

SOUTH AUSTRALIA

RAILWAYS (OPERATIONS AND ACCESS) ACT 1997

SUMMARY OF PROVISIONS**PART 1
PRELIMINARY****DIVISION 1—FORMAL PROVISIONS**

1. Short title
2. Commencement

DIVISION 2—OBJECTS

3. Objects

DIVISION 3—INTERPRETATION

4. Interpretation
5. Joint ventures

DIVISION 4—APPLICATION OF THIS ACT

6. Application to railways
7. Application of access regime

DIVISION 5—CROWN TO BE BOUND

8. Crown to be bound

DIVISION 6—THE REGULATOR

9. The regulator

**PART 2
CONSTRUCTION AND OPERATION OF RAILWAYS****DIVISION 1—ACQUISITION OF LAND**

10. Land acquisition

DIVISION 2—FIXED RAILWAY INFRASTRUCTURE

11. Fixed infrastructure may be dealt with as personal property

DIVISION 3—CONTROL OF TRAFFIC

12. Traffic control devices
13. Powers of authorised person

DIVISION 4—REPORTS

14. Special reports

DIVISION 5—RAIL CORRIDORS

15. Rail corridor need not be fenced
16. Exemption from rates and taxes

DIVISION 6—EXCLUSION OF LAW OF COMMON CARRIERS

17. Industry participant not to be common carrier

DIVISION 7—LIQUOR AND GAMBLING

18. Ministerial authorisation to sell liquor
19. Ministerial authorisation to provide gambling facilities

DIVISION 8—BY-LAWS

20. By-laws

**PART 3
CONDUCT OF OPERATOR'S BUSINESS**

DIVISION 1—GENERAL RULES FOR CONDUCT OF BUSINESS

21. Segregation of businesses
22. Segregation of accounts and records
23. Unfair discrimination
24. Preventing or hindering access to railway services
25. Report to Minister

DIVISION 2—APPOINTMENT OF ADMINISTRATOR

26. Appointment of administrator

**PART 4
PRICING PRINCIPLES AND INFORMATION RELEVANT TO ACCESS**

DIVISION 1—PRICING PRINCIPLES

27. Pricing principles

DIVISION 2—INFORMATION ABOUT ACCESS

28. Information brochure
29. Operator's obligation to provide information about access
30. Information to be provided on non-discriminatory basis

**PART 5
NEGOTIATION OF ACCESS**

31. Access proposal
32. Duty to negotiate in good faith
33. Limitation on operator's right to contract to provide access

**PART 6
ARBITRATION OF ACCESS DISPUTES**

DIVISION 1—ACCESS DISPUTES AND REQUESTS FOR ARBITRATION

34. Access dispute
35. Request for reference of dispute to arbitration

DIVISION 2—CONCILIATION AND REFERENCE TO ARBITRATION

- 36. Conciliation and reference to arbitration
- 37. Appointment of arbitrator

DIVISION 3—PRINCIPLES OF ARBITRATION

- 38. Principles to be taken into account

DIVISION 4—PARTIES TO ARBITRATION

- 39. Parties to arbitration
- 40. Representation
- 41. Minister's right to participate

DIVISION 5—CONDUCT OF ARBITRATION PROCEEDINGS

- 42. Arbitrator's duty to act expeditiously
- 43. Hearing to be in private
- 44. Procedure on arbitration
- 45. Procedural powers of arbitrator
- 46. Giving of relevant documents to the arbitrator
- 47. Power to obtain information and documents
- 48. Confidentiality of information

DIVISION 6—EARLY TERMINATION OF ARBITRATION

- 49. Termination of arbitration in cases of triviality, etc.
- 50. Proponent's right to terminate arbitration

DIVISION 7—AWARDS

- 51. Awards
- 52. Restrictions on awards
- 53. Consent awards

DIVISION 8—WITHDRAWAL FROM AWARD

- 54. Proponent's option to withdraw from award

DIVISION 9—VARIATION OR REVOCATION OF AWARDS

- 55. Variation or revocation of award

DIVISION 10—MISCELLANEOUS

- 56. Appeal on question of law
- 57. Costs
- 58. Removal and replacement of arbitrator
- 59. Non-application of Commercial Arbitration Act 1986

**PART 7
MONITORING POWERS**

- 60. Regulator's power to monitor costs
- 61. Copies of access contracts to be supplied to regulator
- 62. Operator's duty to supply information and documents
- 63. Confidentiality
- 64. Duty to report to the Minister

**PART 8
ENFORCEMENT OF THIS ACT**

- 65. Injunctive remedies
- 66. Compensation
- 67. Enforcement of arbitrator's requirements

**PART 9
REGULATIONS AND PROCLAMATIONS**

- 68. Regulations and proclamations

RAILWAYS (OPERATIONS AND ACCESS) ACT 1997

being

Railways (Operations and Access) Act 1997 No. 55 of 1997
[Assented to 31 July 1997]¹

¹ Came into operation 11 September 1997: *Gaz.* 11 September 1997, p. 704.

N.B. The amendments effected to this Act by the *Alice Springs to Darwin Railway (Miscellaneous) Amendment Act 2000* have not been brought into operation.

An Act to provide for the operation of railways and access to railway services on fair commercial terms; and for other purposes.

