fencing Rules at any time, where:
  - the auditor (and the scope of the audit) must be approved by the Commission; and
  - the access provider must ensure that the auditor has a primary duty of care to the Commission – formalised in a tripartite deed – to conduct the audit independently and objectively.

- Section 6.2 of the Ring Fencing Rules provides that the Commission can waive requirements under the Rules where the Commission considers this would be consistent with the Commission’s statutory obligations and that compliance is not necessary to achieve the purpose of the Rules.

### 3.5 Discussion of issues raised in submissions

There was a range of comments on the Draft Ring Fencing Rules. GrainCorp indicated that in principle, the Draft Ring Fencing Rules appeared to address its concerns. ARTC (while preferring vertical separation), also supported the scope of the ring fencing arrangements. However, QR felt that the Commission has adopted an overly prescriptive approach in some areas. Pacific National had a number of concerns with the elements and drafting of the Draft Ring Fencing Rules.

Some specific issues raised in submissions are summarised and addressed below.

#### Staff transfer

QR argued that the Rules should not prevent the transfer of staff between the access provider’s organisational divisions, but should be directed to minimising the misuse of information, for example by imposing delay periods on the transfer of staff with sensitive information, and requiring appropriate debriefing processes during all transfers. Pacific National and VicTrack expressed similar views. ARTC was also “somewhat cautious as to how such a prohibition may work in practice, where there may be a number of concurrent requests for access at various stages of development.”

*The Commission appreciates that this restriction on staff movement may impose a cost on the access provider but considers that this cost is unlikely to be particularly high as it is not expected that there would (or should) be high rates of transfer of staff who have been involved in the conduct of access activities to the access provider’s above-rail business. Secondly, the restriction only relates to the period commencing at the time when the access provider receives a request for access from an access seeker. Experience in other jurisdictions suggests that the number of access seekers seeking access from time to time is unlikely to be so high as to cause this provision to become a costly constraint.*

#### Provision of non-access services

Pacific National also suggested that the Rules should permit the Network Access business unit to undertake activities that are not declared services such as managing state projects (such as regional fast rail) or providing certain services to the above-rail business (such as platform manning services in certain rural locations).

*The Commission appreciates that the objectives and effectiveness of the Ring Fencing Rules would not be compromised by the Network Access business unit undertaking certain activities that are not declared services, such as managing state projects. However, aside from those activities that have been specifically identified as “related activities”, the Commission requires that where the access provider proposes to engage in new non-access activities, this will need to be approved by the Commission. In relation to services provided to the above-rail business, such*

*as platform manning in country areas, these arrangements will need to be at arm's length and formalised.*

### Procedures for training staff

ARTC proposed that the separation arrangement be required to be approved by the Commission should also include the “policies, procedures and systems that address the informing, training and conduct of staff with respect to obligations under the draft Ring-fencing Rules”.

*The Commission agrees that access providers should inform and train staff with respect to their obligations under the Ring Fencing Rules. A requirement to establish protocols to address these requirements has been included.*

### Ring-fencing within the corporate functions

QR indicated that it was “unclear as to the ring-fencing requirements that are to apply to the ring-fencing information that may be accessed or stored by shared services staff.”

*The Ring Fencing Rules are not intended to fully address the ring fencing of confidential access seeker or user information. This is because there is a statutory requirement, under section 38ZZZB of the RCA, that access providers submit proposed business rules for the use and handling of access seeker information to the Commission for approval. These business rules for handling confidential information are therefore separate and additional to the compliance requirements under the Ring Fencing Rules.*

## 3.6 Changes made to draft version of instrument

Section	Amendment
2.2 (Separation of business units)	1. Amendment clarifies that ‘access activities business unit’ may provide services to an ‘other activities business unit’ (subject to compliance with the requirements of new section 2.7).
2.7 (Provision of services to other activities business unit) 5.2(a) (Contents of proposed separation arrangement)	2. New section 2.7 inserted. 3. The section prohibits access providers from arranging for the access activities business unit or related body corporate of the access provider to provide services to the other activities business unit (other than shared services) except where to do so is more cost effective, the service is provided pursuant to a written agreement that sets out the terms and conditions for the provision of the service, the service is provided on an arms' length basis and the arrangement complies with the Ring Fencing Rules. 4. Section 5.2(a) requires access provider to explain how each arrangement for the provision of services set out in section 2.7 complies with the requirements of section 2.7.
4(b)(viii) (Establishment and maintenance of policies etc)	5. New section 4(b)(viii) inserted.

Section	Amendment
	6. The section requires access providers to have policies, procedures and systems for training staff about the access provider's obligations under the ring fencing rules.
6.2 (Waiver of ring fencing rules)	7. Commission may waive access provider's obligations under the ring fencing rules where this would be consistent with Commission's statutory objectives <b>and</b> (rather than <b>or</b> ) compliance would not be necessary to achieve the purpose of the ring fencing rules.
7 (Definitions)	8. Definition of "confidential access seeker and user information" now includes any information collected by an access provider about an access seeker or user that is of a confidential nature.



## 4 CAPACITY USE RULES

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### 4.1 Introduction

Section 38T of the RCA requires the Commission to make Capacity Use Rules which must:

- require the access provider or a user to surrender unutilised or under-utilised train paths;
- require an access provider to report actual train path utilisation to the Commission;
- be consistent with the principle of passenger priority; and
- prohibit an access provider from unreasonably favouring itself when carrying out a capacity allocation activity.

In addition, the Commission can make rules requiring an access provider to prepare and maintain protocols for the allocation of the capacity of the network, and in relation to the method by which an access provider must report actual train path utilisation.

The Commission has made the Capacity Use Rules, reproduced at Annexure C, to satisfy the statutory requirement in section 38T, and by reference to its objectives in section 38F of the RCA (Objectives). In addition, when developing Capacity Use Rules, section 38T(5) of the RCA requires that the Commission have regard to the desirability, where practicable, of reserving train paths for access seekers who are not related to an access provider. The Commission's consideration of this question is presented in section 4.5.

### 4.2 Purpose

A key issue for the functionality of a third party rail access regime is the 'fair and reasonable' allocation of network capacity to access seekers and access users. Fairness in the allocation of train paths can be just as important as 'fair and reasonable' charges.

The Capacity Use Rules regulate an access provider's activities of assessing the capacity of the rail network and allocating train paths in order to:

- ensure that a transparent and equitable process is established for allocating capacity between access seekers and users;
- prevent the access provider favouring its affiliated above-rail operations over those of third parties;
- prevent capacity allocation practices that are designed to frustrate third party access to the rail network ("hoarding" capacity); and
- to ensure that capacity allocation is carried out consistently with the principle of passenger priority.

By ensuring equity and competitive neutrality in the capacity allocation process, and by preventing the hoarding of capacity, these rules facilitate the process of negotiating and establishing access arrangements, as well as facilitating above-rail competition more generally.

