



REPORT OF THE
STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS

IN RELATION TO THE

Government Railways (Access) Bill 1998

Presented by the Hon Murray Nixon (Chairman)

STANDING COMMITTEE ON CONSTITUTIONAL AFFAIRS

Date first appointed:

21 December 1989

Terms of Reference:

1. The functions of the committee are to inquire into and report on:
 - (a) the constitutional law, customs and usages of Western Australia;
 - (b) the constitutional or legal relationships between Western Australia and the Commonwealth, the States and Territories,

and any related matter or issue;
 - (c) a bill to which SO 230 (c) applies but subject to SO 230 (d);
 - (d) any petition.

2. A petition stands referred after presentation. The committee may refer a petition to another standing committee where the subject matter of the petition is within the terms of reference of that standing committee. A standing committee to which a petition is referred shall report to the House as it thinks fit.

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ISBN 0 7309 8891 0

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Report of the Legislative Council Constitutional Affairs Committee

in relation to the

Government Railways (Access) Bill 1998

1. Executive Summary

- 1.1 The purpose of the *Government Railways (Access) Bill 1998* is to provide a framework where third parties can negotiate access with the owner of the rail network, Westrail, on transparent and equal terms. The *Government Railways (Access) Bill 1998* addresses a range of matters which include the designation of a Regulator with monitoring and enforcement functions, amendments to the *National Rail Corporation Agreement Act 1992* to enable National Rail to compete for intra-state services on equal footing with other operators and amendments to the *Western Australia Government Railways Act 1904* to remove existing barriers to competition.
- 1.2 The *Government Railways (Access) Bill 1998* provides for the establishment of a *Rail Access Code* to govern the use of government railways for rail operations by persons other than Westrail. The *Rail Access Code* outlines the process and procedures to negotiate access, matters to be considered in access agreements, information requirements of the Regulator and the pricing principles to be applied in determining prices to be paid for access.

2. Recommendations

- 2.1 The Constitutional Affairs Committee's report makes recommendations in relation to each and every clause of the *Government Railways (Access) Bill 1998* and, where appropriate, provides comment on the clause. The Committee has recommended that all clauses should be passed with the exceptions of clause 9, clause 12 (1) (b) and certain clauses in Part 3 where it has been recommended that -

Clause 9 - Code is subsidiary legislation

The clause to be fully debated in the House concerning whether the Code should be disallowable (see comments page 11).

Clause 12 - Three-yearly review of the Code

Page 8, line 27 - To delete "3" and substitute the following -
" 5 " (see comments page 14).

Part 3 - The Regulator

Part 3, clause 14, of the Bill provides that the "functions of the Regulator under this Act and the Code are to be performed by the person who for the time being holds, or is acting in, the office of Director General of Transport under section 8 of the *Transport Co-ordination Act 1966*".

The Committee understands that the National Competition Council ("NCC") has expressed concerns regarding the independence of the Regulator as defined in the Bill. In particular, the NCC has commented that a Regulator within a Minister's Department, particularly one closely linked to the Minister in other areas, will remain influenced by a range of objectives that can conflict with the requirements of an independent Regulator.

The NCC noted that there are a number of access regime models which could satisfy the Competition Principles Agreement ("CPA") requirement for independence of a Regulator. For example, South Australia has proposed the South Australian Independent Pricing and Access Regulator ("SAIPAR"). The key feature of SAIPAR is that it will be entirely independent of direction or control by the Crown or any Minister or Officer of the Crown.

In these circumstances, the Committee agrees with the NCC's concerns regarding the independence of the Regulator. Moreover, the Committee considers that Western Australia should adopt a model similar to South Australia in order to comply with the CPA requirement that a Regulator of an access regime be independent. The Committee believes that such an office should be established within a twelve (12) month period. Until that time, the Committee considers that it would be preferable for the functions of the Regulator to be performed by the Commercial Tribunal in order to ensure independence (see comments on page 15).

**Report of the Legislative Council
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3. Reference and Procedure

3.1 The *Government Railways (Access) Bill 1998* (the "Bill") was referred to the Constitutional Affairs Committee (the "Committee") by the Legislative Council under Standing Order 230(d).

4. Contents and Purpose of the Bill

4.1 The purpose of the Bill is to provide a framework where third parties can negotiate access with the owner of the rail network, Westrail, on transparent and equal terms.