The Parliament of South Australia enacts as follows:

**PART 1
PRELIMINARY**

DIVISION 1—FORMAL PROVISIONS

Short title

1. This Act may be cited as the *Railways (Operations and Access) Act 1997*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

DIVISION 2—OBJECTS

Objects

3. The objects of this Act are—

- (a) to promote a system of rail transport in South Australia that is efficient and responsive to the needs of industry and the public; and
- (b) to provide for the operation of railways; and
- (c) to facilitate competitive markets in the provision of railway services; and
- (d) to promote the efficient allocation of resources in the rail transport segment of the transport industry; and
- (e) to provide access to railway services on fair commercial terms and on a non-discriminatory basis.

DIVISION 3—INTERPRETATION

Interpretation

4. In this Act, unless the contrary intention appears—

"**access**" means a right to the provision of railway services by an industry participant;

"**access contract**" means a contract giving access to railway services or a contractual variation of an existing access contract affecting access to railway services in a significant way or to a significant extent;

"**access dispute**" means a dispute about an access proposal;

"**access proposal**" — *See section 31*;

"**access regime**" means Parts 3 to 8 (inclusive) of this Act;

"**authorised person**" means a person authorised by an operator to exercise the powers of an authorised person under this Act;

"**costs**" of an arbitration means the fees, costs and expenses of the arbitrator, including the fees, costs and expenses of any expert or lawyer engaged by the arbitrator;

"**Court**" means the Supreme Court of South Australia;

"**fixed railway infrastructure**" means—

- (a) railway track; and
- (b) buildings, installations and equipment for—
 - (i) the operation and use of railway track; or
 - (ii) the embarkation and disembarkation of passengers; or
 - (iii) the loading and unloading of goods;

"**freight service**" means the service of carrying goods on a railway;

"**industry participant**" means—

- (a) an operator; or
- (b) a person who operates, or proposes to operate, railway rolling stock on the railway network;

"**lawyer**" means a person qualified and entitled to practise as a legal practitioner under the law of an Australian State or Territory;

"**operator**" means a person who provides, or is in a position to provide, railway services in relation to the railway network;

"**passenger service**" means the service of carrying passengers on a railway;

"**pricing principles**" — *See section 27;*

"**rail corridor**" means—

- (a) land over which a railway track passes; and
- (b) land used for providing a passenger service or a freight service; and
- (c) other land classified by proclamation as part of a rail corridor,

but does not include—

- (d) a railway workshop or a passenger or freight terminal building; or
- (e) land used solely or predominantly by a person who is not an industry participant; or
- (f) land excluded from the ambit of this definition by proclamation;

"**railway infrastructure**" means—

- (a) fixed railway infrastructure; and
- (b) other installations, plant and equipment (whether fixed or moveable) used or available for use in connection with the operation of the railway network to the extent that it is brought within the ambit of this Act by proclamation;

"**railway network**" means the railways to which this Act applies;

"**railway rolling stock**" means a locomotive, carriage, or other vehicle for use on a railway;

"**railway service**" means—

- (a) a passenger service or a freight service; or
- (b) the service of providing (or providing and operating) railway infrastructure for another industry participant;

"**railway service business**" means a business consisting of the provision of railway services;

"**regulator**" means an authority, officer or person to which the functions of the regulator under this Act are assigned by proclamation;¹

"**related**" — bodies corporate are **related** if they are related bodies corporate under the *Corporations Law*;

"**respondent**" to an access proposal — *See section 31(4)*;

"**traffic control device**" has the same meaning as in the *Road Traffic Act 1961*.

¹ *See section 9.*

Joint ventures

5. (1) If an industry participant consists of the participants in a joint venture, the participants are jointly and severally liable to the obligations under this Act.

(2) The participants in the joint venture may from time to time give the regulator written notice of a representative (who may—but need not be—a participant in the joint venture) who is authorised to give and receive notices on their behalf.

(3) A notice given by or to the authorised representative is taken to have been given by or to all participants in the joint venture.

(4) If no representative is currently nominated under this section, a notice given to any one of the participants in the joint venture is taken to have been given to all.

(5) A **joint venture** includes a partnership.

DIVISION 4—APPLICATION OF THIS ACT

Application to railways

6. (1) Subject to any exclusion in force under subsection (2), this Act (apart from the access regime) applies to all railways in the State.

(2) The Governor may, by proclamation—

(a) exclude a specified railway from the application of this Act or specified provisions of this Act; or

(b) vary or revoke an exclusion in force under this section.

Application of access regime

7. (1) The access regime applies in relation to operators and railway services to the extent that it is declared by proclamation to apply.

(2) The Governor may, by proclamation—

(a) declare that operators and railway services are subject to the application of the access regime; or

(b) vary or revoke a declaration in force under this section.

DIVISION 5—CROWN TO BE BOUND

Crown to be bound

8. This Act binds the Crown not only in right of the State but also (so far as the legislative power of the State extends) in all its other capacities.

DIVISION 6—THE REGULATOR

The regulator

9. (1) The Governor may, by proclamation—

(a) assign the functions of the regulator under this Act to a nominated authority, officer or person; or

(b) vary or revoke an earlier assignment of those functions.