### 4.3 Approach

The Capacity Use Rules focus on:

- Requiring the access provider to prepare and maintain certain information that will be informative to access seekers in relation to the availability of capacity. These are:
  - the Master Train Timetable, which will indicate all the passenger and scheduled freight train paths; and
  - a Network Map which shows for each line on the network, the number of train paths that are passenger train paths, scheduled freight, unscheduled and available train paths.
- Establishing a transparent and equitable process for assessing available capacity, and allocating train paths, in response to access applications. This includes a requirement that the access provider establish a policy, guidelines and procedures in relation to this process. Specific timeframes governing this process are contained in the negotiation guidelines, as is the scope for dispute resolution by the Commission. There is an explicit requirement that the capacity allocation process be non-discriminatory, and the access provider must not unreasonably favour itself or another person over any other person.
- A process for resolving conflicts between access seekers who seek the same available train path based on the principle that the seeker who offers the greater train path utilisation should get the path.
- Protocols must be established for varying the allocation of train paths, and these protocols must deal with the following specific matters:
  - passenger priority – the rules explain how the principle of passenger priority will be assured;
  - “use it or lose it” rules for the surrender of unused or under-utilised train paths. The rules require that a scheduled path that is under-utilised be downgraded to an unscheduled path, and as such become an available path to any access seeker or user wanting to use that path on a scheduled basis (i.e. with more regular utilisation). Where a train operator can no longer demonstrate an ability to use a path – for example, if an end user switches to another above-rail operator, and the holder of the train path can no longer use it – the access provider must require the operator to relinquish that path.
- Regular reporting of capacity utilisation to the Commission.

#### 4.4 Stakeholder views on the draft instrument

Several submitters considered that the Draft Capacity Use Rules were too prescriptive. For example, Pacific National argued that the:

*... capacity use rules should allow Pacific National the flexibility to man[a]ge the network in the most efficient fashion.*

*The current draft [rules] does not reflect the Victorian network situation and introduces unnecessary complexity into capacity management.<sup>7</sup>*

A similar view was shared by VicTrack regarding the general content of the protocols:

*This scope of protocols appears extremely prescriptive and it is considered that they could be covered by a more simple list of requirements rather than a method of application – allowing different access providers flexibility to operate in their own way.<sup>8</sup>*

ARTC supported a prescriptive approach (while having reservations about the elements). It submitted:

*Where the third party and an associated party are seeking the same end business there is no less motivation on the part of the access provider to frustrate third party access. ARTC considers that the structural arrangements and consequent motivations of the access provider are a far more important consideration with regards to the degree of heavy or light handedness of a regime than network volumes and utilization.*

*ARTC would have no issue with the Commission taking a heavy handed approach ...<sup>9</sup>*

*In framing the final Capacity Use Rules the Commission has sought, not only to address specific issues raised by submitters, but has also endeavoured to ensure that the Capacity Use Rules reflect a more flexible approach.*

#### Capacity and train path allocation rules

Several submitters, including ARTC, Pacific National and Connex, did not agree with the train path ordering based on ‘passenger’, ‘scheduled’, ‘conditional’ and ‘flexible’ train paths. Pacific National submitted:

*The prescribed use of scheduled train, conditional train and flexible train paths is unhelpful and will result in an inefficient use of the Victorian network. ... The scheduled, conditional, and flexible train paths concepts may make sense on other networks but on Pacific National’s Victorian network this will increase complexity and restrict the flexibility of the Access Provider to meet access seekers’ demands.<sup>10</sup>*

In relation to the metropolitan train network, Connex noted that:

*... outside of the peak periods the network capacity has a large amount of flexibility ... There is no requirement, given the amount of capacity the network has in these off peak*

<sup>7</sup> Pacific National Submission, p 13.

<sup>8</sup> VicTrack Submission, p 6.

<sup>9</sup> ARTC Submission, p 14.

<sup>10</sup> Pacific National Submission, p 13 and 14.

*periods, to require a detailed hierarchy of train paths covering conditional, flexible, and other train paths, apart from passenger and scheduled (freight) train paths.<sup>11</sup>*

ARTC commented:

*This approach to formally recognise a prioritisation of paths with regard to planning and utilization is somewhat unique, and ARTC is somewhat uncertain as to how the approach would work in practice, particularly with regard to planning complexity. ... Nevertheless, ARTC does see some merit in formalisation.*

*The Commission has adopted a simpler ordering of train paths. This now includes just two types of freight train paths, scheduled freight train paths and unscheduled freight train paths.*

### **'Use it or lose it' rules**

The Draft Capacity Use Rules contained specific requirements in relation to the surrender of train paths including:

- variation of the status and potential relinquishment of unused or under-utilised train paths; and
- surrender of train paths that can no longer be used (for example, where a freight owner has switched to a different operator).

GrainCorp stated:

*Rules for the downgrading and/or surrender of unutilised or under utilised paths should be highly prescriptive and closely monitored. Where the access provider also provides above track services, any financial charge or penalty applied for failure to operate a service, on a mandatory or conditional path will have no financial impact. This needs to be addressed in the rules.<sup>12</sup>*

Connex also criticised the requirements for varying or surrendering train paths:

*The proposed rules ... require the access provider to continually monitor scheduled train path usage in order to revise down the status of that train path. For the Connex Network, ... given the surplus of peak capacity on the network, this requirement would impose a large administrative burden and additional costs for little gain in order to promote additional network access.<sup>13</sup>*

*Section 38T of the RCA requires that the Commission make rules to require the surrender of unused or under-utilised train paths. The Commission has therefore retained these requirements.*

### **Monthly reporting of train path utilisation**

Most submitters were opposed to the monthly reporting of actual utilisation of train paths. Pacific National submitted:

*This is a significant administrative burden and it is unclear to Pacific National the benefit the Commission will obtain from having such regular reporting.<sup>14</sup>*

<sup>11</sup> Connex Submission, p 5.

<sup>12</sup> GrainCorp Submission, p 3.

<sup>13</sup> Connex Submission, p 6.

<sup>14</sup> Pacific National Submission, p 16.