4.2 In his Second Reading speech in the Legislative Council, Hon Eric Charlton MLC explained that the Bill will -

- provide for the establishment of a *Rail Access Code* (the "Code") to govern the use of government railways for rail operations by persons other than Westrail;
- designate a Regulator with monitoring and enforcement functions relating to the implementation of the Code;
- specify the kind of administrative arrangements that Westrail is to have in place for the purposes of that implementation;
- amend the *National Rail Corporation Agreement Act 1992* to enable National Rail to compete for intra-state services on equal footing with other operators; and
- amend the *Western Australia Government Railways Act 1904* to remove existing barriers to competition.

4.3 The Hon Eric Charlton MLC also explained that the Code will be subsidiary legislation to the Bill and will -

- establish the parts of the railway network and associated infrastructure open to access;
- outline the process and procedures to negotiate access, including avenues for dispute resolution;
- specify the matters to be considered in access agreements;
- identify the information requirements of the Regulator; and
- outline the pricing principles to be applied in determining prices to be paid for access.

4.4 The Bill contains 43 clauses in seven (7) parts -

Part 1: Preliminary

Part 2: Establishment of the Code

Part 3: The Regulator

Part 4: Administrative and accounting arrangements of the Commission

Part 5: Enforcement

Part 6: Amendment of the *National Rail Corporation Agreement Act 1992*

Part 7: Amendments of the *Government Railways Act 1904*

4.5 The Bill is outlined below and the Committee has provided comment, where appropriate, on the relevant clauses. The Committee has provided recommendations in relation to each clause of the Bill.

4.6 The Committee has recommended that all clauses should be passed with the exception of clause 9, clause 12 (1) (b) and certain clauses in Part 3 where it has been recommended that -

Clause 9 - Code is subsidiary legislation

The clause to be fully debated in the House concerning whether the Code should be disallowable (see comments on page 11).

Clause 12 - Three-yearly review of the Code

Page 8, line 27 - To delete "3" and substitute the following -
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Part 3 - The Regulator

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The Committee understands that the National Competition Council ("NCC") has expressed concerns regarding the independence of the Regulator as defined in the Bill. In particular, the NCC has commented that a Regulator within a Minister's Department, particularly one closely linked to the Minister in other areas, will remain influenced by a range of objectives that can conflict with the requirements of an independent Regulator.

The NCC noted that there are a number of access regime models which could satisfy the Competition Principles Agreement ("CPA") requirement for independence of a Regulator. For example, South Australia has proposed the South Australian Independent Pricing and Access Regulator

("SAIPAR"). The key feature of SAIPAR is that it will be entirely independent of direction or control by the Crown or any Minister or Officer of the Crown.

In these circumstances, the Committee agrees with the NCC's concerns regarding the independence of the Regulator. Moreover, the Committee considers that Western Australia should adopt a model similar to South Australia in order to comply with the CPA requirement that a Regulator of an access regime be independent. The Committee believes that such an office should be established within a twelve (12) month period. Until that time, the Committee considers that it would be preferable for the functions of the Regulator to be performed by the Commercial Tribunal in order to ensure independence. (see comments on page 15)

- 4.7 As part of the review, the Committee placed an advertisement in *The West Australian* newspaper inviting submissions on the Bill. In response, the Committee received two (2) submissions which were considered as part of the inquiry.
- 4.8 As part of the review, the Committee heard evidence from a number of witnesses concerning the operation of the Bill. The witnesses who appeared before the Committee were -
- Hon Bob Pearce, Consultant to National Rail;
 - Mr Alan Nelson, Regional Manager, National Rail Corporation;
 - Mr Bruce Chan, Project Manager, Rail Policy, Department of Transport;
 - Mr Doug Brindal, Director of Regional Policy, Department of Transport;
 - Ms Anne Hill, Assistant Director, Competition Policy Unit; and
 - Mr Graham Harman, Principal Policy Officer, Minister for Transport's Office.
- 4.9 The government announced an intention to privatise Westrail after the Bill had been referred to the Committee. The Committee noted the announcement but has not referred to the matter in this report as it falls outside the Terms of Reference of the Bill.

Part 1 — Preliminary

1. Short title

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

Recommendation 1: the clause be passed

2. Commencement

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

Comment: This clause distinguishes Part 6 of the Act from the remainder of the Act as to when each part comes into operation.

Part 6 of the Act, which amends the *National Rail Corporation Agreement Act* to enable National Rail to compete for intra-state services, comes into operation on the day the Act receives Assent. However, the remaining parts of the Act are to come into operation on the day fixed by proclamation.

The rationale for considering Part 6 differently from the rest of the Act is that the Act has been submitted to the National Competition Council (“NCC”) to be certified as effective. To accommodate any possible changes resulting from the NCC review process, the Act will not come into effect until it is proclaimed on a date to be determined.