(2) The regulator is subject to the control and direction of the Minister.

(3) However, no Ministerial direction can be given to suppress information or recommendations provided or made under this Act.

(4) The regulator must, on or before 30 September in every year, forward to the Minister a report on the work carried out by the regulator under this Act for the financial year ending on the preceding 30 June.

(5) The Minister must, within 12 sitting days after receiving a report under subsection (4), have copies of the report laid before both Houses of Parliament.

**PART 2
CONSTRUCTION AND OPERATION OF RAILWAYS**

DIVISION 1—ACQUISITION OF LAND

Land acquisition

10. (1) An operator may, with the written consent of the Minister, acquire land for the construction or extension of railways.

(2) The *Land Acquisition Act 1969* applies to the acquisition of land under this section.

DIVISION 2—FIXED RAILWAY INFRASTRUCTURE

Fixed infrastructure may be dealt with as personal property

11. Despite any other law, fixed railway infrastructure does not merge with the land to which it is affixed and may be dealt with and disposed of as personal property.

DIVISION 3—CONTROL OF TRAFFIC

Traffic control devices

12. (1) An operator may, with the Minister's written consent, install and operate traffic control devices that may be necessary or desirable for the safe operation of a railway.

(2) An operator must, at the Minister's written direction, install and operate traffic control devices as required in the direction.

Maximum penalty: \$5 000.

Powers of authorised person

13. (1) An authorised person may give directions to the drivers of motor vehicles and other persons that may be necessary or desirable—

- (a) for the safe operation of a railway; or
- (b) to deal with an emergency.

(2) A person who contravenes a direction given under this section is guilty of an offence.

Maximum penalty: \$1 250.

DIVISION 4—REPORTS

Special reports

14. An operator must, at the Minister's request, provide the Minister with a report—

- (a) on a particular aspect of the operator's operations; or
- (b) on a particular incident related to the operation of a railway.

DIVISION 5—RAIL CORRIDORS

Rail corridor need not be fenced

15. Despite any other law, an operator is not required to fence a rail corridor or to maintain a fence in relation to a rail corridor.

Exemption from rates and taxes

16. A rail corridor is exempt from—

- (a) land tax; and
- (b) rates and compulsory charges under the *Local Government Act 1934*.

DIVISION 6—EXCLUSION OF LAW OF COMMON CARRIERS

Industry participant not to be common carrier

17. An industry participant is not a common carrier.

DIVISION 7—LIQUOR AND GAMBLING

Ministerial authorisation to sell liquor

18. (1) The Minister may authorise an operator to sell and supply liquor on a passenger train or on premises associated with a railway if satisfied that the sale and supply of liquor is reasonably incidental to the provision of a passenger service.

(2) Before granting an authorisation under this section, the Minister must consult with the Liquor and Gaming Commissioner.

(3) The *Liquor Licensing Act 1986* applies with modifications prescribed by regulation in relation to an authority granted under this section.

Ministerial authorisation to provide gambling facilities

19. (1) The Minister may authorise an operator to provide and operate gambling facilities on a passenger train or on premises associated with a railway if satisfied that the facilities are reasonably incidental to the provision of a passenger service.

(2) Before granting an authorisation under this section, the Minister must consult with the Liquor and Gaming Commissioner.

(3) The laws of the State relating to gambling apply with modifications prescribed by regulation in relation to an authority granted under this section.

DIVISION 8—BY-LAWS

By-laws

20. (1) The Governor may make by-laws regulating—

- (a) the conduct of railway passengers and others while on property associated with the operation of a railway; and
- (b) the protection of an operator's property, or property in the custody or under the control of an operator; and

(c) the sale and disposal of unclaimed goods; and

(d) other matters related to the operation of the railway.

(2) A by-law may confer on an authorised person power to require a person to state the person's name and address or to produce documentary evidence of identity.

(3) Before the Governor makes by-laws under this section, the Minister must consult on the text of the proposed by-laws with any operator whose operations may be affected by the by-laws.

(4) A by-law may impose a fine (not exceeding \$2 500) for contravention of the by-law.

PART 3
CONDUCT OF OPERATOR'S BUSINESS

DIVISION 1—GENERAL RULES FOR CONDUCT OF BUSINESS

Segregation of businesses

21. (1) An operator must not carry on a business other than an authorised business.

(2) The following are **authorised businesses**:

- (a) the provision of railway services;
- (b) the operation of railways;
- (c) investing in railway infrastructure (including investment in the share capital of bodies corporate that own railway infrastructure);
- (d) designing, constructing or maintaining railways;
- (e) providing consultancy, technical or other services related to investment in railway infrastructure or the design, construction, maintenance or operation of railways.

Segregation of accounts and records

22. (1) An operator must keep accounts and records of its railway service business so as to give a true and fair view of that business as distinct from other businesses carried on by the operator.

(2) The accounts and records must be kept in a way that gives—

- (a) a comprehensive view of the operator's legal and equitable rights and liabilities in relation to railway infrastructure related to the railway network; and
- (b) a true and fair view of—
 - (i) income and expenditure derived from, or relating to, railway infrastructure related to the railway network; and
 - (ii) assets and liabilities of the operator's business so far as they relate to railway infrastructure.