QR also considered that monthly utilisation reporting:

*may be excessive in the circumstances ... [and] ... to be a potentially resource intensive task that provides little value in the vast majority of cases.*<sup>15</sup>

VicTrack expressed similar concerns:

*This reporting appears to be in excess of what may be reasonably required. ... This type of reporting is likely to apply a cost impost over the needs of the access regime.*<sup>16</sup>

Connex similarly submitted:

*The monthly reporting approach ... [on capacity utilisation] would be very onerous for Connex. Capacity utilisation for passenger services should be exempt ... If freight train path utilisation is to be monitored, the frequency of monitoring should ... be on an annual basis ...*<sup>17</sup>

On the other hand, GrainCorp considered the monthly reporting of network utilisation to be 'good management practice in any business with a high level of assets'.<sup>18</sup> ARTC supported the monthly utilisation reporting of train paths but suggested:

*This information, by itself, may not be particularly informative, and ARTC suggests that, say, a three month rolling average utilization (or such other period as is meaningful in the context of required path utilisation) also be reported.*<sup>19</sup>

*The reporting of actual train path utilisation has been relaxed from monthly reporting to quarterly reporting. The Commission believes quarterly reporting provides a good balance between minimising the administrative burden and ensuring transparency in capacity allocation.*

### **Principle of passenger priority**

The principle of passenger priority in the rules raised concerns for Pacific National:

*Section 2.1.a.ii and throughout incorrectly implies that Passenger priority should be absolute. The requirements to vary a train for any passenger priority is too onerous and would include heritage trains. The requirement should be ... limited to passenger trains necessary for the Director [of Public Transport] to deliver his subsidised passenger train services.*<sup>20</sup>

ARTC argued:

*ARTC has no issue with the legislative application of passenger priority in planning, but considers that this priority should be applied on a reasonable basis (ARTC considers that this is provided for in the legislation).*

On the other hand, Connex submitted:

*Connex supports the passenger priority approach ... This approach is also enshrined in the metropolitan Master Timetable (including the V/Line timetable) which is approved by the*

<sup>15</sup> QR Submission, p 16-17.

<sup>16</sup> VicTrack Submission, p 8.

<sup>17</sup> Connex Submission, p 6-7.

<sup>18</sup> GrainCorp Submission, p 3.

<sup>19</sup> ARTC Submission, p 16-17.

<sup>20</sup> Pacific National Submission, p 15.

*State. Consequently, Connex would argue that it is only appropriate to develop capacity allocation protocols in relation to only freight paths.<sup>21</sup>*

*In the Commission's view, the approach taken to the principle of passenger priority in the Capacity Use Rules is consistent with section 38H of the RCA, and with section 10 of the Transport Act 1983.*

*It is the Commission's understanding that the principle of passenger priority in the RCA only relates to the giving of priority to declared rail transport services that are passenger services, and hence only applies to services provided to V/Line. Section 10 of the Transport Act 1983 applies to any passenger service where there is an exclusive franchise agreement which enables the Director of Public Transport to determine the timetable (i.e. it includes metropolitan passenger services), and where a change in that timetable conflicts with existing freight train paths, these must be varied to accommodate the change in passenger train paths.*

### **Publication of the master train plan and register of available capacity**

The publication of the Master Train Plan and register of available capacity for each line is supported by ARTC<sup>22</sup> and GrainCorp. GrainCorp submitted:

*With the Master Train Plan forming the foundation for the development of train paths, assurance needs to be given that its construction and principles provide the basis for the optimum number of network paths. Any doubts or concerns that the Commission has in this area need to be examined, possibly using the services of an external, suitably qualified auditor.<sup>23</sup>*

Pacific National disagreed with the need to publish the Master Train Plan and register of available capacity for each line, stating:

*The documenting of the master train plan/ practical capacity for each line is impractical ... Capacity depends on a number of factors including: the origin and destination of the train services ...; the quality of the track ...; the size of trains being run ...; the speed of the trains and the number of stops; the signalling capability currently employed; and current infrastructure ...*

*... [I]t would be impossible to calculate the practical capacity of a line segment given that the alternative combinations of the above factors is almost infinite.<sup>24</sup>*

Connex confirmed that it maintains its Master Passenger Timetable on its website and stated:

*Given the surplus capacity that exists on the Connex Network in off peak times it is not necessary for [a master train plan] to be maintained.<sup>25</sup>*

QR also expressed reservations about the master train plan:

*... [T]he Commission's proposed approach may prove unduly onerous for little corresponding value to access seekers.*

<sup>21</sup> Connex Submission, p 5.

<sup>22</sup> ARTC Submission, p 16.

<sup>23</sup> GrainCorp Submission, p 3.

<sup>24</sup> Pacific National Submission, p 14-15.

<sup>25</sup> Connex Submission, p 6.

... [I]f trains travel over various line sections the capacity of one line section may not be relevant to the overall availability of capacity. ... [Where] capacity isn't scarce there is little to be gained by requiring the on-going analysis of each line's practical capacity.<sup>26</sup>

Similarly, VicTrack:

... queries whether the master Train Plan is the correct document ... [and] ... would not see a need to provide this level of capacity detail ...<sup>27</sup>

*The requirement for a Master Train Plan has been replaced with a requirement for a Master Train Timetable. This requires access providers to prepare, maintain and keep up to date, a list of all scheduled passenger and freight train paths. This should significantly reduce the administrative burden identified in submissions, as access providers would already be expected to prepare this type of information as part of their usual business activities.*

*Instead of requiring access providers to report on the practical capacity of each line, the Capacity Use Rules now require access providers to prepare, maintain and update annually a Network Map. This map is required to show for each line, the number of scheduled passenger train paths, scheduled freight train paths, unscheduled freight train paths and unallocated (i.e. available) train paths. The Commission believes this approach allows access seekers to determine the likely available practical capacity on each line, whilst ensuring access providers are not overly burdened by administrative reporting costs.*

### **Allocating capacity between two or more access seekers requesting a freight train path**

Different views have been expressed regarding the 'greatest utilisation' rule for the allocation of capacity between two or more access seekers requesting the same available freight train path at the same time. ARTC submitted that:

... the allocation of capacity is a commercial decision for the access provider, and the access provider should be permitted to offer access to the party whose terms and condition of access offers the best commercial outcome to the access provider. The test would [be] broader than a simple utilization test, and would be an NPV assessment considering the costs and risks to the access provider ... including consideration of maximum utilisation.<sup>28</sup>

QR suggested that:

... this provision be extended to include consideration of all of the terms on which access is sought (e.g. price, certainty, length of commitment etc) to ensure that the considerations focus on the issues most relevant to the efficient utilisation of the network (rather than only the utilisation of the network).<sup>29</sup>

VicTrack highlighted other aspects of utilisation, which may be relevant in allocating capacity:

*This clause relates to greater utilization of the train path based on duration and frequency. It ignores the size of the tonnage for freight task and other factors including revenue value and cost to the community which could potentially utilize the network at a higher level.<sup>30</sup>*

<sup>26</sup> QR Submission, p 16.

<sup>27</sup> VicTrack Submission, p 7.

<sup>28</sup> ARTC Submission, p 16.

<sup>29</sup> QR Submission, p 17.

<sup>30</sup> VicTrack Submission, p 7.

*The Commission has retained the provision governing the allocation of capacity between two or more access seekers requesting the same freight train path. The Commission believes that a set of objective rules in these circumstances would increase access seekers' confidence in, and transparency of, the access regime overall. The definition of 'utilisation' in that provision has, at the suggestion of VicTrack, been broadened to include the aggregate tonnage of the freight services that use that train path.*

## 4.5 Reserving capacity for third party operators

The legislation requires the Commission to consider the desirability of reserving capacity for third party operators – that is, train operators other than the access provider or its affiliates.