Exception has been made to the amendments to the *National Rail Corporation Agreement Act* as they will not be affected by the NCC review process. These changes are also expedited to ensure that National Rail is not penalised should Government decide to provide access through administrative direction as an interim measure.

Recommendation 2: the clause be passed

3. Definitions

In this Act, unless the contrary intention appears —
“**access**” means the use of railway infrastructure;

- “**access agreement**” means an agreement under the Code between the Commission and another person for access by that person;
- “**Code**” means the Code for the time being in force under section 4;
- “**Commission**” has the same meaning as in the *Government Railways Act 1904*;
- “**Competition Principles Agreement**” means the Competition Principles Agreement made on 11 April 1995 by the Commonwealth, the States and the Territories as in force for the time being;
- “**railway**” means a railway, as defined in section 2 of the *Government Railways Act 1904*, that is under the management and control of the Commission as provided by section 13 of that Act;
- “**railway infrastructure**” means the facilities necessary for the operation of a railway, including —
- (a) railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of a railway);
 - (b) tunnels and bridges;
 - (c) stations and platforms;
 - (d) train control systems, signalling systems and communication systems;
 - (e) electric traction infrastructure;
 - (f) buildings and workshops; and
 - (g) associated plant machinery and equipment,
- but not including —
- (h) private sidings and spur lines connected to premises not under the management or control of the Commission; and
 - (i) rolling stock, rolling stock maintenance facilities, office buildings, housing, freight centres, or terminal yards and depots;
- “**Regulator**” means the official provided for by Part 3.

Recommendation 3: the clause be passed

Part 2 — Establishment of Code

4. Minister to establish Code

- (1) The Minister is to establish a Code in accordance with this Act to give effect to the Competition Principles Agreement in respect of railways.
- (2) Provision is to be made in the Code —
 - (a) for railway infrastructure to be available for use by persons other than the Commission to carry on rail operations in accordance with —
 - (i) agreements with the Commission; or
 - (ii) determinations made by way of arbitration;
 - (b) prescribing —
 - (i) which parts of the railways network; and
 - (ii) which railway infrastructure associated with those parts, are to be so available; and
 - (c) setting out —
 - (i) provisions that are to govern the content of agreements and determinations referred to in paragraph (a); and
 - (ii) rights, powers and duties that are to apply to and in relation to the negotiation, making, and implementation of agreements.

Comment: This clause requires the Minister to prepare a Code to govern the use of government railways by persons other than Westrail. The Code is to establish the parts of the railway network and associated infrastructure open to access, outline the process and procedures to negotiate access, include avenues for dispute resolution and specify the matters to be considered in access agreements.

Recommendation 4: the clause be passed

5. Criteria to be considered in applying Code to particular routes

- (1) In deciding, for the purpose of establishing or amending the Code, which routes are to be prescribed under section 4(2)(b), the Minister is to consider the questions set out in subsection (3).
- (2) If in respect of a route the Minister is satisfied that each of those questions must be answered in the affirmative the route is to be prescribed under section 4(2)(b).
- (3) The questions are —

- (a) whether access to the route will promote competition in at least one market, other than the market for railway services;
 - (b) whether it would be uneconomical for anyone to establish another railway on the route;
 - (c) whether the route is of significance having regard to —
 - (i) its length;
 - (ii) its importance to trade or commerce; or
 - (iii) its importance to the economy;
 - (d) whether access to the route can be provided without undue risk to human health or safety;
 - (e) whether there is not already effective access to the route; and
 - (f) whether access or increased access to the route would not be contrary to the public interest.
- (4) A decision of the Minister of the kind referred to in subsection (1) is not liable to be challenged in, or reviewed or called in question by, a court.
- (5) In this section —
- 16) “**route**” means —
- (a) a particular part of the railways network; and
 - (b) the associated railway infrastructure.

Comment: This clause requires the Minister to consider a set of criteria related to the *Competition Principles Agreement* when considering an addition or deletion of routes covered by the Code. These criteria are consistent with the requirements outlined in Sections 44G(2) and 44H(4) of Part IIIA of the *Trade Practices Act*.

The approach of specifying questions as in Section 5(3) has been adopted to clearly show consistency between the Western Australian legislation and the *Competition Principles Agreement*. Nevertheless, decisions of this type essentially involve transport policy issues which are properly the province of the Minister and not the Courts. Therefore, section 5(4) provides that the Minister’s answers to the questions, as set out in the clause 5(3), cannot be challenged in a Court. This, however, does not affect the Minister’s duty to ensure that the Code is within the powers conferred by the Act.