Unfair discrimination

23. (1) An operator must not unfairly discriminate between proponents in preferring one access proposal to another.

Example—

If, for example, proponents A and B make access proposals to the operator, and both A and the operator are subsidiaries of the same holding company, it would be unfair discrimination for the operator to prefer A's access proposal on the basis of the relationship between them. It would also be unfair discrimination to prefer A's access proposal on the basis of price if B offers a fair price and the higher price offered by A is merely a transfer-pricing arrangement transferring profits from one part of a corporate group to another.

(2) An operator must not unfairly discriminate between a industry participants in the terms and conditions on which the operator provides access to railway services.

- (3) An operator must not unfairly discriminate between industry participants by—
- (a) waiving rights under access contracts or awards on a non-uniform basis; or
 - (b) making a kick-back arrangement or arrangements (*ie* arrangements directly or indirectly returning a proportion of the consideration to which the operator is entitled under the contract or award to industry participants or their associates) on a non-uniform basis.

Example—

If, for example, the operator provides railway services for an industry participant (A) at a discounted price, but does not give a corresponding discount to another industry participant (B) because B is a competitor of a body corporate associated with the operator, the discrimination would be unfair.

(4) A person must not be a party to discrimination by an operator that is contrary to this section.

- (5) A person is a **party** to discrimination if the person—
- (a) aids, abets, counsels or procures the discrimination; or
 - (b) induces the discrimination through threats or promises or in some other way; or
 - (c) is knowingly concerned in the discrimination; or
 - (d) conspires with the operator to discriminate.

Preventing or hindering access to railway services

24. (1) An operator or industry participant, or a body corporate related to an operator or industry participant, must not engage in conduct for the purpose of preventing or hindering access to railway services.

Conduct includes negative conduct such as a failure or refusal to act or delay.

The **purpose** of conduct is to prevent or hinder access to railway services if that is one of the purposes of the conduct.

(2) In deciding a body corporate's purpose, the state of mind of directors, agents, employees and others who are in a position to control or influence the body corporate's conduct are to be imputed to the body corporate.

Report to Minister

25. If the regulator considers that an operator or other person has contravened or failed to comply with this Division in any respect, the regulator must prepare a report on the matter and furnish it to the Minister.

DIVISION 2—APPOINTMENT OF ADMINISTRATOR

Appointment of administrator

26. (1) If an operator becomes insolvent, ceases to provide railway services or fails to make efficient and effective use of its railway infrastructure in the State, the Court may, on application by the regulator, appoint an administrator to take over the business of the operator in the State.

(2) In exercising its jurisdiction under this section, the Court is bound to apply principles and criteria agreed between the State and the operator or the State and a secured creditor of the operator affecting the basis on which the Court's jurisdiction will be invoked or exercised.

(3) An administrator appointed under this section—

(a) is entitled to possession of the operator's assets in the State; and

(b) has the powers conferred on the administrator by the Court.

(4) The Court may order that the costs of the administration be paid wholly or in part from the proceeds of the business.

(5) The Court may make any orders it considers necessary to facilitate an administration under this section.

**PART 4
PRICING PRINCIPLES AND INFORMATION RELEVANT TO ACCESS**

DIVISION 1—PRICING PRINCIPLES

Pricing principles

27. (1) The regulator may establish principles (the **pricing principles**) for fixing a floor and ceiling price for the provision of railway services generally or railway services of a particular class.

(2) The floor price should reflect the lowest price at which the operator could provide the relevant services without incurring a loss and the ceiling price should reflect the highest price that could fairly be asked by an operator for provision of the relevant services.

(3) The pricing principles do not prevent an operator from entering into an access contract on terms that do not reflect the principles.

(4) However, if in an arbitration the arbitrated price for services cannot be less than the floor price and cannot exceed the ceiling price.

DIVISION 2—INFORMATION ABOUT ACCESS

Information brochure

28. (1) An operator must, on the written application of an industry participant, provide an information brochure containing—

- (a) if the operator carries on the business of providing passenger or freight services—a statement of the terms and conditions on which the operator provides the services; and
- (b) the terms and conditions on which the operator is prepared to make the operator's railway infrastructure available for use by others; and
- (c) other information required by the regulator.

(2) The information brochure must be provided within 30 days (or a longer period allowed by the regulator) after the operator receives the application.

(3) The information brochure must refer to any relevant pricing principles and show how the terms and conditions relate to, or compare with, relevant pricing principles.

(4) The form of the information brochure must comply with requirements imposed by the regulator.

(5) The operator must, within 14 days after providing an industry participant with the information brochure, give a copy to the regulator.

(6) If the operator fails to comply with this section in any respect, the operator is guilty of an offence.

Maximum penalty: \$20 000.

Operator's obligation to provide information about access

29. (1) An operator must, on the application of a person with a proper interest in making an access proposal to the operator, provide the applicant with information reasonably requested by the applicant about—

- (a) the extent to which the operator's railway infrastructure is currently being utilised; and
- (b) the extent to which it would be necessary, and technically and economically feasible, to add to or extend the operator's railway infrastructure so that it could meet requirements stated in the application; and
- (c) whether the operator would be prepared to provide a service of a specified description and—
 - (i) if so, the general terms and conditions (including an indication of the likely price) on which the operator would be prepared to provide the service; and
 - (ii) if not, the reasons why the service cannot be provided.