In the *Draft Commission Instruments: Consultation Paper* the Commission indicated its preliminary view that it will be unnecessary and undesirable to reserve rail capacity for access seekers because:

- The Victorian intrastate rail network is not intensively utilised, and is believed to have considerable excess capacity, and in this context, the “use it or lose it” rules should ensure that there is adequate available capacity for access seekers.
- If the tariff structure incorporates a “flag fall” charge (i.e. a charge for the reservation of train paths), this may provide additional discouragement to parties, including the access provider, in relation to hindering access by inefficiently reserving train paths.
- There would be a number of practical difficulties arising from a reservation of capacity decision. For example, issues would need to be addressed such as whether specific train paths would need to be reserved, what assumptions would be made about the characteristics of the operators to be using the train paths, and on which parts of the network the train paths would be reserved. Specifying these things would require some degree of speculation about the nature of market developments.
- As it would also appear to require the development of rules and mechanisms in relation to how access seekers will gain access to reserved train paths, and the circumstances in which train paths would become unreserved, this may add an unnecessary layer of complexity to access negotiations.
- Reservation of train paths may inefficiently impede the access provider’s ability to operate or expand its own services. As this could be detrimental to the legitimate business interests of the access provider, some claims for compensation may arise. This could result in increased costs to rail network users and reduced efficiency in the sector.

Instead of reserving capacity, the Commission suggested that provisions for surrendering unutilised or under-utilised train-paths, as well as requiring transparent timetabling, should be more effective in achieving the balance of competitive benefits and regulatory costs.

Submissions tended to support this approach. For example, ARTC stated:

*On balance, ARTC considers that benefits of reservation of ‘blocks’ of available capacity that can only be utilised by third parties, are outweighed by the cost of inefficient asset utilisation. Available capacity may, in fact, offer little value to third parties.*

...



*[However,] ARTC can see merit in introducing provision to allow for an access seeker to be able to reserve capacity for a period of time following execution of an access agreement before commencement of operations.<sup>31</sup>*

A similar view was expressed by QR:

*In relation to the Commission's view on the reservation of capacity for non-related third parties, QR does not consider it appropriate for particular paths to be reserved for operators unrelated to the access provider.<sup>32</sup>*

In forming its final views on this question, the Commission has considered the arguments presented in submissions. Having regard to the Commission's preliminary views and the arguments raised by stakeholders, the Commission has concluded that it is unnecessary and undesirable at present to reserve rail capacity for access seekers, and does not propose to exercise its powers under section 38T(5) of the RCA at the present time.

However, as noted in the Consultation Paper, it is important to note that while the Capacity Use Rules require any new access agreements to be consistent with the Rules, they do not over-ride an access agreement made prior to the Rules coming into effect. Consequently it is possible that an existing agreement may include terms that prevent the access provider from complying with some rules, for example in relation to freight path priorities or train path surrender. Should these circumstances arise, the Commission expects access providers to use reasonable endeavours to renegotiate existing agreements to incorporate processes that are consistent with the requirements in the Capacity Use Rules.

In the unlikely event that a concern should arise in relation to train path hoarding arising from existing access agreements, the Commission notes that it can reconsider the question as to whether it should use its powers under section 38T(5) of the RCA at any time. Should it consider the need to do so, the Commission can (within the process established in section 38N of the RCA) amend the Capacity Use Rules to impose an obligation with regard to release of train paths.

## 4.6 Changes made to draft version of instrument

Section	Amendment
Throughout	1. Freight train paths are now classified only as "scheduled freight train paths" and "unscheduled freight train paths". "Unscheduled freight train paths" now include train paths previously described as "flexible" and "conditional" freight train paths.
2 (Obligations of an access provider with respect to relevant capacity allocation activities)	2. Section 2 simplified. Access providers' obligations with respect to access arrangements etc with users has been moved to new section 7. 3. When carrying out relevant capacity allocation activities, access providers are no longer required to "ensure the safe and reliable operation of the rail network" and to "comply with relevant

<sup>31</sup> ARTC Submission, p 18.

<sup>32</sup> QR Submission, p 17.

Section	Amendment
	<p>legislation, all applicable standards and good industry practice". This is because many of these requirements are already imposed by law.</p>
3 (Protocols and capacity allocation protocols)	4. Section 3 has been moved to new section 6.
New section 3 (Master train timetable and network map)	<p>5. Access providers are now required to maintain a current "master train timetable" (rather than a master train plan recording the practical capacity of each line, and showing passenger train paths and freight train paths) and a "network map" (rather than a register of practical capacity recording the practical capacity of each line) (sections 3.1, 3.2).</p> <p>6. Access provider may be required to answer questions in relation to the master train timetable about whether a train path is the subject of an access agreement and if so, whether it is a scheduled freight train path or an unscheduled freight train path (section 3.1(b)).</p> <p>7. The network map must identify "available" train paths using a "standard freight train path" and be updated annually (section 3.2).</p>
New section 4.3(c)(i) (formerly section 5.3(c)(i)) (Resolving conflicts with respect to freight train paths)	8. Where an access provider cannot satisfy two or more requests for access to the same freight train path, the access provider is now required to take into account the aggregate tonnage of the freight services that use that train path when determining which access application that offers the greatest "utilisation" of the rail network.
New section 5 (formerly section 6) (Variation of and surrender of a train path)	<p>9. Former section 6.1 "overview" section is deleted.</p> <p>10. New section 5 is amended to replace references to "scheduled", "conditional" and "flexible" freight train paths with references to "scheduled" and "unscheduled" freight train paths. As a result:</p> <p>11. section 5.2 (formerly section 6.3) requires an access provider to vary permanently "unscheduled" freight train paths where an access seeker applies to use that freight train path as a scheduled freight train path;</p> <p>12. section 5.5 (formerly section 6.6) requires an access provider to revise the status of under-utilised scheduled freight train paths to "unscheduled" freight train paths; and</p> <p>13. when varying train paths, access providers must first vary "unscheduled" freight train paths, then "scheduled" freight train paths, and must re-allocate "scheduled" freight train paths before re-allocating "unscheduled" freight train paths (section 5.7</p>