Recommendation 5: the clause be passed

6. Other matters for which Code may make provision

- (1) The Code may also make provision for or in relation to —
- (a) the registration of access agreements;
 - (b) the arbitration of disputes between the Commission and a person who has made a proposal for access under the Code;

- (c) the establishment of panels of arbitrators, and the appointment of arbitrators, by the Regulator;
 - (d) the regulation of matters —
 - (i) of a savings, transitional or supplementary nature; or
 - (ii) that are otherwise necessary or convenient for the purposes of this Act.
- (2) Transitional provisions referred to in subsection (1)(d)(i) may authorize the Minister to determine by order published in the *Gazette* how any matter in progress immediately before the commencement of this Part is to be treated, after that commencement, for the purposes of the provisions of the Code.

Recommendation 6: the clause be passed

7. Code does not affect existing agreements

The making of the Code —

- (a) does not affect the terms and conditions, or the operation, of an agreement for the use of railway infrastructure made with the Commission before the commencement of the Code whether under section 61 of the *Government Railways Act 1904* or otherwise; and
- (b) does not afford a party to such an agreement any ground or reason for not complying with the agreement according to its terms and conditions.

Comment: This clause ensures that the terms and conditions, or the operation of existing access agreements, are not affected by the implementation of the Code.

Four interstate operators - National Rail, Toll Rail, Specialised Container Transport and Great Southern Railway - are using the inter-state track under individual access agreements with the Commission.

Section 61 of the *Government Railways Act* currently provides the Commission with the power, subject to approval by the Minister, to enter into an access agreement with another rail operator. However, it does not compel the Commission to negotiate such access.

Section 61 of the *Government Railways Act* will be retained and will be particularly attractive to non-commercial operators, such as the Hotham Valley Tourist Railway, seeking small scale access to the rail network, including those parts not covered by the Code. This would mean that such non-commercial operators would not be subjected to the same pricing guidelines as contained in the Code and relevant to commercial users of the rail network.

Recommendation 7: the clause be passed

8. Code is subject to *Rail Safety Act 1998*

The Code is not to contain any provision that is contrary to or inconsistent with the *Rail Safety Act 1998*.

Recommendation 8: the clause be passed

9. Code is subsidiary legislation

The Code is subsidiary legislation within the meaning of the *Interpretation Act 1984*.

Comment: This clause defines the Code as subsidiary legislation as defined in Part VI of the *Interpretation Act 1984*. Under this clause, the Code is not subject to disallowance by the Delegated Legislation Committee or review by Parliament. Accordingly, the Committee considers that the House should debate amending clause 9 of the Bill in the following terms-

Page 7 - To delete clause 9 of the Bill and substitute the following -

9. Code is subsidiary legislation and is disallowable

The provisions of the Code -

- (a) are subsidiary legislation within the meaning of the *Interpretation Act 1984*; and
- (b) are taken to be regulations for the purposes of section 42 of that Act.

Recommendation 9: The clause be fully debated in the House.

10. Public comment on amendment or replacement of Code

- (1) Before the Minister exercises the power —
 - (a) to amend the Code; or
 - (b) to repeal and replace it,

he or she must make the proposed amendment or replacement available for public comment in accordance with subsection (2).

- (2) The Minister must —
 - (a) cause a notice giving a general description of the proposal to be published in one issue of —

- (i) a daily newspaper circulating throughout the Commonwealth; and
 - (ii) a daily newspaper circulating throughout the State; and
- (b) include in the notice the following information —
- (i) the places at which a copy of the proposal may be obtained;
 - (ii) a statement that written submissions on the proposal may be made to the Minister by any person within a specified period; and
 - (iii) the address to which the submissions may be delivered or posted.
- (3) The period specified under subsection (2)(b)(ii) is not to be less than 30 days after both of the notices under subsection (2)(a) have been published.
- (4) The Minister must have regard to any submission made in accordance with the notice.

Comment: This clause requires the Minister to undertake a public review process taking into consideration the submissions received prior to amending, repealing or replacing the Code.

Recommendation 10: the clause be passed

11. Exception to section 10

- (1) Section 10(1) does not apply if the Minister is satisfied that a proposed amendment to the Code is —
 - (a) of a minor nature; or
 - (b) required to be made urgently.
- (2) If in reliance on subsection (1)(b) the Minister amends the Code without complying with section 10(1) —
 - (a) he or she must call for public comment on the amendment as soon as is practicable after it has come into force; and
 - (b) subsections (2) and (3) of section 10 apply with all necessary modifications.
- (3) Having regard to any submissions made on the amendment, the Minister must consider whether he or she should amend the Code —
 - (a) to reverse the effect of the amendment; or
 - (b) in some other manner.