(2) The operator may make a reasonable charge (to be determined on a basis decided or approved by the regulator) for providing information under this section.

(3) If the operator makes a charge for providing information under this section, the operator must give the regulator written notice of the amount of the charge and the nature of the information provided.

Information to be provided on non-discriminatory basis

30. An operator must provide information to persons interested in making access proposals to the operator on a non-discriminatory basis.

PART 5
NEGOTIATION OF ACCESS

Access proposal

31. (1) An industry participant (the **proponent**) who wants access to a railway service, or who wants to vary an access contract in a significant way or to a significant extent, may put a written proposal (the **access proposal**) to the operator of the relevant railway infrastructure setting out—

- (a) the nature and extent of the required access or variation; and
- (b) terms and conditions for the provision of access, or for making the variation, that the proponent considers reasonable and commercially realistic and to which the proponent is prepared to agree.

(2) If the implementation of an access proposal would require an addition or extension to the railway infrastructure, the access proposal may include a proposal for that addition or extension to railway infrastructure.

(3) When the operator receives an access proposal, the operator must give written notice of the proposal to—

- (a) the regulator; and
- (b) any industry participant whose interests could be affected by implementation of the proposal.

(4) The **respondents** to the proposal are—

- (a) the operator; and
- (b) the other industry participants entitled to notice of the proposal under subsection (3).

Duty to negotiate in good faith

32. (1) The operator must negotiate in good faith with the proponent with a view to reaching agreement on whether the proponent's requirements as set out in the access proposal (or some agreed modification of the requirements) could reasonably be met, and, if so, the terms and conditions for the provision of access for the proponent.

(2) The other respondents (if any) whose rights (or prospective rights) would be affected by implementation of the access proposal must also negotiate in good faith with the proponent with a view to reaching agreement on the provision of access to the proponent and any consequent variation of their rights (or prospective rights) of access.

Limitation on operator's right to contract to provide access

33. (1) An operator must not enter into an access contract unless—

- (a) there is no other respondent to the proposal; or
- (b) all other respondents to the access proposal agree; or

- (c) the operator gives the other respondents written notice of the proposed access contract and—
 - (i) no formal objection to the proposed contract is made within 21 days of the notice; or
 - (ii) a formal objection, or formal objections, are made within the 21 day period, but all objections are later withdrawn.

(2) A respondent to an access proposal makes a formal objection to a proposed access contract by giving written notice setting out the grounds of the objection to—

- (a) the proponent; and
- (b) the respondent; and
- (c) the other respondents to the access proposal.

(3) A contract entered into in contravention of this section is void.

PART 6
ARBITRATION OF ACCESS DISPUTES

DIVISION 1—ACCESS DISPUTES AND REQUESTS FOR ARBITRATION

Access dispute

34. An access dispute exists if—

- (a) the operator or another respondent to an access proposal fails to respond to the proposal within 30 days after the proposal is given to the operator or other respondent; or
- (b) the operator or another respondent to an access proposal refuses or fails to negotiate in good faith with the proponent on the access proposal; or
- (c) the proponent, after making reasonable attempts to reach agreement with the operator and other respondents, fails to obtain an agreement on the proposal or an agreed modification of the proposal; or
- (d) a respondent to an access proposal makes a formal objection to a proposed access contract of which notice has been given under Part 3.¹

¹ See section 33.

Request for reference of dispute to arbitration

35. (1) A proponent may, by written notice given to the regulator, ask the regulator to refer an access dispute to arbitration.

(2) A copy of a notice under this section must be given to all respondents to the access proposal.

DIVISION 2—CONCILIATION AND REFERENCE TO ARBITRATION

Conciliation and reference to arbitration

36. (1) On receipt of a request to refer an access dispute to arbitration, the regulator must (subject to this section)—

- (a) attempt to settle the dispute by conciliation; or
- (b) appoint an arbitrator and refer the dispute to the arbitrator.

(2) If the regulator fails to settle an access dispute by conciliation after making a reasonable attempt to do so, the regulator must then (subject to this section) appoint an arbitrator and refer the dispute to the arbitrator.

(3) The regulator is not obliged to refer the dispute to arbitration if, in the regulator's opinion—

- (a) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
- (b) the person seeking arbitration of the dispute has not negotiated in good faith; or
- (c) the regulator is satisfied on the application of a party to the dispute that there are good reasons why the dispute should not be referred to arbitration.

- (4) A dispute cannot be referred to arbitration if—
- (a) the dispute involves only one proponent and, before the appointment of the arbitrator, the proponent notifies the regulator that the proponent does not want to proceed with the arbitration; or
 - (b) the dispute involves two or more proponents and, before the appointment of the arbitrator, all proponents notify the regulator that they do not want to proceed with the arbitration.

Appointment of arbitrator

37. (1) An arbitrator must be a person who is properly qualified to act in the resolution of the dispute and has no direct or indirect interest in the outcome of the dispute.

(2) Before appointing an arbitrator, the regulator must consult with each of the parties to the dispute and must attempt (but is not bound) to make an appointment that is acceptable to all parties.

DIVISION 3—PRINCIPLES OF ARBITRATION

Principles to be taken into account

38. (1) The arbitrator must take into account—

- (a) the objects of this Act; and
- (b) the non-discrimination principles; and
- (c) the operator's legitimate business interests and investment in railway infrastructure; and
- (d) the cost to the operator of providing access as sought by the proponent (excluding costs arising from increased market competition); and
- (e) if applicable—the economic value to the operator of additional investment the proponent proposes to undertake; and
- (f) the economically efficient operation of the railway infrastructure; and
- (g) the pricing principles; and
- (h) the price of comparable services for other industry participants (including—if applicable—the operator itself); and
- (i) the interests of industry participants whose interests may be affected by the proposal; and
- (j) the contractual obligations of the operator and existing industry participants; and
- (k) the operational requirements for the safe and reliable operation of the railway infrastructure; and

- (l) the public interest in market competition; and
 - (m) relevant technical and legal issues.
- (2) The arbitrator may take into account other matters the arbitrator considers appropriate.

DIVISION 4—PARTIES TO ARBITRATION

Parties to arbitration

39. (1) The parties to an arbitration are—

- (a) the proponent and respondents to the access proposal; and
- (b) any other person who has, in the regulator's opinion a material interest in the outcome of the arbitration and is nominated by the regulator as a party to the arbitration; and
- (c) any other person who is joined by the arbitrator as a party to the arbitration.

(2) However, a party whose interests are unlikely to be materially affected by the outcome of the arbitration may, by leave of the arbitrator, withdraw from the arbitration.

Representation

40. A party may be represented in the arbitration proceedings by a lawyer or, by leave of the arbitrator, another representative.

Minister's right to participate

41. (1) The Minister may participate in arbitration proceedings under this Act.

(2) If the Minister participates, the Minister may call evidence and make representations on the questions subject to the arbitration.

DIVISION 5—CONDUCT OF ARBITRATION PROCEEDINGS

Arbitrator's duty to act expeditiously

42. An arbitrator must proceed with the arbitration as quickly as the proper investigation of the dispute, and the proper consideration of all matters relevant to the fair determination of the dispute, allow.

Hearing to be in private

43. (1) Arbitration proceedings must be conducted in private unless all parties agree to have the proceedings (or part of the proceedings) conducted in public.

(2) An arbitrator may give directions about who may be present at arbitration proceedings conducted in private.

(3) In giving directions under subsection (2), the arbitrator must have regard to the wishes of the parties and the need for commercial confidentiality.

(4) A person must comply with a direction under subsection (2).

Maximum penalty: \$15 000.

Procedure on arbitration

44. (1) An arbitrator—

- (a) is not bound by technicalities, legal forms or rules of evidence; and
- (b) may obtain information on matters relevant to the dispute in any way the arbitrator thinks appropriate.

The arbitrator may, for example, conduct proceedings by—

- telephone; or
- closed circuit television; or
- other means of communicating at a distance.

(2) An arbitrator may require the presentation of evidence or argument in writing and may decide matters on which the arbitrator will hear oral evidence or argument.

Procedural powers of arbitrator

45. (1) An arbitrator may—

- (a) give procedural directions;
- (b) make orders requiring—
 - (i) the delivery of documents clarifying the issues between the parties;
 - (ii) the discovery and inspection of documents;
- (c) sit at any time or place;
- (d) adjourn the arbitration proceedings from time to time and from place to place;
- (e) refer a matter to an expert for report, and accept the expert's report in evidence;
- (f) do anything else necessary for the expeditious hearing and determination of the dispute.

(2) An arbitrator may proceed with arbitration proceedings in the absence of a party if the party has been given notice of the proceedings.

(3) An arbitrator may engage a lawyer to provide advice on the conduct of the arbitration and to assist the arbitrator in drafting the award.

Giving of relevant documents to the arbitrator

46. A party to the arbitration may give the arbitrator a copy of all documents (including confidential documents) the party considers to be relevant to the dispute.

Power to obtain information and documents

47. (1) If an arbitrator has reason to believe that a person is in a position to give information, or to produce documents, that may be relevant to the dispute, the arbitrator may, by written notice—

Railways (Operations and Access) Act 1997

- (a) require the person within a period stated in the notice—
 - (i) to give the arbitrator a written statement of specified information; or
 - (ii) to produce to the arbitrator specified documents or copies of specified documents; or
- (b) require the person to appear before the arbitrator at a specified time and place to give evidence.

(2) A written statement must, if the arbitrator so requires, be verified by statutory declaration of the person providing the information or, if the person is a body corporate, an appropriate officer of the body corporate.

(3) If documents (whether originals or copies) are produced to an arbitrator, the arbitrator may—

- (a) take possession of, make copies of, and take extracts from, the documents; and
- (b) keep the documents for as long as is necessary for the purposes of the arbitration.

(4) A person must—

- (a) comply with a requirement of the arbitrator under subsection (1) or (2); and
- (b) if the person is required to appear as a witness before the arbitrator—comply with further requirements to make an oath or affirmation, or to answer questions.

Maximum penalty: \$15 000.

(5) However, a person need not give information or produce a document if—

- (a) the information or the contents of the document is the subject of legal professional privilege, or would tend to incriminate the person of an offence; and
- (b) the person objects to giving the information or producing the document by giving written notice of the ground of the objection to the arbitrator or, if the person is appearing as a witness before the arbitrator, by an oral statement of the ground of objection.

Confidentiality of information

48. (1) A person who gives the arbitrator information, or produces documents, may ask the arbitrator to keep the information or the contents of the documents confidential.

(2) The arbitrator may, after considering representations from the parties (or the other parties), impose conditions limiting access to, or disclosure of, the information or documentary material.

(3) A person must not contravene a condition imposed under subsection (2).

Maximum penalty: \$60 000.

DIVISION 6—EARLY TERMINATION OF ARBITRATION

Termination of arbitration in cases of triviality, etc.

49. (1) The arbitrator may terminate an arbitration if the arbitrator thinks—

- (a) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
- (b) the person on whose application the dispute was referred to arbitration has not engaged in negotiations in good faith.

(2) The arbitrator may terminate an arbitration by consent of the parties.

Proponent's right to terminate arbitration

50. (1) If an arbitration involves only one proponent, the proponent may terminate the arbitration, and if it involves two or more proponents, the proponents may together terminate the arbitration.

(2) The arbitration is terminated under this section by giving notice of termination to—

- (a) the arbitrator and the regulator; and
- (b) the other parties to the arbitration.

DIVISION 7—AWARDS

Awards

51. (1) Before the arbitrator makes an award, the arbitrator must give each of the parties and the Minister a copy of the draft award and may take into account representations that any of them may make on the proposed award.

(2) An award must—

- (a) be in writing; and
- (b) set out the reasons on which it is based.

(3) If an award confers a right of access, it must—

- (a) state the period for which the proponent is entitled to access; and
- (b) state the terms and conditions on which the proponent is to have access; and
- (c) resolve, or provide for the resolution of, all related and incidental matters.

(4) The arbitrator must, within seven days after an award is made (including an award made by consent), give a copy of the award to—

- (a) the regulator; and
- (b) the parties to the arbitration.

Railways (Operations and Access) Act 1997

Restrictions on awards

52. (1) An arbitrator cannot make an award that would have the effect of requiring the operator to bear any of the capital cost of any addition or extension to railway infrastructure unless the operator agrees.

(2) An arbitrator cannot make an award that would prejudice the rights of an existing industry participant under an earlier contract or award unless—

- (a) the industry participant agrees; or
- (b) the arbitrator is satisfied that—
 - (i) the industry participant's entitlement to access exceeds the entitlement that the participant actually needs and there is no reasonable likelihood that the participant will need to use the excess entitlement; and
 - (ii) the proponent's requirements cannot be satisfactorily met except by transferring the excess entitlement (or some of it) to the proponent.

Consent awards

53. If—

- (a) the parties to an arbitration consent to a proposed award; and
- (b) the arbitrator is satisfied that the award is appropriate in the circumstances,

the arbitrator may make an award in the terms proposed.

DIVISION 8—WITHDRAWAL FROM AWARD**Proponent's option to withdraw from award**

54. (1) A proponent may, within seven days after the making of an award or such further time as the regulator may allow, elect not to be bound by the award by giving written notice of the election to the regulator.

(2) The regulator must, within seven days after receiving a notice of election under subsection (1), notify the operator and the other parties to the arbitration.

(3) If the proponent elects not to be bound by an award—

- (a) the award is rescinded; and
- (b) the proponent is precluded from making another access proposal for 12 months from the date the notice of election was given unless the regulator authorises a further access proposal within that period.

(4) An authorisation under subsection (3)(b) may be given on conditions the regulator considers appropriate.

DIVISION 9—VARIATION OR REVOCATION OF AWARDS

Variation or revocation of award

55. (1) The regulator may vary or revoke an award if all parties to the award agree.

(2) If the parties are unable to agree on a proposed variation of an award, the regulator may, on the application of one or more of the parties, refer the dispute to arbitration.

(3) However, the regulator will not refer the dispute to arbitration if the regulator is of the opinion that there is no sufficient reason for varying the award.

(4) In deciding whether to refer a dispute to arbitration under this section, the regulator must have regard to—

- (a) whether there has been a material change in circumstances since the award was made or last varied; and
- (b) the nature of the matters in dispute; and
- (c) the time that has elapsed since the award was made or last varied; and
- (d) other matters the regulator considers relevant.

(5) The provisions of this Part (other than Division 8) about the arbitration of a dispute arising from an access proposal apply with necessary modifications to a dispute about the proposed variation of an award.

DIVISION 10—MISCELLANEOUS

Appeal on question of law

56. (1) An appeal lies to the Court from an award, or a decision not to make an award, on a question of law.

(2) On an appeal, the Court may exercise one or more of the following powers—

- (a) vary the award or decision;
- (b) revoke the award or decision;
- (c) make an award or decision that should have been made in the first instance;
- (d) remit the matter to the arbitrator for further consideration or re-consideration;
- (e) make incidental or ancillary orders (including orders for costs).

(3) An award or decision of an arbitrator cannot be challenged or called in question except by appeal under this section.

(4) Unless the Court specifically decides to suspend the operation of an award until the determination of the appeal, an appeal does not suspend the operation of an award.

Costs

57. (1) The costs of an arbitration are to be borne by the parties in proportions decided by the arbitrator, and in the absence of a decision by the arbitrator, in equal proportions.

(2) However, if the proponent terminates an arbitration or elects not to be bound by an award, the proponent must bear the costs in their entirety.

(3) The regulator may recover the costs of an arbitration as a debt.

Removal and replacement of arbitrator

58. (1) The regulator may remove an arbitrator from office if the arbitrator—

- (a) becomes mentally or physically incapable of carrying out the arbitrator's duties satisfactorily; or
- (b) is convicted of an indictable offence; or
- (c) becomes bankrupt or applies to take the benefit of a law for the benefit of bankrupt or insolvent debtors.

(2) If an arbitrator resigns, is removed from office, or dies, the regulator may appoint another person to take the arbitrator's place.

Non-application of Commercial Arbitration Act 1986

59. The *Commercial Arbitration Act 1986* does not apply to an arbitration under this Part.

**PART 7
MONITORING POWERS**

Regulator's power to monitor costs

60. (1) The regulator may, by written notice to an operator, require the operator to provide, within a period stated in the notice, specified information relevant to monitoring the costs of railway services provided by the operator.

(2) An operator must comply with a requirement imposed under this section.

Maximum penalty: \$60 000.

Copies of access contracts to be supplied to regulator

61. An operator must provide the regulator, on a confidential basis, with a copy of every access contract made with the operator—

- (a) if the contract was made before the commencement of this Part—within 30 days after the commencement of this Part; and
- (b) if the contract is made after the commencement of this Part—within 30 days after the making of the contract.

Maximum penalty: \$60 000.

Operator's duty to supply information and documents

62. (1) The regulator may, by written notice, require an operator to give the regulator, within a stated time or at stated intervals, specified information or copies of specified documents related to the provision of railway services by the operator.

Examples—

The regulator might require the operator to provide the regulator with financial statements and reports referred to in section 316 of the *Corporations Law* together with any further information that might be necessary to enable the regulator to assess the impact of this Act on the operator's financial position and business interests.

The regulator might require the operator to provide the regulator with periodic reports on the extent to which transactions that were not entered into at arm's length are affecting the operator's financial position.

(2) An operator must not, without reasonable excuse, contravene, or fail to comply with, a notice under this section.

Maximum penalty: \$60 000.

Confidentiality

63. (1) The regulator must maintain the confidentiality of confidential information obtained under this Part.

(2) However, the regulator may disclose confidential information to the Minister if it is in the public interest to do so.

Duty to report to the Minister

64. The regulator must, at the request of the Minister, report to the Minister on—

- (a) the costs of railway services; or
- (b) any aspect of the operation of this Act.

PART 8
ENFORCEMENT OF THIS ACT

Injunctive remedies

65. (1) The Court may grant an injunction—

- (a) restraining a person from contravening a provision of this Act or a provision of an award; or
- (b) requiring a person to comply with a provision of this Act or a provision of an award.

(2) The power of the Court to grant an injunction restraining a contravention of a provision of this Act or an award may be exercised—

- (a) whether or not the defendant has previously contravened the same provision; and
- (b) whether or not there is imminent danger of substantial damage to any person.

(3) The power of the Court to grant an injunction requiring compliance with a provision of this Act or an award may be exercised—

- (a) whether or not the defendant has previously failed to comply with the provision; and
- (b) whether or not there is imminent danger of substantial damage to any person.

(4) The Court may grant an interim injunction under this section.

(5) An application for an injunction under this section may be made by—

- (a) the regulator; or
- (b) a person with a proper interest in whether the relevant provision is complied with.

(6) The Court may grant an injunction by consent without inquiring into the merits of the application.

(7) If the regulator makes an application for an injunction, the Court cannot require the regulator or any other person to give an undertaking as to damages as a condition of granting the injunction.

(8) The Court may, on application by the regulator or an interested party, discharge or vary an injunction.

Compensation

66. (1) If a person contravenes a provision of this Act or an award, the Court may, on application by the regulator or an interested person, order compensation of persons who have suffered loss or damage as a result of the contravention.

(2) An order may be made under this section against the person who contravened the provision and others involved in the contravention.

- (3) A person is **involved in the contravention** if the person—
- (a) aided, abetted, counselled or procured the contravention; or
 - (b) induced the contravention through threats or promises or in some other way; or
 - (c) was knowingly concerned in, or a party to, the contravention; or
 - (d) conspired with others to contravene the provision.

Enforcement of arbitrator's requirements

67. (1) If a person fails to comply with an order, direction or requirement of an arbitrator under this Act, the arbitrator may certify the failure to the Court.

(2) The Court may inquire into the case and make such orders as may be appropriate in the circumstances.

**PART 9
REGULATIONS AND PROCLAMATIONS**

Regulations and proclamations

68. (1) The Governor may make regulations and proclamations for the purposes of this Act.

(2) A proclamation (other than a proclamation made for the purpose of bringing this Act into operation) may be varied or revoked by a subsequent proclamation.

(3) A regulation—

- (a) may establish evidentiary presumptions to facilitate the enforcement of this Act (or a regulation or by-law under this Act);
- (b) may prescribe a fine (not exceeding \$2 500) for contravention of the regulation.