Section	Amendment
	<p>(former section 6.8).</p> <p>14. Access providers' obligations under section 5.6 (former section 6.7) (Surrender of train paths) in relation to giving the user notice and requiring the user to show cause, are to be addressed within guidelines, principles and procedures (see new section 6.3(a)(viii)).</p>
<p>New section 6.3 (Protocols and capacity allocation protocols)</p>	<p>15. Section 6.3(a)(i): Access providers are now required to keep a record of the standard freight train path used for allocating freight train paths, rather than being required to have policies and procedures for identifying the practical capacity of each line and adjusting practical capacity as a result of repair maintenance etc.</p> <p>16. Section 6.3(a)(iv): Decision criteria simplified to reflect classification of freight train paths as "scheduled" and "unscheduled".</p>
<p>New section 7 (formerly section 2.2) (Access agreements and other arrangements with users)</p>	<p>17. Section has been simplified so that access provider is required to ensure that access agreements and other arrangements with users are consistent with the Capacity Use Rules and each binding protocol that an access provider is required to maintain under the Capacity Use Rules. The section no longer lists the relevant protocols with which the access agreement or other arrangement must be consistent.</p>
<p>New section 8.2 (formerly section 7.2(b)) (Reporting utilisation of train paths)</p>	<p>18. Access providers are required to provide the report before the twentieth (not the tenth) day of each calendar quarter (section 8.2(a)).</p> <p>19. Access providers are not required to report utilisation of sidings (section 8.2(b)(ii)).</p> <p>20. Access providers are required to report unavailability of scheduled train paths where this is not due to "State-sponsored rail network alterations" (section 8.2(b)).</p> <p>21. Access providers have 28 days or such longer period as notified by the Commission to adjust the methodology used to produce the calculations in the "train path utilisation report" if the Commission directs the access provider to do so (section 8.2(c)).</p>
<p>New section 9.2 (formerly section 8.2) (Waiver of capacity use rules)</p>	<p>22. Commission may waive access provider's obligations under the Capacity Use Rules where this would be consistent with the Commission's statutory objectives and (rather than or) compliance would not be necessary to achieve the purpose of</p>

Section	Amendment
	the Capacity Use Rules.
New section 11 (formerly section 10) (Definitions)	23. "Available train path": An unscheduled freight train path is now classified as "available" even if a user has paid for that train path.

## 5 NETWORK MANAGEMENT RULES

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### 5.1 Introduction

Section 38U of the RCA requires the Commission to make Network Management Rules for or in respect to the carrying out of certain rail network management activities. Among other things, section 38U allows the Commission to require access providers to prepare binding rail network management protocols.

The Commission has made the Network Management Rules, reproduced at Annexure D, to satisfy the statutory requirement in section 38U, and by reference to its objectives in section 38F of the RCA (Objectives).

### 5.2 Scope and purpose of the instrument

Network management refers to day-to-day train scheduling, train control and associated services. Given that the Victorian rail industry is vertically integrated, a key issue in network management is the equal treatment of train operators by the access provider.

The Network Management Rules complement the Capacity Use Rules by providing protocols for how the short-term and real time management of the system will be undertaken. (The Capacity Use Rules deal with forward-looking timetabling processes.) Protocols established under the Network Management Rules will govern an access provider's rail network management activities, including train service scheduling and planning, train control services, management of the interaction of rail infrastructure and rolling stock and management of incidents that affect the operation of a rail network.

The purpose of the Network Management Rules is to ensure that the network management practices are not used to hinder third party access or discriminate against third party network users, thereby distorting competition between above-rail service providers.

### 5.3 Approach

In developing the Network Management Rules, the Commission considered the objectives of the legislation, the submissions of stakeholders, and comparable regulatory frameworks. It has also given consideration to the interaction of the VRAR with the ARTC regime, and to issues relating to the safe operation of the network.

The Network Management Rules contain a number of over-arching principles that network management activities must be consistent with. These include:

- transparency as to the conduct of rail network management activities;
- the principle of passenger priority;
- non-discrimination (i.e. an access provider must not unreasonably favour itself or another person);
- maximising usage of the network and promoting compatibility in operations with other rail networks.

The Network Management Rules require the access provider to develop detailed protocols and standards in relation to network management and train control, and for managing the interaction of rail infrastructure and rolling stock. The Network Management Rules specify a number of elements that must be addressed by the protocols, but are generally not prescriptive in regard to the way these are to be addressed.

Given that some network operating protocols have been in place for some time, the Commission considers that the access provider is best placed to propose a set of detailed operational protocols. However, the Network Management Rules also contain some requirements that the protocols must contain or meet.

## 5.4 Stakeholder views on draft instrument

At a general level, GrainCorp and Connex supported the Draft Network Management Rules. GrainCorp stated:

*The draft Network Management Rules appear sound and follow the basic principles of train control. While GrainCorp considers reference to the Master Train Diagram, Master Train Timetable and Daily Train Plans appropriate ... [a]n audit process conducted by an external body would establish that the network is being operated in [a] manner that assures optimum productivity & utilisation.<sup>33</sup>*

Connex stated that it:

*... supports in general the approach taken by the Commission to the draft Network Management Rules. Connex already has a comprehensive framework in place that essentially addresses these network management issues and believes ... it should only be necessary to provide the existing set of network protocols, provided the areas raised in the draft Network Management Rules are adequately addressed.<sup>34</sup>*

In the area of network management, GrainCorp generally favoured prescriptive rules:

*Rules that are prescriptive in [their] nature will assist in addressing shortcoming[s] in the present Regime and minimize possible disputes requiring a ruling from ESC.<sup>35</sup>*

Pacific National, on the other hand, favoured rules that would be less binding on the access provider:

*These Network Management Rules appear to document a number of procedures and arrangements with other Access Providers and users, which currently exist. ... By virtue of the documentation of such procedures and arrangements in these rules, they are elevated to the status of absolute obligation on the access provider. This is inappropriate, as the Access Provider needs to have certain discretion or flexibility in the application of its procedures and arrangements with other Access Providers and users, to be able to respond to the day-to-day exigencies of the network.<sup>36</sup>*

<sup>33</sup> GrainCorp Operations Limited, p 4.

<sup>34</sup> Connex Submission, p 7.

<sup>35</sup> GrainCorp Operations Limited, p 4.

<sup>36</sup> Pacific National Submission, p 18.

## Safety requirements and rolling stock interface standards

Pacific National raised specific concerns about the network management rules covering safety:

*The Network Management Rules as currently drafted seek to put safety requirements on the Access Provider. This appears to be outside the scope and purpose of the access regime under the Act. In addition, there is scope for a conflict of obligations of the Access Provider under the safety legislation and these rules. It is therefore suggested that the Commission should not seek to include safety requirements on the access provider nor access seeker as part of these rules, but instead rely on the applicable safety legislation.*<sup>37</sup>

Pacific National cited the protocols covering transport of hazardous or dangerous goods, military occupation, and rolling stock standards as examples of possible conflict between the safety protocols in the rules and any applicable safety legislation.<sup>38</sup>

The view to exclude safety requirements from the rules appear to be shared by ARTC, which, in response to the contemplated rolling stock interface standards, submitted that:

*...[the] ARTC is cautious about an access regulator being in a position to approve rollingstock interface standards that are largely a matter of engineering and safety, outside of the matters relating to non-discriminatory treatment of affiliated and third party users and seekers.*

*ARTC makes a similar comment with respect to communications protocols (particularly with regard to communications, coordination and management of the interface with neighbouring networks).*<sup>39</sup>

QR expressed similar concerns:

*QR suggests that it is critical for the Commission to have relevant expertise available to it to enable it to undertake an assessment of rollingstock interface standards if it is to take on this responsibility. These documents contain technical information and would not be readily accessible by many personnel engaged in the work of the Commission.*<sup>40</sup>

Pacific National objects to the access rules requiring ‘reliable’ operation of the network:

*The term “reliable” is highly subjective and dependent on the context of the service. For example, the importance of maintaining sectional running time for a passenger train is likely to be far greater than for a grain train. Thus matters of service quality should be dealt with in access contracts, not in the instruments that prescribe the access regime. In any event a reliability requirement is not appropriate for the Victorian Network as much of the Victorian task is at best marginally profitable[.] The costs of running a “reliable” network may not be able to be met by the access seeker. Thus in order to compete with road, access seekers may prefer to accept a higher reliability risk with associated lower access prices.*<sup>41</sup>

*The Network Management Rules will require access seekers to establish and maintain documented rolling stock interface standards and safe working systems, but the Rules no longer*

<sup>37</sup> Pacific National Submission, p 18.