Comment: This clause outlines the circumstances when a public review prior to an amendment of the Code is not required. In these instances, however, the Minister will have to undertake a public review of the amendment as soon as practicable after the amended Code has been effected.

Recommendation 11: the clause be passed

12. Three-yearly review of Code

- (1) The Regulator must carry out a review of the Code as soon as is practicable after —
 - (a) the third anniversary of its commencement; and
 - (b) the expiry of each 3 yearly interval after that anniversary.
- (2) The purpose of a review is to assess the suitability of the provisions of the Code to give effect to the Competition Principles Agreement in respect of railways.
- (3) Before carrying out a review of the Code, the Regulator must call for public comment in accordance with subsection (4).
- (4) The Regulator must —
 - (a) cause notice of the review to be published, in one issue of —
 - (i) a daily newspaper circulating throughout the Commonwealth; and
 - (ii) a daily newspaper circulating throughout the State;and
 - (b) include in the notice —
 - (i) a statement that written submissions on the Code may be made to the Regulator by any person within a specified period; and
 - (ii) the address to which the submissions may be delivered or posted.
- (5) The period specified under subsection (4)(b)(i) is not to be less than 30 days after both of the notices under subsection (3)(a) have been published.
- (6) The Regulator must prepare a report based on the review and give it to the Minister.

Comment: This clause requires the Regulator to carry out a review every three (3) years to assess the effectiveness of the Code to give effect to the *Competition Principles Agreement*. It also requires the Regulator to call for public comment as part of its review and to report his or her findings to the Minister.

The Committee considers that the requirement for the Code to be reviewed every three (3) years is exceedingly onerous. Accordingly, the Committee believes that the clause should be amended to require the Code to be reviewed every five (5) years after the initial three (3) year review.

Recommendation 12: the following amendment to clause 12(1)(b) be passed -

Clause 12

**Page 8, line 27 - To delete " 3 " and substitute the following -
" 5 "**

Part 3 — The Regulator

Division 1 — Office and functions

13. Definition

In this Part —

“department” means the department of the Public Service principally assisting the Minister responsible for the *Transport Co-ordination Act 1966* in the administration of that Act.

Recommendation 13: see recommendation 14

14. Who performs functions of Regulator

The functions of the Regulator under this Act and the Code are to be performed by the person who for the time being holds, or is acting in, the office of Director General of Transport under section 8 of the *Transport Co-ordination Act 1966*.

Comment: Clause 14 provides that the "functions of the Regulator under this Act and the Code are to be performed by the person who for the time being holds, or is acting in, the office of Director General of Transport under section 8 of the *Transport Co-ordination Act 1966*".

The Committee understands that the National Competition Council ("NCC") has expressed concerns regarding the independence of the Regulator as defined in the Bill. In particular, the NCC has commented that a Regulator within a Minister's Department, particularly one closely linked to the Minister in other areas, will remain influenced by a range of objectives that can conflict with the requirements of an independent Regulator.

The NCC noted that there are a number of access regime models which could satisfy the Competition Principles Agreement ("CPA") requirement for independence of a Regulator. For example, South Australia has proposed the South Australian Independent Pricing and Access Regulator ("SAIPAR"). The key feature of SAIPAR is that it will be entirely independent of direction or control by the Crown or any Minister or Officer of the Crown.

Recommendation 14: In these circumstances, the Committee agrees with the NCC's concerns regarding the independence of the Regulator. Moreover, the Committee considers that Western Australia should adopt a model similar to South Australia in order to comply with the CPA requirement that a Regulator of an access regime be independent. The Committee believes that such an office should be established within a twelve (12) month period. Until that time, the Committee considers that it would be preferable for the functions of the Regulator to be performed by the Commercial Tribunal in order to ensure independence.

15. Functions of Regulator

The Regulator —

- (a) is responsible for monitoring and enforcing compliance by the Commission with the provisions of —
 - (i) this Act;
 - (ii) the obligations imposed by Part 4; and
 - (iii) the Code;

- and
- (b) also has the functions given to him or her by particular provisions of this Act and the Code.

Recommendation 15: the clause be passed

16. Staff and resources

- (1) The Regulator may make use of —
- (a) the services of any officer of the department; or
 - (b) the facilities of the department.
- (2) The employing authority under the *Public Sector Management Act 1994* in relation to the department may exercise the powers in section 100 of that Act to enable the Regulator to perform his or her functions.

Comment: This clause empowers the Regulator to acquire the necessary resources to undertake his or her functions.

Section 100 of the *Public Sector Management Act* defines the powers of the employing authority to appoint a person on a casual employment basis and/or engage a person under contract for services.

Recommendation 16: see recommendation 14

17. Financial administration etc.

For the purposes of section 9 of the *Transport Co-ordination Act 1966*, the performance of the functions of the Regulator are to be treated as operations of the department.

Recommendation 17: see recommendation 14

18. Delegation

- (1) The Regulator may, by instrument in writing, delegate the performance of any of his or her functions, except this power of delegation, to —
- (a) an officer of the department; and
 - (b) a person engaged under the powers referred to in section 16(2).

- (2) A function performed by a delegate is to be taken to be performed by the Regulator.
- (3) A delegate performing a function of the Regulator is to be taken to do so in accordance with the terms of the delegation unless the contrary is shown.

Recommendation 18: clause be passed

19. Regulator to act independently

The Regulator in performing his or her functions —

- (a) must act independently; and
- (b) is not subject to direction by the Minister or any other person.

Recommendation 19: see recommendation 14

Division 2 — Monitoring and enforcement powers

20. Purpose of powers

- (1) The Regulator may exercise the powers in this Division for the purpose of performing his or her functions under this Act or the Code.
- (2) Without limiting subsection (1), the powers in this Division extend to financial information relating to the Commission's own use of railway infrastructure to which the Code applies.

Recommendation 20: the clause be passed

21. Powers to obtain information

- (1) The Regulator may by notice in writing require the Commission —
 - (a) to send to the Regulator before a day specified in the notice a statement setting out such information as is specified in the notice;
 - (b) to give information to the Regulator by way of periodical returns at times specified in the notice; and

- (c) to send to the Regulator, before a day specified in the notice, any book, document, or record that is in the possession or under the control of the Commission.
- (2) The Commission must comply with a notice under subsection (1).

Recommendation 21: the clause be passed

22. Powers in respect of documents etc.

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

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

Recommendation 22: the clause be passed

23. Confidentiality

In relation to the exercise of his or her powers under this Division, the Regulator must ensure that confidential information to which section 31 applies is protected from use or disclosure except —

- (a) in the performance of the Regulator's functions;
- (b) as required or allowed by any law;
- (c) with the written consent of the person who supplied the information;
or
- (d) in circumstances prescribed by regulations made by the Governor for the purposes of this section.

Recommendation 23: the clause be passed

Part 4 — Administrative and accounting arrangements of the Commission

Division 1 — Preliminary

24. Definitions

In this Part —

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

“**officer of the Commission**” includes an officer of the Department as defined in the *Government Railways Act 1904*;

“**relevant officer**” means an officer of the Commission who is in any way concerned in the performance of access-related functions.

Recommendation 24: the clause be passed

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

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

Recommendation 25: the clause be passed

Division 2 — Administrative arrangements

26. Commission to make administrative arrangements

The Commission is to make such administrative arrangements within its organization that it from time to time considers necessary or expedient for the carrying out of its access-related functions.

Recommendation 26: the clause be passed

27. Delegation

- (1) The Commission may, by instrument in writing, delegate the performance of any of its access-related functions (including the execution of access agreements) to an officer or officers of the Commission.

- (2) A function so performed is to be taken to be performed by the Commission.
- (3) An officer of the Commission when performing a function as a delegate of the Commission is to be taken to do so in accordance with the terms of the delegation, unless the contrary is shown.

Recommendation 27: the clause be passed

Division 3 — Segregation of access-related functions

28. Duty to segregate

- (1) In making arrangements under section 26 the Commission must segregate its access-related functions from its other functions.
- (2) The Commission must have appropriate controls and procedures to ensure that the measures in place under subsection (1) —
 - (a) operate effectively; and
 - (b) are complied with.

Comment: This clause requires the Commission to segregate its access-related functions from its other operational activities with internal controls and procedures.

The proper segregation of the access-related functions (i.e. those functions related to the use of railway infrastructure *per definitions in clause 3*) from operational functions is extremely important to ensure that equity and confidentiality are maintained when Third Parties are negotiating access to rail infrastructure (see comments on clause 29).

Recommendation 28: the clause be passed

29. Powers of Regulator in relation to segregation

- (1) Before the Commission puts in place or varies any arrangement for the purpose of carrying out its obligations under section 28 it must obtain the Regulator's approval to the arrangement or variation.
- (2) In addition to subsection (1), the Regulator may confer with the Commission on any matter which relates to the way in which the Commission's obligations under section 28 are to be carried out, with a view to the Regulator and the Commission reaching agreement on the matter.