<sup>38</sup> Pacific National Submission, p 18.

<sup>39</sup> ARTC Submission, p 22.

<sup>40</sup> QR Submission, p 18.

<sup>41</sup> Pacific National Submission, p 13.

*require that the safety related protocols be approved by the Commission. Those protocols are only required to comply with relevant legislation, all applicable standards and good industry practice. This is intended to address concerns about the Commission involving itself in issues relating to safety (which are addressed by other regulators).*

*The access provider is no longer required to ensure the safe and reliable operation of the network as part of its general obligations under the Network Management Rules. Safety has been left to relevant legislation, applicable standards and good industry practice.*

### **Interdependencies with adjoining networks**

Pacific National submits that the rules fail to recognise interdependencies with adjoining networks.

*For example if the Connex network is blocked there is no point progressing trains through the Pacific National network just to sit on the edge of the Connex network until such time as the network is cleared. In addition, the ARTC often requests access to the Pacific National Network in order to facilitate ease of movements on the interstate line. ... In some cases this is to manage emergencies on their network, which could impact on an access seeker on the Pacific National network, but overall provide a generally more efficient outcome for all operators in general.<sup>42</sup>*

*The Commission considers that this issue is adequately addressed in section 5.2 of the Network Management Rules, which specifically requires each access provider to establish and maintain protocols for communications with the operator of an interfacing network, and for the coordination and management of the interface between the networks, including a 24 hour communications link.*

### **Emergencies and force majeure events**

Pacific National considers it unreasonable to require the access provider to specify policies and procedures that it will apply in event of an emergency or force majeure event:

*... [T]he action to be taken in case of an emergency or force majeure event will depend on the nature of that emergency or force majeure event, and it is not feasible to predict every possible type of emergency or force majeure event.<sup>43</sup>*

*The Instrument is not prescriptive as to the policies and procedures that should apply. It will be up to the access provider to submit what it considers can be reasonably established in these policies and procedures. It is therefore not considered that section 4.6 needs to be revised or removed.*

### **Appropriateness of the term ‘all reasonable endeavours’**

The term ‘all reasonable endeavours’ used in the network management rules have raised some criticism. GrainCorp expressed concerns that the term will become an area of dispute:

<sup>42</sup> Pacific National Submission, p 19.

<sup>43</sup> Pacific National Submission, p 19.



*GrainCorp would be hopeful that this does not become an area of contention when inconsistent or questionable decisions are made [by] the access provider [at various levels due to differences in] expertise and knowledge of train controllers.<sup>44</sup>*

Pacific National argued that:

*... the definition of ‘all reasonable endeavours’ is inappropriate in the context of network management rules for the provision of access to the network, particularly the inclusion of ‘good industry practice’ and ‘international benchmarks’.<sup>45</sup>*

*Submitters expressing concern about this definition were not able to provide a definition that the Commission considered to be superior. The reference to international benchmarks in the definition is qualified by the terms “where relevant”.*

### **Train priority and train health**

ARTC raised a number of issues relating to train priority:

*ARTC considers that there is too much emphasis placed on train priority in the rules. ... ARTC supports the use of the train health as the primary driver of an operational conflict decision. When all else is equal (in terms of relative health), then the priority of a train in terms of whether it is carrying passengers, or certain types of freight, can become more important.<sup>46</sup>*

On the issue of ‘train health’ mentioned above, ARTC notes that:

*The definitions of train health ... used in the draft Network Management Rules are inconsistent with those used in other jurisdictions. In these jurisdictions (including ARTC’s), the concept of train health recognizes that a train can be off path as a result of failure on the part of the operator, failure on the part of the track manager, or failure of both.<sup>47</sup>*

*The definition of train health has been amended to accommodate a train that is not on time due to below-rail causes.*

### **Possessions for network maintenance**

Some different proposals have been suggested for the process by which access providers take possession of the network for maintenance. ARTC submits that:

*In a vertically integrated environment, ARTC can see merit in prescribing a minimum time for notification of a track possession, where utilisation of a train path would be materially affected, as it would present an opportunity for the access provider to inconspicuously discriminate against third parties.<sup>48</sup>*

GrainCorp backs the use of a timetable before access providers can assume possession of the track, but add that:

<sup>44</sup> GrainCorp Operations Limited, p 4.

<sup>45</sup> Pacific National Submission, p 20.

<sup>46</sup> ARTC Submission, p 20.

<sup>47</sup> ARTC Submission, p 21.

<sup>48</sup> ARTC Submission, p 23.

*The process should also include consultation with the access user, so that where possible a mutually agreed arrangement is reached to minimize any disruption to the supply chain.<sup>49</sup>*

Pacific National, on the other hand, recommends the rules be changed to reflect the current method of organising possession through an Occupations Committee:

*Possessions are currently dealt with by the Occupations Committee which co-ordinates possession between the track providers to ensure efficient possession and minimisation of disruption. V/Line Pass and any other access seeker are invited to join this forum. This approach reflects the nature of the network with different hub and radial access providers. This process is efficient, open, the result of an ongoing Access Agreement with V/Line passenger and needs to continue. Thus the Network Management Rules should be changed to reflect the current efficient and open practice.<sup>50</sup>*

Connex expressed a similar view to support the continuation of the Occupations Committee:

*Regular maintenance and repair work is generally short term and does not materially impact on the capacity of the line. It would be administratively costly to continually update the register of practical capacity for this type of work. The Occupations Committee ensures that the relevant network users and providers are involved in coordinating network maintenance and hence any temporary reduction in line capacity is communicated to the affected participants.<sup>51</sup>*

*The Commission does not object to the proposal by Connex and Pacific National to continue using the Occupations Committee for coordinating possession of the network for maintenance. The rules only require [high level aspects of] the network possession process to be documented and formalised in protocols to improve transparency and provide potential access seekers with greater certainty about their access entitlements. The rules do not prevent access providers from continuing the function of the Occupations Committee under the VRAR.*

## 5.5 Summary of changes made to draft version of instrument

Section	Amendment
Throughout	1. Consequential amendments to network management rules made to reflect amendments to the Capacity Use Rules. For example: <ul style="list-style-type: none"> <li>• references to "master train plan" have been replaced with references to "master train timetable";</li> <li>• references to "flexible" and "conditional" freight train paths and to "ad hoc" train paths have been replaced with references to "unscheduled" freight train paths.</li> </ul>
2.1(a) (Obligations of an access provider with respect to relevant rail network management activities)	2. Access providers are now required to use all reasonable endeavours to "promote", rather than "maximise", the compatibility in operations of its rail network with the operations of any other rail network of an access provider that interfaces

<sup>49</sup> GrainCorp Operations Limited, p 4.

<sup>50</sup> Pacific National Submission, p 19.

<sup>51</sup> Connex Submission, p 6.

Section	Amendment
	with the access provider's rail network.
4.1(a)(vi) (Short term scheduling and planning train services)	3. Access providers are now required to reschedule "scheduled" freight train paths before "unscheduled" freight train paths. The references to rescheduling "train services" have been deleted. Access providers are now only required to reschedule "train paths".
10.1 (Submission and approval of protocols)	<p>4. Section 10.1(a): Access provider is still required to prepare and maintain, but is no longer required to submit to the Commission for approval, the communications protocol and the rolling stock interface standards (or any variation thereto).</p> <p>5. New section 10.1(g): If the Commission twice rejects an amended proposed protocol (or a variation to a binding protocol), the Commission may now either return the amended proposed protocol (or proposed varied protocol) to the access provider for reconsideration and resubmission or amend the amended proposed protocol (or proposed varied protocol) itself so that it provides for the matters listed in the network management rules and is consistent with the objectives set out in section 38F of the Rail Corporations Act.</p>
10.2 (Access provider's obligation to comply with protocols and standards)	6. Section 10.2 is amended to clarify when the access provider's obligations to comply with protocols and the rolling stock interface standards commence.
New section 10.4 (Copies of variations to other protocols and standards)	7. Under this new section, if an access provider varies its communications protocol, complaints protocol or the rolling stock interface standards, the access provider must provide a copy of that varied protocol or those varied standards to the Commission.
11.2 (Waiver of rules)	8. Commission may waive access provider's obligations under the network management rules where this would be consistent with Commission's statutory objectives <b>and</b> (rather than <b>or</b> ) compliance would not be necessary to achieve the purpose of the network management rules.
12 (Definitions)	<p>9. Definitions of "possession", "real-time scheduling" and "unscheduled" inserted (the first two definitions are relevant to the protocols that access providers are required to prepare and maintain, e.g., in respect of the management of a rail network and possessions of the rail network).</p> <p>10. Amendments to definitions of "healthy" and "unhealthy" clarify the effect of "below rail" and "above rail" causes on the</p>

Section	Amendment
	classification of train services and trains.

## 6 NEGOTIATION GUIDELINES

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### 6.1 Background

Section 38V of the RCA requires the Commission to make Negotiation Guidelines to establish requirements for each access provider to establish a process for negotiation of access agreements that is fair and equitable, and to set this out in its proposed access arrangement.

The Negotiation Guidelines are required to address:

- the information that an access provider must provide to an access seeker;
- the procedure under which an access seeker may make an application to be provided a declared rail transport service by the access provider;
- the procedure and method for the assessment of an application by an access provider for the provision of a declared rail transport services by the access provider;
- the time period within which assessments and determinations of such applications must occur; and
- prohibitions on an access provider from requiring or requesting an access seeker to identify a consignee (in identified circumstances).

The Negotiation Guidelines operate slightly differently from the other Commission Instruments in that a breach of the Guidelines is not a breach of a penalty provision. However, the Guidelines may prescribe certain information or procedures that an access provider must include in a proposed access arrangement (which is subject to approval by the Commission). Also, if an access seeker believes that the access provider has not complied with the Negotiation Guidelines, this can give rise to an access regime dispute that the access seeker can call upon the Commission to decide. Furthermore, in certain circumstances non-compliance with the negotiation guidelines could constitute a hindering of access for the purposes of section 38ZZS of the RCA, which is a penalty provision.

### 6.2 Purpose

The Negotiation Guidelines require the establishment of a framework to assist the parties to undertake negotiations in good faith, with the appropriate information available and in a timely manner.

In submitting an access application, access seekers are at a considerable disadvantage in terms of available information (for the purposes of negotiation with the access provider). Additionally, in the absence of a clearly established negotiation framework there can be a considerable degree of uncertainty in the negotiation process, particularly as the access provider may have an incentive to delay proceedings to forestall the entry of a potential competitor. These factors could deter competition. The Negotiation Guidelines are intended to address these issues.

The Negotiation Guidelines are intended to facilitate the process of negotiating access to a declared rail transport service by an access seeker. The Commission envisages that the guidelines will assist access providers and access seekers by setting out the basic information that an access

provider will be required to provide to interested access seekers and any procedures that must be followed (including timeframes) in relation to applying for, assessing and determining applications for access.

Given the Commission’s objective under s 38F of the RCA to “promote competition in rail transport services to achieve an increase in the use of, and efficient investment in, rail infrastructure”, the Commission considers that the Negotiation Guidelines should ensure that interested parties have access to sufficient information to make commercially viable decisions regarding potential use of, or investment in, rail infrastructure.

### 6.3 Commission’s Approach

Access to a rail network or a declared terminal will generally require the access seeker to enter into an access agreement with the access provider. The Negotiation Guidelines establish, or require the establishment of, a process for progressing an application for access through from its earliest stages to a completed access agreement. The Negotiation Guidelines require that throughout this process, both parties act in good faith.

The main principles underlying the negotiation guidelines are:

- (a) protecting the legitimate interests of the access provider and access seekers by establishing a process that facilitates commercial negotiation;
- (b) requiring that the parties negotiate in good faith;
- (c) preventing discrimination between access seekers and users, and in particular the favouring of the access provider’s above-rail business over third party operators; and
- (d) facilitating access to declared rail transport services and interconnection to be made available on fair and reasonable terms.

The procedural details contained in the Negotiation Guidelines are also intended to assist the parties to understand their rights and obligations under the legislative framework with respect to the negotiation of access agreements.

In developing Negotiation Guidelines the Commission has had regard, in addition to legislative objectives and good regulatory practice, to:

- comparative regulatory frameworks, and in particular the Queensland, Western Australian and ARTC models, and
- stakeholders’ comments, for example in relation to the scope of information to be exchanged by the access provider and access seeker, and the requirement for fixed timeframes for handling access applications.

The Negotiation Guidelines – provided in Annexure E – specify in some detail the information exchanged and procedural steps that will occur in the access application process. Timelines for the major steps in the negotiation process between access seeker and provider are also set out. To further reinforce the transparency and meaningful interaction of the negotiation process, there are general obligations for both parties to negotiate in good faith, and for the access provider to treat all parties equally.

The negotiation guidelines contain:

- information that must be provided by the access provider to an access seeker prior to it making its access application (section 2);
- procedures that an access seeker must follow, and information it must provide when making an access application (section 3);
- procedures and timelines that the access provider must follow when making its assessment of an application and responding to the access seeker (sections 4.1 and 4.2);
- the requirement for each access provider to develop a negotiation protocol that contains the procedure and method for negotiating the terms and conditions of access, and for resolving disputes that may arise between the access provider and the access seeker, including alternative dispute resolution (section 4.3);
- obligations and procedures for making an assessment of required works in circumstances where an access provider has insufficient capacity to meet an access seeker's request (section 4.4); and
- information to be exchanged and procedures for assessing and negotiating applications for interconnection (section 7).

In addition, the prohibition of an access provider requiring or requesting an access seeker or user to identify a consignee, required under section 38V(1)(e) of the RCA, is in section 5. Fees and levies are specified in section 6 – in accordance with the provisions of section 38V(2) of the RCA.

The Guidelines require that the access provider must maintain an information pack that must be made available to an access seeker on request within seven (7) days. The information pack must contain the information set out in section 2(c) of the Guidelines, including such things as information about the rail network, signalling systems, the master train timetable, the capacity allocation policy and network management handbook, standard terms and conditions and the access application form. In addition, the access provider must (under sections 2(d) and (e)) also provide additional information specific to the service being sought by the access seeker, including, for example, information in relation to planned upgrades or modifications to the relevant parts of the network, likely capacity availability and section running times. Under section 6 a maximum fee of \$1000 will apply for providing the information pack and the additional information.

Access applications must be made using the standard access application form, and provide the specified information required by the access provider to assess the application request.

After receiving a formal access application the access provider must:

- within 7 days acknowledge receipt of the application (section 4.1(a));
- within a further 14 days determine whether there is available capacity (section 4.2(a));
- if there is available capacity, must at the same time offer terms and conditions and access; and
- if rejecting an access application, this must be done within a further 7 days (i.e. 21 days after the acknowledgement of the application).

The negotiation protocol will specify the negotiation and alternative dispute resolution processes that will be available to the access seeker when seeking to commercially settle the terms and conditions of access (in addition to the availability of seeking a determination from the Commission if the parties cannot agree the terms and conditions). It must also specify timeframes and processes for resolving disputes. The negotiation protocol will form part of the access arrangements that are provided to the Commission for its approval.

## 6.4 Stakeholder views

Most of the submitters, including ARTC, Connex, QR, GrainCorp, VicTrack, considered that the Draft Negotiation Guidelines establish a reasonable process with a reasonable degree of prescription. However, Pacific National felt that the Draft Guidelines fell short in some respects, as the “information envisaged is unrealistic in a number of places”, and “the proposed process is not as flexible as it should be”.

Some of the specific issues emphasised are discussed below.

### Timeframes

Several submitters considered that some of the timeframes were too tight. For example, Connex argued that 7 days is too short to prepare a rejection notice with a comprehensive list of additional information required. ARTC, Connex and QR all considered that the period to provide an assessment of the availability of capacity and proposed terms and conditions should be extended- two of these submitters indicating that 30 days would be more practical.

*The timeframes within the Negotiation Guidelines have been amended to be based on business days rather than calendar days, and to align more closely with the timeframes contained in the ARTC Access Undertaking.*

### Indicative access proposal

Some comments were directed to the requirement (in 2(f)(vi)) for an access provider to provide an initial estimate of the access charge that would apply to the relevant service and an explanation of how it has been calculated (note that this applies where an access seeker has sought information and provided a description of the service it is considering seeking). GrainCorp stated that it:

*“is concerned that the draft document refers to the access provider being required to provide an estimate of the access charge at the request of the access seeker. A request that does not propose to introduce additional tonnage to a line, but simply entails the transfer of tonnage to a different operator being the access seeker, should be able to be given an actual charge for access.”*

On the same question, ARTC considered that:

*“while the proposed structure of steps contemplated in the draft guidelines appear to be a reasonable process ... QR considers it would be useful to adopt a consistent terminology, description of process and information requirements as exists for the neighbouring ARTC*



*regime. In particular, QR notes that there is no specific requirement for a defined indicative access proposal similar to that which exists for QR and ARTC.”*

*The framework for establishing reference prices within the VRAR requires an access provider to establish a price or a methodology for calculating a price for reference service. This differs from the ARTC Access Undertaking, in which reference prices are indicative prices. The Commission considers that, in light of this difference, the requirement to provide an initial estimate of the access charge at the enquiry stage, followed by a formal offer after an access application has been received, is a suitable framework.*

### **Accreditation and rolling stock compliance**

QR submitted that the requirements that an access seeker should provide evidence that its rolling stock complies with rolling stock interface standards specified by the access provider, and evidence that the access seeker has or will have accreditation to operate its services, are onerous. Further, QR suggested that by enabling the access provider to reject an application on these grounds, the Commission is erecting a substantial barrier to entry for access seekers. QR maintained that “it is inappropriate for the access provider to assess and decide whether the access seeker has the managerial and financial ability to carry on the operation”.

*The Commission has taken the view that an access seeker that is not accredited or does not comply with the rolling stock interface standards does not have an automatic right of access. However, the ability for the access provider to reject an application from a non-compliant access seeker does not remove the obligation of both parties to act in good faith. Nor does it prevent the access seeker re-applying once it is compliant.*

## **6.5 Changes made to draft version of instrument**

<b>Section</b>	<b>Amendment</b>
2(b), (c), (f) (Information provided by access provider)	<ol style="list-style-type: none"> <li>1. Access provider must make information pack available to access seeker within 5 business days (not "7 days").</li> <li>2. Information pack must also contain information about "axle load limitations".</li> <li>3. If an access seeker requests additional information, the access provider is not required to provide information about upgrades or modifications of the relevant part of the rail network "reasonably expected in the next five years".</li> </ol>
3(b) (Access application by access seeker)	<ol style="list-style-type: none"> <li>4. An access provider may now require an access seeker to provide information (in its access application information) about the type of freight to be carried to the extent necessary to determine which reference tariff would apply if the access provider's access arrangement provides for different reference tariffs to apply depending on the type of freight to be carried.</li> </ol>
4.1 (Acknowledgment of receipt of application)	<ol style="list-style-type: none"> <li>5. The amendments to section 4.1:</li> </ol>

Section	Amendment
	<ul style="list-style-type: none"><li>• clarify the access provider's obligations on receipt of an access application;</li><li>• clarify the access provider's obligations to notify an access seeker after receipt of an access application; and</li><li>• specify the circumstances in which an access provider may reject the access application (if the application is not in the correct form or does not contain the required information).</li></ul>