- (3) The Regulator may give directions in writing to the Commission with respect to a matter to the extent that agreement is not reached under subsection (2), and the Commission is to comply with any such direction.

Comment: This clause requires that the Commission’s segregation arrangements are acceptable to the Regulator. If an agreement cannot be reached, the clause empowers the Regulator to direct the Commission to implement additional arrangements.

Recommendation 29: the clause be passed

30. Matters to be covered under section 28

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

Recommendation 30: the clause be passed

31. Protection of confidential information

- (1) There must be an effective regime designed for the protection of confidential information relating to the affairs of persons seeking access or rail operators from —
- (a) improper use; and
 - (b) disclosure by relevant officers, or other persons, to other officers of the Commission or other persons, except for proper purposes.
- (2) In this section —
- “**confidential information**” means information that has not been made public and that —
- (a) is by its nature confidential;
 - (b) was specified to be confidential by the person who supplied it; or
 - (c) is known by an officer using or disclosing it to be confidential.

Recommendation 31: the clause be passed

32. Avoidance of conflict of interest

The arrangements under section 26 must be such as to ensure that a relevant officer does not have a conflict between his or her duties —

- (a) as an officer concerned in the performance of access-related functions, on the one hand; and
- (b) as an officer involved in other business of the Commission, on the other.

Recommendation 32: the clause be passed

33. Duty of fairness

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

Recommendation 33: the clause be passed

34. Maintenance of separate accounts and records

The Commission must ensure that its accounts and records are in such form as to enable —

- (a) all income, expenditure, assets and liabilities relating to the carrying out of its access-related functions to be properly recorded and distinguished from the Commission's other income, expenditure, assets and liabilities; and
- (b) where necessary, any item of income, expenditure, assets or liabilities which relates only in part to the carrying out of its access-related functions to be apportioned in a fair and reasonable manner.

Recommendation 34: the clause be passed

Part 5 — Enforcement

35. Contract enforcement not affected

Nothing in this Part affects the enforceability of an access agreement as a contract, or the availability of damages for a breach of the agreement.

Recommendation 35: the clause be passed

36. Remedies

- (1) The obligations imposed on the Commission by the Code are enforceable —
 - (a) by arbitration under the Code; or
 - (b) under section 37,

as the case may require, but a breach of those obligations does not give rise to an action for damages.
- (2) Sections 177 and 178 of *The Criminal Code* do not apply to the obligations referred to in subsection (1).

Comment: This clause ensures that the obligations imposed on the Commission are enforceable by the arbitration process as specified under the Code, or from an application to the Supreme Court.

However, the clause does not allow compensation claims to be made to a Court for breaches of the Act or any award of an arbitrator. In addition, a breach of obligations will not give rise to the Commission being criminally liable under Sections 177 (Disobedience to Statute Law) and 178 (Disobedience to lawful order issued by statutory authority) of the *Criminal Code*. The same provision is made in the third party access provisions in the *Gas Corporation Act*, the *Electricity Corporation Act* and the *Dampier to Bunbury Pipeline Act*. The obligations in the Code are adequately enforced by resort to arbitration or by obtaining a Supreme Court injunction to require the Commission to comply with the Code.

Recommendation 36: the clause be passed

37. Injunctions

- (1) The Supreme Court may grant an injunction in such terms as the Court thinks fit if it is satisfied that the Commission —
 - (a) has engaged in conduct that amounts to a breach of the Code; or

- (b) is proposing to engage in conduct that would amount to such a breach,

other than conduct for which a remedy by way of arbitration is available under the Code.
- (2) An application for an injunction under subsection (1) may be made by —
 - (a) the Regulator; or
 - (b) a person to whose proposal under the Code for access the conduct or proposed conduct relates.

Recommendation 37: the clause be passed

Part 6 — Amendment of the *National Rail Corporation Agreement Act 1992*

Division 1 — Preliminary

38. Principal Act

In this Part the *National Rail Corporation Agreement Act 1992** is referred to as the principal Act.

[* Act No. 56 of 1992.]

Recommendation 38: the clause be passed

Division 2 — Amendments about the NRC carrying on intra-State services

39. Section 5A inserted

After section 5 of the principal Act the following section is inserted in Part 2 —

“

5A. Intra-State rail services by Company

The Company is not to carry on intra-State rail services in the State unless the Minister has given the Company approval in writing to do so.

”

Comment: This clause is one of two amendments to the *National Rail Agreement Act* to enable National Rail to carry on intra-state rail services if approved by the Minister.

The requirement for Ministerial approval effectively re-enforces the prohibition in clause 3(b) of the *National Rail Corporation Memorandum of Association* which prohibits the Company from carrying on any intra-state rail services in any State unless that State has given its prior approval in writing to the Company.

Recommendation 39: the clause be passed

40. Section 5B inserted

Before section 6 of the principal Act the following section is inserted in Part 3 —

“

5B. Referral of power to the Parliament of the Commonwealth

- (1) The matter of the Commonwealth holding shares in the Company in accordance with the Agreement, to the extent to which it is not otherwise included in the legislative powers of the Parliament of the Commonwealth, is referred to the Parliament of the Commonwealth.
- (2) The reference under subsection (1) only has effect for the period —
 - (a) beginning on the day on which section 40 of the *Government Railways (Access) Act 1998* commences; and
 - (b) ending on the day fixed under subsection (3) as the day on which the reference under subsection (1) terminates.
- (3) The Governor may, by proclamation, fix a day as the day on which the reference under subsection (1) terminates.
- (4) In this section, a reference to holding shares includes a reference to acquiring, disposing of or dealing with those shares.

”

Comment: This clause provides for a referral of power to the Commonwealth under the *National Rail Agreement Act* to enable National Rail to carry on intra-state rail services in Western Australia.

Clause 3(a) of the *National Rail Corporation Memorandum of Association* precludes the company from carrying on any intra-state rail services in a State unless there is a referral of power to the Commonwealth under s.51(xxxvii) of the *Commonwealth Constitution*, in relation to that State.

Clause 3(a) recognises a Constitutional limitation in that the Commonwealth Parliament does not have legislative power to set up, or participate in setting up or owning a body that is involved in intra-state trade as opposed to inter-state trade. S.51(xxxvii) enables the State to allow the Commonwealth to draw on some of the State’s legislative power so that it can hold shares in a company engaging in intra-state rail services. This situation is currently in place in both New South Wales and Victoria. There is no loss of power to Western Australia in making this referral.

Recommendation 40: the clause be passed

Division 3 — Minor amendments

41. Section 3 amended

Section 3 of the principal Act is amended in the definition of “the Agreement” by deleting “Schedule 1” and substituting the following —

“ the Schedule to this Act” .

Recommendation 41: the clause be passed

42. Schedule 1 amended

Schedule 1 to the principal Act is amended —

- (a) in the heading to the Schedule, by deleting “1”; and
- (b) by inserting after the execution details that follow clause 10 of the Agreement, the following heading —

“ **Schedule 1** ”.

Recommendation 42: the clause be passed

Part 7 — Amendment of the *Government Railways Act 1904*

43. Consequential amendments to the *Government Railways Act 1904*

- (1) In this section the *Government Railways Act 1904** is referred to as the principal Act.

[* *Reprinted as approved 27 October 1982.*

For subsequent amendments see 1997 Index to Legislation of Western Australia, Table 1, pp. 98-9.]

- (2) Section 13 of the principal Act is amended by repealing subsection (1) and substituting the following subsections —

“

- (1) The Commission shall have the management, maintenance and control of every Government railway.

- (1a) Subsection (1) has effect subject to —

- (a) this Act;
(b) section 18E of the *Transport Co-ordination Act 1966*; and
(c) the *Government Railways (Access) Act 1998*.

”

- (3) Section 22 of the principal Act is repealed.
(4) Section 25 of the principal Act is repealed and the following section is substituted —

“

25. Conditions of carriage of goods

The Commission may determine the conditions of carriage of goods on any rail service operated by it, including limits on its liability for loss of, damage to or delay in the delivery of such goods.

”

- (5) Section 26A of the principal Act is amended by deleting “Notwithstanding the provisions of section twenty-two of this Act, the” and substituting the following —

“ The ”.

- (6) Section 28A(3) of the principal Act is amended by deleting “Notwithstanding sections twenty-two and twenty-five of this Act, the” and substituting the following —

“ The ”.

- (7) Section 61(5) of the principal Act is amended by inserting after “enactment” the following —

“ , including the *Government Railways (Access) Act 1998* ”.

- (8) Section 68 of the principal Act is amended by deleting from and including “, subject, however, to the following conditions” to the end of the section and substituting a full stop.
- (9) Section 69 of the principal Act is repealed.
- (10) The Second Schedule to the principal Act is repealed.

Recommendation 43: the clause be passed

Hon Murray Nixon MLC
Chairman

Date: