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Rail Corporations Act 1996 VICTORIAN RAIL ACCESS REGIME Account Keeping Rules

1. Background

1.1 Legislative Background

Section 38R of the **Rail Corporations Act 1996** provides that the Commission must make account keeping rules in accordance with the procedure set out in section 38N. Section 38R provides:

38R. Account keeping rules

- (1) The Commission must make rules for or with respect to requiring an access provider to—
 - (a) prepare, maintain and keep accounting records in relation to access activities and other activities of the access provider; and
 - (b) prepare, maintain and keep accounts in relation to access activities and other activities of the access provider; and
 - (c) provide the accounting records and accounts referred to in paragraphs (a) and (b) to the Commission.
- (2) Without limiting sub-section (1), rules must be made that—
 - (a) require an access provider to prepare, maintain and keep records relating to internal transfer terms; and
 - (b) require an access provider to prepare, maintain and keep records that disclose the allocation of the costs it incurs in operating its business as between activities carried out in operating that business; and
 - (c) require an access provider to provide the records referred to in paragraphs (a) and (b) to the Commission; and
 - (d) specify accounting principles with which an access provider must prepare accounts in relation to access activities and other activities of the access provider.

Note: The procedure for making of the account keeping rules is set out in section 38N.

These account keeping rules are made pursuant to section 38R.

1.2 Purpose

The **account keeping rules** require **access providers** to maintain and provide to the **Commission** accounting records and accounts (including **internal transfer terms**) in accordance with accounting principles specified in these rules, in order to:

- (a) ensure that the **Commission** has the financial and accounting information necessary to carry out its regulatory functions; and
- (b) require **access providers** to maintain accounting separation between their **access activities** and their **other activities**.

1.3 Commencement

These **account keeping rules** commence with effect from 1 January 2006.

1.4 Application

These **account keeping rules** apply in their entirety to all **access providers**, except to the extent set out in any notice given by the **Commission** to an **access provider** under section 6.2.

SPECIAL

2. Preparing, maintaining and keeping accounting records and accounts**2.1 General obligation**

An **access provider** must:

- (a) prepare, maintain and keep accounts and accounting records for its **access activities** separate from the accounts and accounting records for its **other activities**;
- (b) in preparing the accounts and accounting records relating to its **access activities** and **other activities**, comply with all applicable **Australian Accounting Standards**; and
- (c) keep the accounts and accounting records for its **access activities** and its **other activities** referred to in paragraph (a) for a minimum of five years.

2.2 Financial statements

- (a) For each completed **financial year** an **access provider** must prepare and keep separate audited financial statements that relate to:
 - (i) the whole of the business conducted by the **access provider**; and
 - (ii) (A) the **access activities business unit**; and
(B) the **other activities business units** as a whole; and
 - (iii) a reconciliation of the financial statements referred to in sub-paragraphs (i) and (ii) above.
- (b) The audited financial statements referred to in section 2.2(a) must include:
 - (i) a profit and loss statement that sets out information relating to revenue, costs and profit, including details of:
 - (A) operating revenue (including in the case of the financial statements referred to in section 2.2(a)(ii), separately identifying revenues associated with the provision of services by the **access activities business unit** to an **other activities business unit**, and by an **other activities business unit** to the **access activities business unit**);
 - (B) non-operating revenue, excluding interest;
 - (C) interest income (in relation to the whole of the business conducted by the **access provider**);
 - (D) operating and maintenance costs (including in the case of the financial statements referred to in section 2.2(a)(ii), separately identifying costs associated with the provision of services by the **access activities business unit** to an **other activities business unit**, and by an **other activities business unit** to the **access activities business unit**);
 - (E) any other internal transfer payments (in the case of the financial statements referred to in section 2.2(a)(ii) only);
 - (F) depreciation and amortisation expenses;
 - (G) tax and interest expenses (in relation to the whole of the business conducted by the **access provider**); and
 - (H) net profit after tax (in relation to the whole of the business conducted by the **access provider**);
 - (ii) a statement of financial position that provides details of:
 - (A) total non-current assets (including a separate identification of land and other fixed assets);
 - (B) current assets and current liabilities; and
 - (C) in relation to the whole of the business conducted by the **access provider**, non-current liabilities, and net assets;

- (iii) details of capital expenditure and asset disposals made during the relevant **financial year**, including information about:
 - (A) the amount of capital expenditure and asset disposals made by the **access provider**, including details of any capital contributions or grants received from any **government agency** or from **users**;
 - (B) the nature of the capital expenditure and asset disposals made by the **access provider**; and
 - (C) the services to which capital expenditure and asset disposals referred to in paragraphs (A) and (B) relate;
- (iv) details of any **related party** transactions entered into by the **access activity business unit**, including sufficient information about those transactions to enable the **Commission**, acting reasonably, to understand their nature, value and substance;
- (v) details of any contributions towards capital and maintenance expenses received from any **government agency** or from **users**, showing separately:
 - (A) capital and maintenance receipts; and
 - (B) contributions received according to the purpose of each contribution.

2.3 Cost allocation statement

- (a) For the purposes of preparing the financial statements referred to in section 2.2(a), an **access provider** must, for each completed **financial year**, prepare and keep a cost allocation statement that contains:
 - (i) a detailed explanation of how the **access provider** has allocated costs:
 - (A) between the **access activities business unit** and the **other activities business units**;
 - (B) with respect to the **access activities business unit**, between:
 - (1) **declared rail transport services**; and
 - (2) other services provided by the **access activities business unit**;
 - (C) with respect to **declared rail transport services**, between:
 - (1) **declared rail transport services**, other than **terminal services**; and
 - (2) **terminal services**; and
 - (D) with respect to **declared rail transport services**, other than **terminal services**:
 - (1) between those services provided within each **pricing zone** of the **rail network**; and
 - (2) between services provided in connection with **freight services** and **passenger services**;
 - (E) costs directly attributable to **non-reference services** that are **passenger services** and **freight services**; and
 - (ii) in relation to the **access activities business unit**, details of:
 - (A) the sum of all **new capital expenditure** undertaken since 30 April 1999;
 - (B) the accumulated depreciation on **new capital expenditure**; and
 - (C) the written-down book value of accumulated **new capital expenditure**; and

- (D) how the **access provider** has allocated the items in paragraphs (A), (B) and (C) in accordance with the requirements of section 2.3(a)(i)(B), (C) and (D).
- (b) The cost allocation statement must be prepared in accordance with the **cost allocation policy**.

2.4 Maintenance and capital works – access activities

- (a) For each completed **financial year** an **access provider** must prepare and keep a statement in relation to maintenance and capital works costs in respect of **access activities**.
- (b) The statement referred to in paragraph (a) must:
 - (i) provide details of operations and maintenance expenditure in relation to **rail infrastructure** in each **pricing zone** and separately in relation to **terminals**, including expenditure on:
 - (A) routine maintenance, including routine track maintenance;
 - (B) major periodic maintenance and renewal, including in relation to track;
 - (C) maintenance of signalling and communications equipment;
 - (D) maintenance of structures, buildings, facilities and **terminals**;
 - (E) other maintenance;
 - (F) total expenditure on maintenance; and
 - (G) network operations of the **access provider** in relation to its **access activities** including **train control services** and safe working operations;
 - (ii) contain a reconciliation of the expenditures reported under paragraph (i) with those reported in the financial statements prepared in accordance with section 2.2 and the cost allocation statement prepared in accordance with section 2.3, including total operating and maintenance expenditure associated with each **pricing zone**, and including:
 - (A) adjustments due to the amortisation of major periodic maintenance; and
 - (B) total operation expenditure on operating activities and reconciliation with total operating and maintenance expenditure of the **access activities**;
 - (iii) contain details of **new capital expenditure** in each **pricing zone**;
 - (iv) contain a reconciliation of the expenditures reported under paragraph (iii) with those reported in the financial statements and cost allocation statement, including details of where an **access provider** has allocated **new capital expenditure** items between **business units** or **pricing zones** in accordance with the **cost allocation policy**; and
 - (v) record the results of maintenance and capital works expenditure, by showing for each **service standard** the performance of the **rail network** measured in the manner and with the frequency specified in the **access arrangement** (or specified by the State in relation to any **declared rail transport services** provided by the **access provider** in connection with **passenger services**).

2.5 Prices and revenues

For each completed **financial year** an **access provider** must prepare, maintain and keep information about the source of revenues that the **access provider** derives from its **access activities**, including:

- (a) with respect to each **reference service**, the prices charged, the quantities of services provided (in **billing units**) and the revenues earned in connection with the **access provider's** (or any related **body corporate's**) use of the **rail network**;
- (b) with respect to each **reference service**, separately identifying in respect of each **user** (other than the **access provider** or a **related body corporate** of the **access provider**) the prices charged, a description of and the quantities of services provided (in **billing units**) and the revenues earned in connection with the use of the **rail network** by **users** other than the **access provider** or a **related body corporate** of the **access provider**; and
- (c) details of any contracts, agreements, arrangements or understandings under which the **access provider** provides **declared rail transport services**, including sufficient information about such contracts, agreements, arrangements or understandings to enable the **Commission**, acting reasonably, to understand their nature, value and substance.

2.6 Form of statements and information

- (a) An **access provider** must prepare and submit to the **Commission** for approval at the same time as it is required to submit a proposed access arrangement, proposed forms for it to use in the preparation and keeping of each of the following:
 - (i) the financial statements to be prepared in accordance with section 2.2;
 - (ii) the cost allocation statement to be prepared in accordance with section 2.3;
 - (iii) the statement of the maintenance and capital works costs in respect of **access activities** to be prepared in accordance with section 2.4; and
 - (iv) the information about the source of revenues that the **access provider** derives from its **access activities** to be prepared in accordance with section 2.5.
- (b) The **Commission** must consult with the **access provider** about each of the proposed forms submitted in accordance with paragraph (a).
- (c) If the **Commission** is not satisfied that a proposed form, if completed, would contain the information required to be provided under the **account keeping rules**, the **Commission** may reject the proposed form. If the **Commission** rejects the proposed form:
 - (i) the **Commission** must return the proposed form to the **access provider** with a notice in writing that outlines the matters that must be addressed for the **Commission** to approve the proposed form;
 - (ii) the **access provider** must amend the proposed form to address the matters specified by the **Commission** under paragraph (i); and
 - (iii) the **access provider** must submit the amended proposed form to the **Commission** within 14 days after receipt of the notice referred to in paragraph (i).
- (d) Subject to paragraph (e), if the **Commission** rejects the proposed form again, the process in this section will continue to apply until the proposed form is accepted.
- (e) If the **Commission** has rejected a proposed form twice, following the second rejection the **Commission** may either:
 - (i) return the proposed form to the **access provider** for reconsideration (in which case the process in paragraph (d) above will apply); or
 - (ii) amend the proposed form so that it provides for the matters required by the **Commission**.

2.7 Auditing and certification

- (a) Each of the financial statements and the cost allocation statement prepared in accordance with sections 2.2, 2.3 and 2.4 and provided to the **Commission** in accordance with section 3.1, must:
- (i) be accompanied by a **director's responsibility statement** or, if otherwise agreed by the **Commission** in writing, be certified by a competent officer of the **access provider** as being accurate and correct;
 - (ii) be accompanied by a report by a qualified and independent auditor that states whether the financial statements, the cost allocation statement and the statement in relation to maintenance and capital works costs represent a true and fair representation of the current position and performance of the **access provider's** business;
 - (iii) be accompanied by a full and detailed statement of the accounting principles used to prepare the financial statements and the cost allocation statement, including:
 - (A) confirmation that the accounting principles used comply with any accounting principles specified by the **Commission** under these rules, conform to the **Australian Accounting Standards** and the accounting principles used by the **access provider** in preparing any financial statements required to be submitted to the Australian Securities and Investments Commission and, if not, an explanation of why different principles have been used and how those principles used differ from those used in preparing any financial statements required to be submitted to the Australian Securities and Investments Commission;
 - (B) details of any changes in accounting principles, when compared to the accounting principles previously used by the **access provider** (including the reasons for the relevant changes to the accounting principles used, and the effect on the financial statements, the cost allocation statement and the statement in relation to maintenance and capital works costs); and
 - (C) details of the capitalisation policy; and
 - (iv) identify and provide an explanation for:
 - (A) the inclusion of any **material** new items appearing in the financial statements, the cost allocation statement and the statement in relation to maintenance and capital works costs; and
 - (B) the omission of any previously included **material** item now not appearing in the financial statements, the cost allocation statement and the statement in relation to maintenance and capital works costs.
- (b) The auditor's report referred to in paragraph (a)(ii) must be conducted under **Australian Auditing and Assurance Standards** and the appointment of the auditor must be consistent with **Australian Auditing and Assurance Standards**.
- (c) The statement of the maintenance and capital works costs in respect of **access activities** and the information about the source of revenues that the **access provider** derives from its **access activities** prepared in accordance with sections 2.4 and 2.5 and provided to the **Commission** in accordance with section 3.1, must be certified by a competent officer of the **access provider** as being accurate and correct.

3. Provision of accounts and accounting records to the Commission

3.1 Provision of statements and information

An **access provider** must provide to the **Commission**:

- (a) a copy of the financial statements prepared in accordance with section 2.2 and kept in accordance with section 2.6(a);
- (b) a copy of the cost allocation statement prepared in accordance with section 2.3 and kept in accordance with section 2.6(a);
- (c) a copy of the statement of the maintenance and capital works costs in respect of **access activities** prepared in accordance with section 2.4 and kept in accordance with section 2.6(a);
- (d) the information about the source of revenues that the **access provider** derives from its **access activities** prepared in accordance with section 2.5 and kept in accordance with section 2.6(a); and
- (e) in relation to and accompanying each of the financial statements and the cost allocation statement prepared in accordance with sections 2.2, 2.3 and 2.4:
 - (i) the **director's responsibility statement** or, if otherwise agreed by the **Commission** in writing under section 2.7(a)(i), the certificate of a competent officer of the **access provider** referred to in section 2.7(a)(i);
 - (ii) a copy of the auditor's report referred to in section 2.7(a)(ii);
 - (iii) a copy of the statement of the accounting principles used to prepare the financial statements, the cost allocation statement and the statement in relation to maintenance and capital works costs referred to in section 2.7(a)(iii); and
 - (iv) the information referred to in section 2.7(a)(iv),

no later than four calendar months after the end of the financial year to which the statement, certificate, report or information relates.

3.2 Other accounts and accounting records

An **access provider** must provide the **Commission** with accounting records and accounts relating to its **access activities** kept pursuant to, and in a format consistent with, the requirements of section 2.1(a) within a reasonable time of being requested to do so by the **Commission** (such reasonable time to be determined by the **Commission**).

4. Internal transfer terms

- (a) An **access provider** that provides **declared rail transport services** to itself or to a **related body corporate** must:
 - (i) record in writing the **internal transfer terms**;
 - (ii) ensure that any such written record is signed by an authorised person on behalf of the **access activities business unit** and the other **business unit** or **related body corporate** of the **access provider** concerned; and
 - (iii) provide a copy of any such written record to the **Commission** within 30 days of the later of the **access provider** first providing **declared rail transport services** to the relevant **business unit** or **related body corporate** and the date of commencement of these rules.

5. Cost allocation policy

5.1 Proposed cost allocation policy

An **access provider** must prepare and submit to the **Commission** for approval at the same time as it is required to submit a proposed access arrangement, a proposed cost allocation policy that explains the methodology and states the principles governing:

- (a) cost allocation between the **access activities business unit** and the **other activities business units** of the **access provider**, identifying:
- (i) the nature of costs that are directly attributable to the **access activities business unit** and to the **other activities business units**, and the costs that are not directly attributable to the **access activities business unit** or the **other activities business units**; and
 - (ii) for any costs that are not directly attributable to the **access activities business unit** or the **other activities business units**, the basis of the allocation of those costs between the **access activities business unit** and the **other activities business units**;
- (b) in respect of the **access activities business unit**, cost allocation between the **access activities** and the **other activities** of the **access activities business unit**, identifying:
- (i) the nature of costs that are directly attributable to **access activities** and to **other activities**, and the costs that are not directly attributable to **access activities** or **other activities**; and
 - (ii) for any costs that are not directly attributable to **access activities** or **other activities**, the basis of the allocation of those costs between **access activities** and **other activities**;
- (c) with respect to the **access activities** of the **access provider**, cost allocation between **access activities** other than **terminal services** and **terminal services**, identifying:
- (i) the nature of costs that are directly attributable to **access activities** other than **terminal services** and to **terminal services**, and the costs that are not directly attributable to **access activities** other than **terminal services** or **terminal services**; and
 - (ii) for any costs that are not directly attributable to **access activities** other than **terminal services** or **terminal services**, the basis of the allocation of those costs between **access activities** other than **terminal services** and **terminal services**;
- (d) with respect to **access activities** of the **access provider** other than **terminal services**, cost allocation between:
- (i) **freight services**; and
 - (ii) **passenger services**,
- identifying separately:
- (iii) the nature of costs that are directly attributable to each of those services, and the costs that are not directly attributable to each of those services; and
 - (iv) for any costs that are not directly attributable to each of those services, the basis of the allocation of those costs between those services;
- (e) with respect to **access activities** of the **access provider** other than **terminal services**, cost allocation between **pricing zones** of the **rail network**, identifying:
- (i) the nature of costs that are directly attributable to each **pricing zone** and the costs that are joint between **pricing zones**; and
 - (ii) for any costs that are not directly attributable to a **pricing zone**, the basis of the proposed allocation of those costs between **pricing zones**;
- (f) with respect to the cost allocation referred to in paragraph (d), cost allocation between non-reference services that are **passenger services** and non-reference services that are **freight services**, identifying separately costs that are directly attributable to non-reference services that are **passenger services** and non-reference services that are **freight services**; and

- (g) with respect to items that are **new capital expenditure** (including accumulated **new capital expenditure**) and depreciation on accumulated **new capital expenditure**, cost allocation between **access activities** and **other activities** identifying:
 - (i) the items that are directly attributable to **access activities** and to **other activities**, and the items that are not directly attributable to **access activities** or **other activities**; and
 - (ii) for any items that are not directly attributable to **access activities** or **other activities**, the basis of the allocation of amounts referable to those items between **access activities** and **other activities**.

5.2 Decision on proposed cost allocation policy

- (a) The **Commission** must make a decision whether or not to approve a proposed cost allocation policy provided to it under section 5.1 as a **cost allocation policy**.
- (b) If the **Commission** makes a decision to approve a proposed cost allocation policy, that policy will be a **cost allocation policy** for the purposes of these rules.
- (c) If the **Commission** is not satisfied that the proposed **cost allocation policy**:
 - (i) provides for the matters listed in section 5.1; and
 - (ii) is consistent with the objectives set out in section 38F of the **Act**, the **Commission** may reject the proposed cost allocation policy.
- (d) If the **Commission** rejects the proposed cost allocation policy:
 - (i) the **Commission** must return the proposed cost allocation policy to the **access provider** with a notice in writing that outlines the matters that must be addressed for the **Commission** to approve the proposed cost allocation policy as a **cost allocation policy**;
 - (ii) the **access provider** must amend the proposed cost allocation policy to address the matters specified by the **Commission** under paragraph (i); and
 - (iii) the **access provider** must submit the amended proposed cost allocation policy to the **Commission** within 14 days after receipt of the notice referred to in paragraph (i) (or such longer period as the **Commission** may, by notice in writing, permit).
- (e) Subject to paragraph (f), if the **Commission** decides to reject the amended proposed cost allocation policy submitted to the **Commission** in accordance with paragraph (d)(iii), the process in this section 5.2 will continue to apply until the proposed cost allocation policy is accepted as a **cost allocation policy**:
 - (i) with such alterations and modifications as are necessary; and
 - (ii) as if the amended proposed cost allocation policy were a proposed cost allocation policy submitted for approval under section 5.1.
- (f) If the **Commission** has rejected the amended proposed cost allocation policy (as described in paragraph (d)(iii) above) twice, following the second rejection the **Commission** may either:
 - (i) return the amended proposed cost allocation policy to the **access provider** for reconsideration (in which case the process in paragraph (e) above will apply); or
 - (ii) amend the amended proposed cost allocation policy so that the **Commission** can be satisfied of the matters described in paragraph (c) above.

5.3 Commission to approve variation to cost allocation policy

- (a) An **access provider** may apply to the **Commission** to vary a **cost allocation policy**.
- (b) The variation must be consistent with these rules.
- (c) An application must;
 - (i) be in writing;
 - (ii) include a description of the proposed variation; and
 - (iii) state the reasons for the proposed variation.
- (d) The **Commission** must make a decision whether or not to approve a variation to a **cost allocation policy**.
- (e) If the **Commission** considers that the variation that is the subject of the application is a material variation, section 5.2 applies to that variation:
 - (i) with such alterations and modifications as are necessary; and
 - (ii) as if:
 - (A) the proposed variation to be made were a proposed cost allocation policy submitted for approval under section 5.1; and
 - (B) a decision under this section were a decision under section 5.2.
- (f) If the **Commission** decides to approve a variation to a **cost allocation policy**, the variation takes effect on and from the date of the decision.

6. Application**6.1 Application of account keeping rules to joint ventures**

- (a) This section applies if there is more than one **access provider** in connection with **rail infrastructure**, including if:
 - (i) the relevant **rail infrastructure** is owned or operated by two or more persons as a joint venture or partnership; or
 - (ii) the **rail infrastructure** is owned and operated by different persons; or
 - (iii) **rail infrastructure** is legally owned by a person or persons on trust for others.

In such a case each **access provider** in connection with the **rail infrastructure** is referred to in this section as a **participant**.

- (b) If these rules require or permit something to be done by the **access provider**, that thing may be done by one of the **participants** on behalf of all the **participants**.
- (c) If a provision of these rules refers to the **access provider** bearing any costs, the provision applies as if the provision referred to any of the **participants** bearing any costs.

6.2 Waiver of rules

The **Commission** may at its sole discretion and by notice in writing to an **access provider** waive any of an **access provider's** obligations under these rules where the **Commission** considers this would be consistent with the **Commission's** statutory obligations and that compliance with the obligation would not be necessary to achieve the purpose of these **account keeping rules** as set out in section 1.2.

7. Definitions**7.1 Definitions**

In these rules, unless the context otherwise requires:

- (a) terms that appear **like this** and that are not otherwise defined in these rules have the same meaning as in the **Act**; and

- (b) **access activities business unit** means the **business unit** of an **access provider** that conducts **access activities**;
- (c) **Act** means the **Rail Corporations Act 1996** (Vic);
- (d) **Australian Accounting Standards** means the Accounting Standards issued by the Australian Accounting Standards Board from time to time;
- (e) **Australian Auditing and Assurance Standards** means the Australian Auditing and Assurance Standards issued by the Australian Auditing and Assurance Standards Board from time to time;
- (f) **billing unit** means a unit against which the prices charged for the provision of, or in connection with, **declared rail transport services** are charged;
- (g) **business unit** means a distinct division, department, branch, group, team or unit of a business or company, or a separate company;
- (h) **cost allocation policy**, in respect of an **access provider**, means a cost allocation policy approved by the **Commission** under section 5;
- (i) **director's responsibility statement** means a statement signed and dated by the Chief Executive Officer and a Non-Executive Director of an **access provider** which states whether, in the opinion of the Chief Executive Officer and Director, the statements prepared in accordance with sections 2.2, 2.3 and 2.4 and provided to the **Commission** are true and fair, and have been prepared in accordance with applicable and appropriate accounting principles and policies, and have been prepared in accordance with these **account keeping rules**;
- (j) **financial year** means:
 - (i) a year commencing on 1 July in any calendar year and ending on 30 June of the immediately following calendar year;
 - (ii) another period of 12 months that has been previously notified to the **Commission**, and approved by the **Commission** in writing as a financial year for the purposes of these account keeping rules;
- (k) **freight services** means services provided utilising **rail transport services**, other than **passenger services** or **terminal services**;
- (l) **government agency** means a government or government department or other body or a governmental, semi governmental, judicial, municipal, statutory or public entity or authority (including a statutory authority or a State-owned enterprise), a self regulatory authority established under statute or a stock exchange (wherever created or located) or a person (whether autonomous or not) who is charged with the administration of a law;
- (m) **material** items are items that, if omitted, mis-stated or not disclosed in the financial statements or the cost allocation statement and the statement in relation to maintenance and capital works costs that are prepared in accordance with sections 2.2, 2.3 and 2.4, and provided to the **Commission** under section 3.1, may result in inaccurate conclusions being made about the relevant financial or operational position, or nature of the business activities, of the **access provider**;
- (n) **new capital expenditure** means capital expenditure undertaken since 30 April 1999;
- (o) **other activity** means any activity carried out by an **access provider** other than an **access activity**;
- (p) **other activities business unit** means a **business unit** of an **access provider** that conducts **other activities**;
- (q) **passenger services** means railway services for the carriage of passengers by **train** between locations on the **rail network**;

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- (r) **pricing zone** means each zone in relation to which the prices at which an **access provider** offers **declared rail transport services** are defined and for which separate reference prices are offered;
 - (s) **related party** means an entity that at any time during a **financial year** had control or significant influence over the management of the **access provider**, or whose management was subject to control or significant influence by the **access provider**, or whose management was controlled or subject to significant influence by the same entity as controls or significantly influences the management of the **access provider**;
 - (t) **service standard** means a quality or service level or standard:
 - (i) contained in an **access arrangement**; or
 - (ii) specified by the State in relation to any **declared rail transport services** provided by the **access provider** in connection with **passenger services**, that the **access provider** is required to achieve in connection with the provision of **declared rail transport services**;
 - (u) **terminal** means a **terminal** (as defined in the **Act**) that has been declared to be **rail infrastructure** under section 38B of the **Act**;
 - (v) **terminal services** means services provided by means of a **terminal**;
 - (w) **train** means a locomotive and with or without wagons used to operate **train services**; and
 - (x) **train service** means a **train** run by a **user** by which that person provides railway **freight services** or **passenger services**.

Dated 1 January 2006

GREG WILSON
Chairperson
Essential Services Commission

Rail Corporations Act 1996
VICTORIAN RAIL ACCESS REGIME
Ring Fencing Rules

1. Background

1.1 Legislative Background

Section 38S of the **Rail Corporations Act 1996** provides for the Commission to make ring fencing rules in accordance with the procedures set out in section 38N. Section 38S provides:

38S. Ring fencing rules

The Commission must make rules for or with respect to—

- (a) requiring an access provider to separate its access activities from its other activities as if the access activities are being carried out by a different entity; and
- (b) the manner in which the access provider is to effect the separation of its access activities from its other activities as provided for by paragraph (a); and
- (c) requiring an access provider that provides declared rail transport services to itself or related bodies corporate, to provide those services on an arm's length basis.

Note: The procedure for making of the ring fencing rules is set out in section 38N.

These ring fencing rules are made pursuant to section 38S.

1.2 Purpose

These **ring fencing rules** establish a set of requirements with which an **access provider** must comply.

The purpose of these **ring fencing rules** is to facilitate competitively neutral access to regulated below rail services by requiring an **access provider** to:

- (a) establish an internal organisational structure in which the **business unit** responsible for providing regulated below rail services is separate from the **access provider's** above rail business and **other activities**; and
- (b) ensure that the below rail **business unit** conducts its business activities at arm's length to the above rail businesses, including with respect to the provision of services to the above rail businesses.

1.3 Overview

- (a) Rules governing the separation of **access activities** from **other activities**, required under section 38S(a) of the **Act**, are set out in section 2 of these **ring fencing rules**.
- (b) Rules requiring the provision of **declared rail transport services** by an **access provider** to itself or a **related body corporate** on an arm's length basis, required under section 38S(c) of the **Act**, are set out in section 3 of these **ring fencing rules**.
- (c) Rules requiring an **access provider** to establish and maintain policies, procedures and systems to ensure compliance by the **access provider** with these **ring fencing rules** are set out in section 4 of these **ring fencing rules**.
- (d) Rules governing the manner in which the separation of **access activities** from **other activities** is to be effected, required under section 38S(b) of the **Act**, are set out in section 5 of these **ring fencing rules**.
- (e) Section 6 of these **ring fencing rules** deals with the application of these **ring fencing rules** to joint ventures and with waiver of some or all of these rules.
- (f) Section 7 of these **ring fencing rules** contains definitions.
- (g) Sections 38ZZZ, 38ZZZA and 38ZZZB of the **Act** place obligations on an **access provider**, an **access seeker** and a **user** in relation to confidential information.

- (h) The **account keeping rules** contain obligations on an **access provider** in relation to accounting separation and cost allocation.

1.4 Application

Subject to section 6.2, these **ring fencing rules** apply:

- (a) in their entirety to an **access provider** that is the lessee from time to time under the **Primary Infrastructure Lease**; and
- (b) in whole or in part to any other **access provider**, as notified by the **Commission** to the relevant **access provider** in writing.

1.5 Commencement

These **ring fencing rules** commence with effect from 1 January 2006.

2. Obligation to separate access activities from other activities

2.1 General obligation to separate activities

- (a) An **access provider** must separate its **access activities** and its **related access activities** from its **other activities** as if the **access activities** and **related access activities** are being carried out by a different entity.
- (b) Without limiting paragraph (a), an **access provider** must:
 - (i) establish a functionally and organisationally separate **access activities business unit** and **other activities business units** in accordance with section 2.2;
 - (ii) establish and maintain separate work areas for **staff** of the **access activities business unit** and the **other activities business units** in accordance with section 2.3;
 - (iii) ensure that the **access activities business unit** and the **other activities business units** have separate **staff** in accordance with section 2.4;
 - (iv) establish and maintain information technology access controls between the **access activities business unit** and the **other activities business units** in accordance with section 2.5;
 - (v) comply with rules governing the outsourcing of functions of the **access activities business unit** to any **other activities business unit** and the provision of services (other than **shared services**) by an **other activities business unit** to the **access activities business unit** (sections 2.6 and 2.7);
 - (vi) comply with rules governing outsourcing of **access activities** and **other activities** (section 2.8); and
 - (vii) comply with rules governing information sharing (section 2.9).

2.2 Separation of business units

An **access provider** must:

- (a) establish and maintain a single **business unit** for the conduct of its **access activities** and **related access activities** that is organisationally and functionally separate from its **business units** that carry out **other activities**;
- (b) subject to section 2.7, ensure that the **access activities business unit** does not carry out **other activities**; and
- (c) subject to section 2.6, ensure that a **business unit** that carries out **other activities** does not carry out **access activities** and **related access activities**.

2.3 Separation of work areas

An **access provider** must ensure that any **access activities business unit** and any **business unit** conducting **other activities** have separate work areas with access controls that prevent:

- (a) **staff of the access provider's access activities business unit** (other than **shared services staff**) from entering a work area of a **business unit** that carries out **other activities**; and
- (b) **staff of a business unit** that carries out other activities (other than **shared services staff**) from entering the work area of the **access provider's access activities business unit**,

except where such access is for the purpose of arm's length dealings in relation to the provision of a **declared rail transport service**.

Note: An **access provider** is required to prepare and maintain policies, procedures and systems for the conduct of day-to-day business between its **access activities business unit** and any **other activities business unit**.

2.4 Separation of staff

- (a) Subject to sections 2.6 and 2.7, an **access provider** must ensure that its **staff** other than **shared services staff** who are involved in the conduct of:
 - (i) **access activities** and **related access activities** are not also involved in the conduct of **other activities**; and
 - (ii) **other activities** are not also involved in the conduct of **access activities** and **related access activities**.
- (b) An **access provider** must not permit any temporary or permanent transfer of **staff** (other than **shared services staff**) from the **access activities business unit** to an **other activities business unit** or from an **other activities business unit** to the **access activities business unit** to take place in the period commencing at the time when the **access provider** receives a request for access from an **access seeker** pursuant to section 3 of the **negotiation guidelines** and ending either:
 - (i) if the **access request** is withdrawn, three months after the date of such withdrawal; or
 - (ii) if the access request is not withdrawn on the later to occur of:
 - (A) the execution of an access agreement with that **access seeker**; or
 - (B) in the event of an **access regime dispute** in relation to that request for access, the final determination or resolution or settlement of that **access regime dispute**.

2.5 Information technology access controls

An **access provider** must establish, maintain and enforce appropriate information technology systems access controls such that information about the **access provider's access activities** and **related access activities** may be accessed only by:

- (a) **staff** involved in the conduct of the **access provider's access activities** and **related access activities**; and
- (b) **shared services staff**.

2.6 Provision of services to the access activities business unit

- (a) An **access provider** must not arrange for an **other activities business unit** or a **related body corporate** of the **access provider** to provide services to the **access activities business unit** (other than **shared services**) unless:
 - (i) to do so is more cost effective (having regard, amongst other things, to cost, risk, quality and safety) than the **access activities business unit** providing that service itself or arranging for another entity to provide that service; and
 - (ii) the relevant service is provided pursuant to a written and executed agreement which contains a description of the service provided and sets out the terms and conditions, including the price, on which the service is provided.

- (b) Where an **other activities business unit** or a **related body corporate** of the **access provider** provides services to the **access activities business unit** in accordance with paragraph (a), the **access provider** must ensure that:
 - (i) those services are provided on an arm's length basis; and
 - (ii) the arrangement referred to in paragraph (a) complies with the requirements of these **ring fencing rules**.

2.7 Provision of services to an other activities business unit

- (a) An **access provider** must not arrange for the **access activities business unit** to provide services to an **other activities business unit** or a **related body corporate** of the **access provider** (other than **shared services**) unless:
 - (i) to do so is more cost effective (having regard, amongst other things, to cost, risk, quality and safety) than the **other activities business unit** providing that service itself or arranging for another entity to provide that service; and
 - (ii) the relevant service is provided pursuant to a written and executed agreement which contains a description of the service provided and sets out the terms and conditions, including the price, on which the service is provided.
- (b) Where the **access activities business unit** provides services to an **other activities business unit** or a **related body corporate** of the **access provider** in accordance with paragraph (a), the **access provider** must ensure that:
 - (i) those services are provided on an arm's length basis; and
 - (ii) the arrangement referred to in paragraph (a) complies with the requirements of these **ring fencing rules**.

2.8 Outsourcing

If an **access provider** arranges for another entity to perform any of its **access activities**, **related access activities** or its **other activities**, it must ensure that the entity complies with these **ring fencing rules** as if it were the **access provider**.

2.9 Information sharing

- (a) An **access provider** must ensure that any **access provider information** that is provided or made available by the **access activities business unit** to an **other activities business unit** or to a **related body corporate**, and which may assist a **user** to provide freight services or passenger services to end users, is also made available on request to an **access seeker** or **user**, other than:
 - (i) where to do so is prohibited by any applicable **legislation** or any **Commission instrument** made under the **Act**; or
 - (ii) where to do so would reveal **confidential access seeker** and **user information** that has been provided to it by another **access seeker** or **user**; or
 - (iii) where the **access provider information** has been provided to **shared services staff** for the purpose of providing **shared services**.

If an **access seeker** or **user** requests **access provider information** under this section that is of a confidential or commercially sensitive nature, the **access provider** may require the **access seeker** or **user** to enter into a confidentiality agreement prior to its disclosure.

- (b) An **access provider** may require the **access seeker** or **user** referred to in paragraph (a) to pay the same price for the same information as the price paid by the **other activities business unit**, but must not require the **access seeker** or **user** to pay a price for that information that exceeds the cost reasonably incurred by the **access provider** of producing and providing that information.

3. **Obligation to provide declared rail transport services on arm's length basis**
- (a) An **access provider** that provides **declared rail transport services** to itself or to **related bodies corporate** must provide those services on an arm's length basis.
 - (b) Without limiting paragraph (a), an **access provider** that provides **declared rail transport services** to itself or to **related bodies corporate** must:
 - (i) not make decisions or act in a manner that unreasonably favours itself or any **related body corporate** over any other person;
 - (ii) document any contract, agreement, arrangement or understanding for the provision of such services in a written access agreement or memorandum of understanding and provide a copy of the executed access agreement or documented memorandum of understanding to the **Commission** within five business days of execution of the agreement; or within five business days of the completion of the memorandum of understanding (as relevant); and
 - (iii) conduct any business between the **access activities business unit** and the **other activities business unit** in relation to the provision of **declared rail transport services** in accordance with the **account keeping rules, capacity use rules, network management rules, negotiation guidelines** and these **ring fencing rules**.
4. **Establishment and maintenance of policies, procedures and systems**
- (a) An **access provider** must establish, maintain and comply with auditable policies, procedures and systems for the purpose of ensuring compliance with the **access provider's** obligations under these **ring fencing rules**.
 - (b) The policies, procedures and systems referred to in paragraph (a) must include, without limitation, policies, procedures and systems:
 - (i) for the maintenance of a register and records of the **access provider's staff**, which register must identify, in respect of each member of **staff** (including the executive officer or officers to whom all **staff** report either directly or indirectly), the name and position of that person and whether that person is **shared services staff, staff** involved in the conduct of **access activities** and **related access activities** or **staff** involved in the conduct of **other activities**;
 - (ii) for the transfer of **staff** between **business units**, which must require that no transfer of the **access provider's staff** (other than **shared services staff**) from the **access activities business unit** to an **other activities business unit** or from an **other activities business unit** to the **access activities business unit** occurs during the period of time specified in section 2.4(b)(i);
 - (iii) including security control and access control systems, that govern access:
 - (A) between the **access activities business unit** and **other activities business units**; and
 - (B) to the information technology systems of and information about the **access activities business unit**;
 - (iv) for the conduct of day-to-day business between the **access activities business unit** and **other activities business units**, which must require that all such dealings be at arm's length;
 - (v) for the flow of information between the **access activities business unit** and **other activities business units** and from the **access activities business unit** to the directors, officers and senior management of the **access provider**;

Note: To illustrate, the **Commission** expects that the **access provider** will need to identify (in policies, procedures and systems) the type of information that its management will need to receive to discharge overarching corporate responsibilities and duties (eg, aggregated financial information about the performance of the different **business units**).

- (vi) for the treatment of information supplied by an **access seeker** or **user** to the **access provider's access activities business unit** in confidence, which must be consistent with the **access provider's** system and business rules for the handling of confidential information established under section 38ZZZB;
- (vii) for the outsourcing of any **access activities** and **related access activities** of the **access provider**;
- (viii) for the training of **staff** about the obligations imposed on the **access provider** under these **ring fencing rules**;
- (ix) for dealing with any complaints made by an **access seeker** or **user** to the **access provider** in connection with a belief that the **access provider** has not complied with:
 - (A) these **ring fencing rules**; or
 - (B) a **separation arrangement**; or
 - (C) the **access provider's** obligations under the **Act** with respect to **information** supplied by the **access seeker** or **user** to the **access provider** in confidence; and
- (x) for reporting to the **Commission** any breach of a policy, procedure or system.

Note: An **access provider** is required under section 5.8(c) to report to the **Commission** any breach of these **ring fencing rules**.

5. Manner in which separation is to be effected

5.1 Submission of separation arrangement to Commission for approval

An **access provider** must prepare and submit to the **Commission** for approval a proposed separation arrangement at the same time as it is required to submit a draft **access arrangement**.

5.2 Contents of proposed separation arrangement

- (a) A proposed separation arrangement must specify in detail how the **access provider** will ensure that it complies with the requirements of these **ring fencing rules** and must include:
 - (i) a description of how the **access provider** will structure its organisation and businesses in order to comply with these **ring fencing rules**, including:
 - (A) a description of the organisational structure and **business units** of the **access provider**; and
 - (B) a description of the activities and functions of each **business unit**, including the structure, staffing, responsibilities, functions of and activities conducted by each **business unit**;
 - (ii) a statement confirming the establishment of each of:
 - (A) a register of the names and positions of the **access provider's staff**, which register must identify, in respect of each member of **staff** (including the executive officer or officers to whom all **staff** report either directly or indirectly), the name and position of that person and whether that person is **shared services staff**, **staff** involved in the conduct of **access activities** and **related access activities** or **staff** involved in the conduct of **other activities**; and

- (B) the policies, procedures and systems referred to in section 4 that the **access provider** is required to prepare and maintain under these **ring fencing rules** or, in the circumstances referred to in section 5.3(a), a copy of the plan referred to in section 5.3(b) for establishing any **outstanding policy**;
- (iii) a complete listing and description of any services provided under section 2.6 to the **access activities business unit**, other than **shared services**, by an **other activities business unit** or a **related body corporate** of the **access provider**, and services provided under section 2.7 by the **access activities business unit** to an **other activities business unit** or a **related body corporate** of the **access provider**, in addition to an explanation of how each such arrangement complies with the requirements of section 2.6 and section 2.7;
- (iv) a description of how the proposed separation arrangement, if approved as a **separation arrangement**, will be consistent with and will ensure that the **access provider** complies with its obligations under the **account keeping rules** and the **access provider's** system and business rules for the handling of confidential information established under section 38ZZZB; and
- (v) any additional information:
 - (A) that the **access provider** considers will be necessary; or
 - (B) that the **Commission** reasonably requests the **access provider** to provide,in order to provide the **Commission** with sufficient assurance that the **access provider** will comply with its obligations under these **ring fencing rules**.
- (b) The statement referred to in paragraph (a)(ii) must be signed by a director of the **access provider** and must certify that any **outstanding policy** will be established in accordance with these **ring fencing rules**.

5.3 Plan for establishing policies, procedures and systems

- (a) If, at the time of submitting a proposed separation arrangement to the **Commission** for approval under section 5.1, the **access provider** has not established all of the policies, procedures and systems referred to in section 4 that the **access provider** is required to establish and maintain under these **ring fencing rules**, the **access provider** must, at the time of submitting the proposed separation arrangement, submit to the **Commission** a plan for establishing any **outstanding policy**.
- (b) The plan referred to in paragraph (a) must require an **access provider** to have established each **outstanding policy** no later than six months after the making of the **access arrangement** referred to in section 5.1.
- (c) No later than six months after the making of the **access arrangement** referred to in section 5.1, an **access provider** must provide a statement to the **Commission** confirming the establishment of each **outstanding policy**, which statement must be signed by a director of the **access provider** and must certify that each **outstanding policy** has been established.

5.4 Decision on proposed separation arrangement

- (a) The **Commission** must make a decision whether or not to approve a proposed separation arrangement provided to it under section 5.1 as a **separation arrangement**.
- (b) If the **Commission** makes a decision to approve a proposed separation arrangement, it will be a **separation arrangement** for the purposes of these **ring fencing rules**.

- (c) If the **Commission** is not satisfied that the proposed separation arrangement:
 - (i) provides for the matters listed in section 5.2; and
 - (ii) is consistent with the objectives set out in section 38F of the Act,the **Commission** may reject the proposed separation arrangement.
- (d) If the **Commission** rejects the proposed separation arrangement:
 - (i) the **Commission** must return the proposed separation arrangement to the **access provider** with a notice in writing that outlines the matters that must be addressed for the **Commission** to approve the proposed separation arrangement as a **separation arrangement**;
 - (ii) the **access provider** must amend the proposed separation arrangement to address the matters specified by the **Commission** under paragraph (i); and
 - (iii) the **access provider** must submit the amended proposed separation arrangement to the **Commission** within 14 days after receipt of the notice referred to in paragraph (i).
- (e) Subject to paragraph (f), if the **Commission** decides to reject the amended proposed separation arrangement submitted to the **Commission** in accordance with paragraph (d)(iii), the process in this section 5.4 will continue to apply until the proposed separation arrangement is accepted as a **separation arrangement**:
 - (i) with such alterations and modifications as are necessary; and
 - (ii) as if the amended proposed separation arrangement were a proposed separation arrangement submitted for approval under section 5.1.
- (f) If the **Commission** has rejected the amended proposed separation arrangement (as described in paragraph (d)(iii)) twice on the basis that it is not satisfied with the description provided for the purpose of section 5.2(a)(i) or section 5.2(a)(iii) or both, then following the second rejection the **Commission** may either:
 - (i) return the amended proposed separation arrangement to the **access provider** for reconsideration (in which case the process in paragraph (e) above will apply); or
 - (ii) amend the amended proposed separation arrangement so that it provides for the matters listed in section 5.2 and is consistent with the objectives set out in section 38F of the Act.

5.5 Compliance with separation arrangement

On and from the date the **Commission** approves a proposed separation arrangement as a **separation arrangement** with respect to an **access provider** the **access provider** must comply with the **separation arrangement**.

5.6 Commission to approve variation to separation arrangement

- (a) An **access provider** may apply to the **Commission** to vary a **separation arrangement**.
- (b) The variation must be consistent with these **ring fencing rules**.
- (c) An application must:
 - (i) be in writing;
 - (ii) include a description of the proposed variation; and
 - (iii) state the reasons for the proposed variation.
- (d) The **Commission** must make a decision whether or not to approve a variation to a **separation arrangement**.

- (e) If the **Commission** considers that the variation that is the subject of the application is a material variation, section 5.4 applies to that variation:
 - (i) with such alterations and modifications as are necessary; and
 - (ii) as if:
 - (A) the proposed variation to be made were a proposed separation arrangement submitted for approval under section 5.1; and
 - (B) a decision under this section were a decision under section 5.4.
- (f) If the **Commission** decides to approve a variation to a **separation arrangement**, the variation takes effect on and from the date of the decision.
- (g) If an **access provider** alters its organisational structure as described in the **separation arrangement** in a manner that affects the **access activities business unit** it must notify the **Commission** in writing. The **Commission** may, by notice in writing, require the **access provider** to submit an application for variation of the **separation arrangement** in consequence of this change.

5.7 Effect of approval of separation arrangement

Any approval by the **Commission** of a separation arrangement or a variation to a **separation arrangement** does not relieve the **access provider** from any of its obligations to comply with these **ring fencing rules**.

5.8 Compliance procedures and compliance reporting

- (a) An **access provider** must provide to the **Commission** annually:
 - (A) a report by a qualified auditor that states that the auditor has audited the matters referred to in paragraph (ii) and expresses the auditor's opinion as to whether the **access provider** is in compliance with these **ring fencing rules**; and
 - (B) a report describing the measures taken by the **access provider** to ensure compliance with its obligations under these **ring fencing rules**, and providing an accurate assessment of the effect of those measures.
- (ii) For the purposes of paragraph (a)(i)(A), the matters include:
 - (A) the measures taken by the **access provider** to ensure compliance with its obligations under these **ring fencing rules**, including, without limitation, the matters set out in sub-paragraphs (B)-(J);
 - (B) the **separation arrangement** and the measures taken by the **access provider** to ensure compliance with the **separation arrangement**;
 - (C) the **access provider's** policies, procedures and systems that the **access provider** is required to establish and maintain under section 4 and the measures taken by the **access provider** to ensure compliance with those policies, procedures and systems;
 - (D) any contract, agreement, arrangement or understanding for the provision of **declared rail transport services** by the **access provider** to itself or to a **related body corporate**;
 - (E) any contract, agreement, arrangement or understanding for the provision of any services by an **other activities business unit** or a **related body corporate** of the **access provider** to the **access activities business unit**;

- (F) any contract, agreement, arrangement or understanding for the provision of any services by the **access activities business unit** to an **other activities business unit** or a **related body corporate** of the **access provider**;
 - (G) any dealings between the **access activities business unit** and an **other activities business unit** or a **related body corporate** of the **access provider** other than those described in sub-paragraphs (D), (E) and (F);
 - (H) any arrangement under which the **access provider** outsources any **access activity** or **other activity**;
 - (I) instances of any complaint made by an **access seeker** or **user** to the **access provider** in connection with a belief that the **access provider** has not complied with these **ring fencing rules**, a **separation arrangement** or the **access provider's** obligations under the **Act** with respect to information supplied by the **access seeker** or **user** to the **access provider** in confidence, and the measures taken by the **access provider** in response to such complaint; and
 - (J) instances of non-compliance by the **access provider** with these **ring fencing rules** or a **separation arrangement** and any correction or rectification measures taken by the **access provider** in respect of each instance of non-compliance.
- (iii) The auditor's report referred to in paragraph (a)(i)(A) must be conducted under **Australian Auditing and Assurance Standards** and the appointment of the auditor must be consistent with **Australian Auditing and Assurance Standards**.
- (iv) A report submitted under paragraph (a)(i)(B) must include:
- (A) details of all instances of non-compliance with each of:
 - (1) these **ring fencing rules**; and
 - (2) the **separation arrangement**;
 - (B) details of correction or rectification measures taken in respect of each instance of non-compliance;
 - (C) details of any complaints made by an **access seeker** or **user** to the **access provider** in connection with a belief that the **access provider** has not complied with:
 - (1) these **ring fencing rules**; or
 - (2) a **separation arrangement**; or
 - (3) the **access provider's** obligations under the **Act** with respect to information supplied by the **access seeker** or **user** to the **access provider** in confidence;
 - (D) details of all measures taken by the **access provider** in response to a complaint reported to the **Commission** under sub-paragraph (iv)(C); and
 - (E) a **director's responsibility statement**, specifying the date on which the statement is made and stating that in the directors' opinion, other than the instances described in sub-paragraph (iv)(C), the **access provider** has complied with its obligations under these **ring fencing rules** and any binding **separation arrangement**.

- (b) The **access provider** must provide a copy of these **ring fencing rules** and the **separation arrangement** to all directors, officers and **staff** of the **access provider** (including all new **staff**) who are required to comply with these **ring fencing rules** and the **separation arrangement**.
- (c) If an **access provider** becomes aware of any possible breach of any of its obligations under these **ring fencing rules** or a **separation arrangement**, the **access provider** must:
 - (i) notify the **Commission** in writing immediately upon becoming aware that the breach may have occurred; and
 - (ii) within five business days after the date on which the **access provider** becomes so aware, provide the **Commission** with a report detailing that possible breach and the corrective measures taken or to be taken by the **access provider** in respect of that possible breach.
- (d) The **Commission** may by notice in writing direct the **access provider** to take any measures necessary to correct any possible breaches and to ensure compliance with these **ring fencing rules** and any **separation arrangement**.
- (e) The first audit that is conducted under this section 5.8 must occur within three months of the approval of the **separation arrangement**.

5.9 **Commission may require access provider to conduct audit**

- (a) The **Commission** may at any time require the **access provider** to obtain and provide to the **Commission** a report by a qualified and independent auditor that states that the auditor has audited the matters referred to in section 5.8(a)(ii) and expresses the auditor's opinion as to whether the **access provider** is in compliance with these **ring fencing rules**.
- (b) The auditor selected by the **access provider** must be approved by the **Commission** prior to the conduct of an audit, and the **Commission** must approve the scope of the audit.
- (c) The **access provider** must ensure that the auditor has a primary duty of care to the **Commission** to conduct the audit independently and objectively, which duty of care must be formalised in a tripartite deed between the **Commission**, the **access provider** and the auditor that is directly enforceable by the **Commission**.
- (d) The auditor's report referred to in paragraph (a) must be conducted under **Australian Auditing and Assurance Standards** and the appointment of the auditor must be consistent with **Australian Auditing and Assurance Standards**.

6. **Application of ring fencing rules to joint ventures and waiver of rules**

6.1 **Application of ring fencing rules to joint ventures**

- (a) This section applies if there is more than one **access provider** in connection with **rail infrastructure**, including if:
 - (i) the relevant **rail infrastructure** is owned or operated by two or more persons as a joint venture or partnership; or
 - (ii) the **rail infrastructure** is owned and operated by different persons; or
 - (iii) **rail infrastructure** is legally owned by a person or persons on trust for others.

In such a case each **access provider** in connection with the **rail infrastructure** is referred to in this section as a **participant**.

- (b) If these **ring fencing rules** require or permit something to be done by the **access provider**, that thing may be done by one of the **participants** on behalf of all the **participants**.

- (c) If a provision of these **ring fencing rules** refers to the **access provider** bearing any costs, the provision applies as if the provision referred to any of the **participants** bearing any costs.

6.2 Waiver of ring fencing rules

The **Commission** may at its sole discretion and by notice in writing to an **access provider** waive any of an **access provider's** obligations under these **ring fencing rules** where the **Commission** considers this would be consistent with the **Commission's** statutory objectives and that compliance with the obligation would not be necessary to achieve the purpose of these **ring fencing rules** as set out in section 1.2.

7. Definitions

In these **ring fencing rules**, unless the context otherwise requires:

- (a) terms that appear **like this** and that are not otherwise defined in these **ring fencing rules** have the same meaning as in the **Act**; and
- (b) **access activity** means any of the following activities carried out by an **access provider**:
- (i) the management or maintenance of, or investment in, **rail infrastructure** used in the provision of **declared rail transport services**;
 - (ii) negotiation or management of agreements for the provision of **declared rail transport services**;
 - (iii) the assessment, allocation and management of capacity;
 - (iv) the provision, scheduling and management of **train control services**;
 - (v) an activity that is incidental to an activity referred to in paragraphs (i) to (iv);
- (c) **access activities business unit** means the **business unit** of an **access provider** that conducts **access activities** and **related access activities**;
- (d) **access provider** has the meaning set out in the **Act**;
- (e) **access provider information** means any information in the possession or control of an **access provider**, including information relating to the **access provider's access activities** and **related access activities**;
- (f) **access seeker** means a person seeking to be provided a **declared rail transport service** by an **access provider** or seeking **interconnection**;
- (g) **Act** means the **Rail Corporations Act 1996** (Vic);
- (h) **Australian Auditing and Assurance Standards** means the Australian Auditing and Assurance Standards issued by the Australian Auditing and Assurance Standards Board from time to time;
- (i) **business unit** means a distinct division, department, branch, group, team or unit of an **access provider**, or a **related body corporate** of an **access provider**;
- (j) **Commission** means the Essential Services Commission of Victoria, as established under Part 2 of the **Essential Services Commission Act 2001**;
- (k) **confidential access seeker and user information** means:
- (i) any information given to the **access provider** by an **access seeker** or **user** in confidence; and
 - (ii) any information collected by an **access provider** about an **access seeker** or **user** that is of a confidential nature (including, for example, aggregate delay information);
- (l) **declared rail transport service** means a rail transport service declared by an Order under section 381 of the **Act**;

- (m) **director's responsibility statement** means a statement signed by the Chief Executive Officer and a non-executive director of an **access provider**;
- (n) **legislation** means Commonwealth, Victorian or local government legislation including regulations, orders, by-laws, rules and other subordinate legislation or other document enforceable under any such legislation, regulations, orders, by-laws, rules or subordinate legislation;
- (o) **other activity** means any activity carried out by an **access provider** other than an **access activity** or a **related access activity**;
- (p) **other activities business unit** means a **business unit** of an **access provider** that conducts **other activities**;
- (q) **outstanding policy** means any policy, procedure or system that the **access provider** is required to establish and maintain under section 4 of these **ring fencing rules** but which the **access provider** has not established at the date of submission of a proposed separation arrangement to the **Commission** for approval in accordance with section 5.1;
- (r) **Primary Infrastructure Lease** means the agreement entitled the "Primary Infrastructure Lease", entered into between the Director and Freight Victoria Limited (ACN 075 295 644) on or about 30 April 1999, as restated on or about 31 August 2004, as amended from time to time;
- (s) **related access activity** means:
- (i) managing and implementing government projects upgrading or investing in **rail infrastructure**;
 - (ii) providing **rail infrastructure** maintenance services to third parties; and
 - (iii) any other activity approved by the **Commission** in writing;
- (t) **related body corporate** has the meaning set out in the **Corporations Act 2001** (Cth);
- (u) **shared services** means corporate administrative functions or services, human resources, accounting, finance, information technology and information technology support services, and includes the functions carried out by the executive officer or officers identified in a **separation arrangement** to whom all **staff** report either directly or indirectly;
- (v) **shared services staff** means:
- (i) **staff** involved only in corporate administrative functions or services, human resources, accounting, corporate finance, information technology support or information technology support services; and
 - (ii) the executive officer or officers identified in a **separation arrangement** to whom all **staff** report either directly or indirectly;
- (w) **staff of an access provider** means employees, servants, consultants, independent contractors or agents of the **access provider**;
- (x) **separation arrangement** means, with respect to an **access provider**, a separation arrangement that the Commission has approved under section 5.4, as amended from time to time in accordance with section 5.6; and
- (y) **user** means a person who:
- (i) is a party to an agreement under which they acquire a **declared rail transport service**; or
 - (ii) has a right to be provided a **declared rail transport service** under a **dispute resolution decision**.

Dated 1 January 2006

GREG WILSON
Chairperson
Essential Services Commission

Rail Corporations Act 1996
 VICTORIAN RAIL ACCESS REGIME
 Capacity Use Rules

1. Background

1.1 Legislative Background

Section 38T of the **Rail Corporations Act 1996** provides for the Commission to make capacity use rules in accordance with the procedures set out in section 38N. Section 38T provides:

38T. Capacity use rules

- (1) The Commission must make rules for or with respect to the carrying out of a relevant capacity allocation activity.
- (2) Without limiting sub-section (1), rules must be made that—
 - (a) require an access provider, or a related body corporate of the access provider, to surrender unutilised or under utilised train paths allocated to that access provider or that related body corporate and the circumstances for the surrender; and
 - (b) require a user to surrender unutilised or under utilised train paths allocated to them under this Part and the circumstances for that surrender; and
 - (c) require an access provider to report to the Commission actual train path utilisation and the method of that reporting.
- (3) The Commission may make rules—
 - (a) for or with respect to requiring an access provider to prepare and maintain protocols for the allocation of the capacity of a rail network;
 - (b) for or with respect to requiring an access provider to comply with protocols referred to in paragraph (a);
 - (c) for or with respect to the method by which an access provider must report to the Commission actual train path utilisation;
 - (d) that confer a function or power on, or leave anything to be decided by, the Commission in relation to any matter or thing specified in sub-section (1), (2) or this sub-section, including the power to approve protocols referred to in paragraph (a) consistent with the rules.
- (4) Rules made under this section—
 - (a) must be consistent with the principle of passenger priority; and
 - (b) must prohibit an access provider from, while carrying out a relevant capacity allocation activity, unreasonably favouring itself or another person over any other person.
- (5) In making rules under this section, the Commission must have regard to the desirability, where practicable, of reserving train paths for access seekers who are not related bodies corporate of an access provider.

Note: The procedure for making of the capacity use rules is set out in section 38N. These capacity use rules are made pursuant to section 38T.

1.2 Purpose

The purposes of these **capacity use rules** are to:

- (a) provide for a transparent and non-discriminatory process for the allocation of the capacity of a **rail network** of an **access provider** as between the **access provider** itself (including any **related body corporate** of the **access provider**), **access seekers** and **users**;

- (b) prevent capacity allocation practices designed to discourage third party access to a **rail network** of an **access provider**, for example, by prohibiting the “hoarding” of capacity;
- (c) encourage optimum use of the **rail network** of an **access provider**, for example, by requiring the surrender of unutilised or under utilised **train paths**; and
- (d) establish a framework for capacity and **train path** allocation that is consistent with the **principle of passenger priority**, and to clarify priorities between non-**passenger train paths**.

1.3 Application

Subject to section 9.2, these **capacity use rules** apply in their entirety to any **access provider**.

1.4 Commencement

These **capacity use rules** commence with effect from 1 January 2006.

2. Obligations of an access provider with respect to relevant capacity allocation activities

- (a) In carrying out a relevant **capacity allocation activity**, an **access provider** must, subject to all relevant **legislation** (including in relation to safety):
 - (i) not unreasonably favour itself or another person (including any **related body corporate** of the **access provider** or a **business unit** of the **access provider** that carries out **other activities**), over any other person;
 - (ii) act in a manner that is consistent with the **principle of passenger priority**; and
 - (iii) subject to paragraphs (i) and (ii), carry out that activity so as to encourage maximum use of the **rail network** of the **access provider**.
- (b) An **access provider** must use **all reasonable endeavours** to allocate to an **access seeker** any **train path** requested by the **access seeker** in an access application.

3. Master train timetable and network map

3.1 Master train timetable

- (a) An **access provider** must prepare, maintain and keep up to date a current **master train timetable** that shows all **passenger train paths** and **scheduled train paths**.
- (b) An **access provider** must:
 - (i) provide a copy of the **master train timetable** to an **access seeker**, a **user** or the **Commission** on request; and
 - (ii) if requested in writing to do so by an **access seeker**, a **user** or the **Commission**, answer questions about how the **access provider** has determined the **master train timetable**, including whether a **train path** is the subject of an access agreement and, if so, whether it is a **scheduled train path** or an **unscheduled train path**.

3.2 Network Map

- (a) An **access provider** must prepare, maintain and update annually a **network map** of the **access provider's rail network**.
- (b) The **network map** must show:
 - (i) each **line** of the **access provider's rail network**;
 - (ii) for each **line**, the number of **passenger train paths**, **scheduled train paths** and **unscheduled train paths** and any **available train paths**.
- (c) In preparing the **network map** and identifying **available train paths**, an **access provider** must use the standard **freight train path** specified in the protocol made under section 6.3(a)(ii).

- (d) An **access provider** must update the **network map** at least annually.
- (e) An **access provider** must make available on request by the **Commission**, or an **access seeker** or a **user**, a copy of the **network map**, together with an explanation of any assumptions underlying the allowances made by the **access provider** in producing the **network map**.

4. Allocating capacity and train paths in response to access applications

4.1 Assessment of available capacity on receipt of an access application

- (a) An **access provider** must, on receipt of an access application by an **access seeker** in accordance with section 4.1 of the **negotiation guidelines**, and in accordance with section 4.2(a) of the **negotiation guidelines**:
 - (i) if the access application relates to a request for access to a **train path**, make an assessment as to whether there is sufficient **available capacity**, in the form of an **available train path**, to meet the **access seeker's request**, having regard to the **master train timetable**, the **network map** and any information provided by the **access seeker** under section 4.1 of the **negotiation guidelines**;
 - (ii) if the access application relates to a request for the provision of **declared rail transport services** at a **terminal**, make an assessment as to whether there is sufficient **available capacity** to meet the **access seeker's request**.
- (b) Where, in the **access provider's** reasonable opinion there is insufficient **available capacity** to satisfy an **access seeker's** request under paragraph (a), the **access provider** must:
 - (i) if the request is for the provision of **declared rail transport services** in respect of a **line**, use **all reasonable endeavours** to find an alternative **train path** that satisfies the requirements of the **access seeker**; and
 - (ii) make an assessment of whether part of the **access seeker's** request can be satisfied with **available capacity** and an assessment of the works that would be required to satisfy the balance of the **access seeker's** request, consistently with each protocol made under section 4.4 of the **negotiation guidelines**; and
 - (iii) provide a written explanation to the **access seeker** as to why the **access seeker's** request could not be satisfied in full.
- (c) The **access provider** must notify the **access seeker** in writing in respect of the matters referred to in paragraph (b) in accordance with section 4.2 of the **negotiation guidelines**.

4.2 Allocation of capacity and train paths

If an **access provider**, after assessing any information provided by an **access seeker** under section 4.1 of the **negotiation guidelines**, and in accordance with section 4.2(a) of the **negotiation guidelines**, determines that there is **available capacity** to satisfy the **access seeker's** request, including a request for a **train path**, the **access provider** must notify the **access seeker** in accordance with section 4.2 of the **negotiation guidelines**.

4.3 Resolving conflicts with respect to freight train paths

- (a) This section 4.3 applies where an **access provider** receives an access application under section 3 of the **negotiation guidelines** with respect to a **freight train path** and, prior to the execution of an access agreement or the withdrawal of the access application, the **access provider** receives an access application from another **access seeker** with respect to a **freight train path**.

- (b) If two or more **access seekers** request the same **available train path** as a **freight train path** and it is not possible to satisfy both requests by using alternative but similar **train paths**, the **access provider** must allocate the **available train path** in accordance with the principle that the access application that offers the greatest utilisation of the **rail network** has priority over and will be allocated the **available train path** in preference to other applications.
- (c) For the purposes of this section 4.3:
- (i) “utilisation” includes the duration of use of the **train path** and the frequency of use of the **train path** and the aggregate tonnage of the **freight services** that use that **train path**; and
- (ii) where a request for the same **available train path** by more than one **access seeker** referred to in paragraph (b) is associated with the servicing of the same freight task, the **access seeker** that can demonstrate a contractual commitment to provide that freight task shall be deemed to be the person whose access application offers the “greatest utilisation” of the **rail network**.
- Note: The reference to “utilisation” in paragraphs (b) and (c) above is not to be taken to be a reference to **utilisation** (as defined in section 10).
- (d) An **access provider** must:
- (i) notify an **access seeker** of a decision made under paragraph (b) in accordance with section 4.2 of the **negotiation guidelines** and must provide reasons for that decision referable to the “utilisation” criteria set out in paragraph (c); and
- (ii) provide a copy of the notice referred to in sub-paragraph (i) to the **Commission** at the same time as the **access provider** provides the notice to the **access seeker**.
- (e) For the avoidance of doubt, an **access provider** may not require or request an **access seeker** seeking the provision of **declared rail transport services** for the purpose of providing **freight services** to identify a consignee.

4.4 Allocation of train paths must be in accordance with these capacity use rules

An **access provider** must not allocate a **train path** other than in accordance with these **capacity use rules**.

5. Variation of and surrender of a train path

5.1 Permanent variation of train paths consequent upon variation of passenger service timetable approved by Director of Public Transport

- (a) If the Director of Public Transport approves, varies or approves the variation of a timetable for a **passenger service** in accordance with section 10 of the **Transport Act 1983**, then, subject to the matters set out in that section, an **access provider** must make the relevant **train paths** available to the relevant **user** for the provision of those **passenger services** and must vary any **train path** of another **user** (including a **user** with a **train path** under an **existing arrangement**) that is necessary to accommodate the change in the **passenger service** timetable.
- (b) When varying the **train paths** of other **users** in the circumstances referred to in paragraph (a), an **access provider** must:
- (i) first, vary **train paths** in the following order:
- (A) **unscheduled train paths**;
- (B) **scheduled train paths**; and

- (C) other **passenger train paths**, but only where there is no other means of accommodating the change in the **passenger service timetable**;
- (ii) second, having complied with paragraph (i), re-allocate **train paths** in accordance with the following order of priorities:
 - (A) other **passenger train paths**;
 - (B) **scheduled train paths**; and
 - (C) **unscheduled train paths**;
- (iii) subject to complying with paragraph (ii), use **all reasonable endeavours** to minimise the disruption to **users** with entitlements to affected **train paths**; and
- (iv) subject to complying with paragraph (iii), use **all reasonable endeavours** to provide satisfactory alternative **train paths** to affected **users**.

5.2 Permanent variation of certain freight train paths

- (a) An **access provider** must make available an **unscheduled train path** for the purposes of making that **train path** available to an **access seeker** who seeks to use that **train path** as a **scheduled train path** and must vary the **train path** of that **user** if that **train path** is allocated to that **access seeker**.
- (b) An **access provider** must give the **user** not less than 30 days prior written notice of the variation to the **train path** of the **user**.

5.3 Variation of train paths by agreement between access provider and user

Subject to complying with each **binding protocol**, if a **user** requests a permanent variation to an existing **train path**, the **access provider** must:

- (a) negotiate with the **user** in good faith; and
- (b) use **all reasonable endeavours** to vary the **train path**, so long as such variation does not interfere with a **train path** of another **user**.

5.4 Variation or surrender of train paths as a result of a breach of relevant legislation, standards or access provider's requirements

Subject to complying with each **binding protocol**, an **access provider** may permanently vary, temporarily vary, or require a **user** to surrender a **train path** of that **user** where the **user** is in breach of relevant **legislation**, any applicable **standard** or the **access provider's rolling stock interface standards** or fails to comply with other material requirements for the operation of **rolling stock** on a **rail network** of the **access provider**.

5.5 Revision of status and surrender of under utilised freight train paths

Where an **access provider** determines that a **freight train path** has not been operated to the level of **utilisation** applicable to that **train path**, as stated in the protocol made under section 6.3(a)(iv), the **access provider** must:

- (a) if the **freight train path** is a **scheduled train path**, revise the status of that **train path** to the status of an **unscheduled train path**; and
- (b) if another **access seeker** or **user** has made a request for that **train path** as a **scheduled train path**, require the **user** to surrender the **train path** for the purpose of making the **train path** available to satisfy the request.

5.6 Surrender of train paths

If:

- (a) an **access provider** reasonably believes that a **user** is no longer able or will no longer be able to **utilise** or fully **utilise** a **freight train path**:
 - (i) to the extent contemplated in an access agreement or **existing arrangement** or entitlement to that **train path** (for example, due to loss of a freight contract); or

- (ii) if the **existing arrangement** or entitlement does not specify a degree of **utilisation** with respect to that **train path**, in accordance with the level of **utilisation** applicable to that type of **train path** stated in the protocol made under section 6.3(a)(iv),

then:

- (b) after having complied with any **binding protocol** made under section 6.3(a)(viii); and
- (c) provided that the **access provider** has acted reasonably and in good faith when considering any response by a **user** to the notice given by the **access provider**,

if the **access provider** determines that the **user** has failed to demonstrate its ability to **utilise** or fully **utilise** that **train path** to the extent contemplated in that access agreement or entitlement, or has otherwise failed to show cause, the **access provider** must by notice in writing to the **user** require the **user** to surrender the **train path**.

5.7 Temporary variations to train paths by access provider

- (a) Subject to complying with each **binding protocol**, an **access provider** may vary a **train path** on a temporary basis for one or more of the following purposes:
 - (i) safety;
 - (ii) repair, maintenance, the upgrading or extension or construction of or making alterations to the **rail network** or **rail infrastructure** of the **access provider**;
 - (iii) at the request of a **user**, where such an adjustment does not interfere with a **train path** of another **user**; or
 - (iv) at the request of the Director of Public Transport, where such adjustment is for the purposes of providing passenger services for a special event.
- (b) If an **access provider** varies a **train path** on a temporary basis, the **access provider** must:
 - (i) first, vary **train paths** in the following order:
 - (A) **unscheduled train paths**;
 - (B) **scheduled train paths**; and
 - (C) **passenger train paths**;
 - (ii) second, having complied with paragraph (i), re-allocate **train paths** in accordance with the following order of priorities:
 - (A) **passenger train paths**;
 - (B) **scheduled train paths**; and
 - (C) **unscheduled train paths**;
 - (iii) subject to complying with paragraph (ii), use **all reasonable endeavours** to minimise the disruption to **users** with entitlements to affected **train paths**; and
 - (iv) subject to complying with paragraph (iii), use **all reasonable endeavours** to provide satisfactory alternative **train paths** to affected **users**.

6. Protocols and capacity allocation protocols

6.1 Obligation to prepare capacity allocation protocols

- (a) An **access provider** must prepare and maintain a statement of capacity allocation protocols.
- (b) The statement of capacity allocation protocols must contain a copy of each **binding protocol** that the **access provider** is required to prepare and maintain under these **capacity use rules** and that the **Commission** has approved under these **capacity use rules**.

- (c) If a **binding protocol** is varied, the **access provider** must update the statement of capacity allocation protocols accordingly.

6.2 Publication of statement of capacity allocation protocols

An **access provider** must:

- (a) make available for inspection at its offices; and
- (b) publish on its website,

a copy of the statement of capacity allocation protocols, as updated from time to time.

6.3 Content of protocols

- (a) An **access provider** must prepare and maintain protocols for the allocation of the capacity of a **rail network** of the **access provider**, which must include:
 - (i) a policy for identifying each **line** of the **access provider's rail network**;
 - (ii) a definition of the standard **freight train path** used for allocating **freight train paths**;
 - (iii) a policy, guidelines and procedures that an **access provider** will apply when assessing a request to be provided a **declared rail transport service**, including a request for a **train path**, which must be consistent with the **negotiation guidelines**;
 - (iv) a description of the required degrees of **utilisation** in respect of **scheduled train paths** and **unscheduled train paths** and the decision criteria that the **access provider** will employ, and an explanation of how the **access provider** will apply those decision criteria, for the purpose of determining whether a **train path** will be:
 - (A) reassigned as an **unscheduled freight train path** in accordance with section 5.5; or
 - (B) required to be surrendered in accordance with section 5.6, which decision criteria must represent an objective test based on the proposed or actual degree of **utilisation** of that **train path**;
 - (v) guidelines, principles and procedures that the **access provider** will apply when responding to or issuing a request to vary permanently a **train path**;
 - (vi) a description of the circumstances in which an **access provider** may permanently vary or require the surrender of a **train path** of a **user** due to a breach by the **user** of relevant **legislation**, an applicable **standard** or the **access provider's rolling stock interface standards** or any other requirement of the **access provider** for the operation of **rolling stock** on a **rail network** of the **access provider** and, where those circumstances create a risk of injury to persons or damage to property, including damage to **rail infrastructure**, may permit the **access provider** to suspend the **train path** immediately until the **user** has addressed the risk to the reasonable satisfaction of the **access provider**;
 - (vii) guidelines, principles and procedures that the **access provider** will apply when determining whether to vary permanently or require the surrender of a **train path** of a **user** in the circumstances referred to in paragraph (vi), which must require an **access provider**:
 - (A) to give a **user** a written notice stating:
 - (1) that it is a notice under section 5.4 of these **capacity use rules**;
 - (2) the alleged breach;

- (3) that the **user** is required to show cause in writing why the **access provider** should not require the permanent variation or surrender of the **train path** the subject of the alleged breach;
 - (4) the date by which the **user** is required to show cause (which must not be less than 14 days after the **user** receives the notice); and
 - (5) that if the **user** does not show reasonable cause by the stated date, the **access provider** may by written notice to the **user** permanently vary or require the surrender of the **train path**;
 - (B) subject to complying with paragraph (A) and when considering any response by a **user** to a “show cause” notice given by the **access provider** under paragraph (A), to act reasonably and in good faith; and
 - (C) subject to complying with paragraph (B), and if the **access provider** determines that the **user** has failed to show cause and that the **train path** should be permanently varied or surrendered, to give the **user** a written notice varying permanently or requiring the surrender of the **train path** and stating the date on which the permanent variation or surrender of the **train path** shall be effective, such date to be not less than 14 days from the date of receipt by the **user** of the notice;
- (viii) guidelines, principles and procedures that the **access provider** will apply when determining whether a **user** is no longer able or will no longer be able to **utilise** or fully **utilise** a **freight train path**, which must require the **access provider**:
 - (A) to give the user a written notice:
 - (1) stating that it is a notice given under section 5.6 of these **capacity use rules**;
 - (2) requiring the user to demonstrate its ability to **utilise**, or fully **utilise** that **train path** to the extent contemplated in section 5.6(a)(i) or (ii) (as applicable) or otherwise to show cause in writing why the **access provider** should not require the surrender of the **train path** the subject of the notice;
 - (3) stating the date by which the **user** is required to provide a written response to the **access provider** (which must not be less than 14 days after the **user** receives the notice); and
 - (4) stating that if the **user** does not show reasonable cause in writing by the stated date, the **access provider** may by written notice to the **user** require the surrender of the **train path** that is the subject of the notice;
 - (B) to act reasonably and in good faith when considering any response by a **user** to a notice given under paragraph (A);
- (ix) a description of the circumstances in which the **access provider** may vary a **train path** on a temporary basis:
 - (A) to repair, maintain, upgrade, extend, construct or make alterations to the **rail network** or **rail infrastructure** of the **access provider**;

- (B) for reasons of safety or for the prevention of injury or damage to the **rail network** or **rail infrastructure** of the **access provider** or to other persons or property; and
- (C) at the request of a **user**;
- (x) the procedures and communications protocols that the **access provider** will follow when varying a **train path** on a temporary basis, including:
 - (A) the period and form of notice that the **access provider** is required to give to affected **users**; and
 - (B) processes for consultation with affected **users**; and
- (xi) principles and procedures for addressing complaints from a **user** or **access seeker** about an alleged failure of the **access provider** to comply with these **capacity use rules**, which must require an **access provider** to:
 - (A) address each complaint in good faith; and
 - (B) report to the **Commission** each such complaint and the measures taken by the **access provider** in response to such complaint.

6.4 Decision on proposed protocols

- (a) An **access provider** must submit to the **Commission** for approval at the same time as it is required to submit a proposed access arrangement proposed protocols for the matters set out in section 6.3.
- (b) The **Commission** must make a decision whether or not to approve a proposed protocol provided to it under section 6.4(a).
- (c) If the **Commission** makes a decision to approve a proposed protocol, that protocol will be a **binding protocol** for the purposes of these **capacity use rules**.
- (d) If the **Commission** is not satisfied that the proposed protocol:
 - (i) provides for those matters listed in section 6.3 that the proposed protocol states it provides; and
 - (ii) is consistent with the objectives set out in section 38F of the **Act**, the **Commission** may reject the proposed protocol.
- (e) If the **Commission** rejects the proposed protocol:
 - (i) the **Commission** must return the proposed protocol to the **access provider** with a notice in writing that outlines the matters that must be addressed for the **Commission** to approve the proposed protocol as a binding protocol;
 - (ii) the **access provider** must amend the proposed protocol to address the matters specified by the **Commission** under paragraph (i); and
 - (iii) the **access provider** must submit the amended proposed protocol to the **Commission** within 14 days after receipt of the notice referred to in paragraph (i).
- (f) If the **Commission** decides to reject the amended proposed protocol submitted to the **Commission** in accordance with paragraph (e)(iii), the process in this section 6.4 will continue to apply until the proposed protocol is accepted as a **binding protocol**:
 - (i) with such alterations and modifications as are necessary; and
 - (ii) as if the amended proposed protocol were a proposed protocol submitted for approval under section 6.4(a).

6.5 Access provider's obligation to comply with protocols

On and from the date the **Commission** approves a proposed protocol as a **binding protocol** with respect to an **access provider**, the **access provider** must comply with the **binding protocol**.

6.6 Variation of protocols

- (a) An **access provider** may apply to the **Commission** to vary a **binding protocol**.
- (b) The variation must be consistent with these **capacity use rules**.
- (c) An application must:
 - (i) be in writing;
 - (ii) include a description of the proposed variation; and
 - (iii) state the reasons for the proposed variation.
- (d) The **Commission** must make a decision whether or not to approve a variation to a **binding protocol**.
- (e) If the **Commission** considers that the variation that is the subject of the application is a material variation, section 6.4 applies to that variation:
 - (i) with such alterations and modifications as are necessary; and
 - (ii) as if:
 - (A) the proposed variation to be made were a proposed protocol submitted for approval under section 6.4(a); and
 - (B) a decision under this section were a decision under section 6.4.
- (f) If the **Commission** decides to approve a variation to a **binding protocol** under this section, the variation takes effect, and is binding on the **access provider**, on and from the date of the decision.

7. Access agreements and other arrangements with users

- (a) Subject to paragraphs (c) and (d), an **access provider** must ensure that any contract, agreement, arrangement or understanding entered into by the **access provider** and an **access seeker** or a **user** for the provision of **declared rail transport services**:
 - (i) is consistent with these **capacity use rules**;
 - (ii) is consistent with each **binding protocol** that the **access provider** is required to prepare and maintain under these **capacity use rules**; and
 - (iii) permits the **access provider** to comply with its obligations under these **capacity use rules**, including with respect to varying, making available or requiring the surrender of **train paths** in accordance with section 5.
- (b) Without limiting paragraph (a), an **access provider** must ensure that any contract, agreement, arrangement or understanding referred to in paragraph (a) which commences after the commencement date of these **capacity use rules**:
 - (i) specifies, in respect of each allocated **train path**, whether that **train path** is a **passenger train path**, a **scheduled train path** or an **unscheduled train path**; and
 - (ii) if the relevant **train path** is a **scheduled train path** or an **unscheduled train path**, specifies a proposed degree of **utilisation** in respect of that **train path** which is consistent with each binding protocol that the **access provider** is required to prepare and maintain under these **capacity use rules**.
- (c) Except where these **capacity use rules** provide otherwise, an **access provider** must use **all reasonable endeavours** to ensure that any **existing arrangement**:
 - (i) is consistent with these **capacity use rules**;
 - (ii) is consistent with each **binding protocol** that the **access provider** is required to prepare and maintain under these **capacity use rules**; and
 - (iii) permits the **access provider** to comply with its obligations under these **capacity use rules**, including with respect to varying, making available or requiring the surrender of **train paths** in accordance with section 5.

- (d) For the avoidance of doubt, subject to complying with paragraph (c), if an **access provider**, after having used **all reasonable endeavours**, is unable to vary or require the surrender of a **train path** under an **existing arrangement** the **access provider** is not required to vary or require the surrender of that **train path** in accordance with those sections.

Note: If practicable to do so, the **Commission** expects access providers to use **all reasonable endeavours** to renegotiate their **existing agreements** to incorporate processes that are consistent with the requirements of sections 5.2 to 5.6.

8. Reporting of actual train path utilisation

8.1 Recording utilisation of train paths

An **access provider** must prepare, maintain and keep records of movements of **rolling stock**, including **train services** and **trains**, on each **line** of the **access provider**, which records must be kept in a form such as to enable them to be reviewed against the **access provider's master train timetable**.

8.2 Reporting utilisation of train paths

- (a) An **access provider** must provide a report to the **Commission** on or before the twentieth day of each calendar quarter describing actual **train path utilisation** in the calendar quarter immediately preceding the date of the report.
- (b) A report submitted under paragraph (a) must include, with respect to each **user**, details of:
- (i) actual **utilisation** of **scheduled train paths**;
 - (ii) actual **utilisation** of **unscheduled train paths**, including maintenance **train paths** but excluding sidings;
 - (iii) the methodology used to produce the calculations in the report;
 - (iv) any notices given by the **access provider** to a **user** of the variation or surrender of a **train path** under sections 5.2, 5.3, 5.4, 5.5 and 5.6;
 - (v) evidence of the **access provider's** compliance with its obligations under sections 5.2, 5.3, 5.4, 5.5 and 5.6;
 - (vi) any **trains** or **train services** cancelled by the **access provider**; and
 - (vii) instances of the unavailability of any part of the **rail network** the subject of a **scheduled train path** not due to State-sponsored **rail network alterations**.
- (c) If directed in writing to do so by the **Commission**, an **access provider** must adjust the methodology used to produce the calculations in the report submitted under paragraph (a) and must resubmit the report to the **Commission** within 28 days of the date of such direction or such longer period as notified by the **Commission** in writing to the **access provider**.

9. Application

9.1 Application of capacity use rules to joint ventures

- (a) This section applies if there is more than one **access provider** in connection with **rail infrastructure**, including if:
- (i) the relevant **rail infrastructure** is owned or operated by two or more persons as a joint venture or partnership; or
 - (ii) the **rail infrastructure** is owned and operated by different persons; or
 - (iii) **rail infrastructure** is legally owned by a person or persons on trust for others.

In such a case each **access provider** in connection with the **rail infrastructure** is referred to in this section as a participant.

- (b) If these **capacity use rules** require or permit something to be done by the **access provider**, that thing may be done by one of the participants on behalf of all the participants.

- (c) If a provision of these **capacity use rules** refers to the **access provider** bearing any costs, the provision applies as if the provision referred to any of the participants bearing any costs.

9.2 Waiver of capacity use rules

- (a) The **Commission** may at its sole discretion and by notice in writing to an **access provider** waive any of an **access provider's** obligations under these **capacity use rules** where the **Commission** considers this would be consistent with the **Commission's** statutory objectives and that compliance with the obligation would not be necessary to achieve the purpose of these **capacity use rules** as set out in section 1.2.

10. Definitions

In these **capacity use rules**, unless the context otherwise requires:

- (a) terms that appear **like this** and that are not otherwise defined in these **capacity use rules** have the same meaning as in the **Act**;
- (b) **access provider** has the meaning set out in the **Act**;
- (c) **access seeker** when used in these **capacity use rules** means a person, including a **business unit** or **related body corporate** of the **access provider**, seeking to be provided a **declared rail transport service** by an **access provider**;
- (d) **Act** means the **Rail Corporations Act 1996** (Vic);
- (e) in deciding whether an **access provider** has used **all reasonable endeavours**, regard shall be had to relevant **standards**, **good industry practice** and other regulatory requirements, the performance of other **access providers** and to interstate, national and international benchmarks;
- (f) **alteration** in respect of **rail infrastructure**, means any material addition to, extension to, modification of, replacement of, recovery of, repair of, maintenance of, removal from, deletion to, destruction of, damage to, loss of or inability to use that **rail infrastructure**;
- (g) **available capacity** means:
 - (i) with respect to a rail **line**, the **available train paths** for that line, as determined by the **access provider** in accordance with these **capacity use rules** and each **binding protocol**;
 - (ii) with respect to a **terminal**, the capability of **providing declared rail transport services** at that **terminal** after taking into account existing contractual commitments and any requirements to reserve capacity for the prudent operation of the **terminal** in accordance with all applicable **standards** and **good industry practice**;
- (h) **available train path** means:
 - (i) a **train path** that is not allocated to a **user** in the **access provider's** **master train timetable**;
 - (ii) with respect to a **freight train path**, any **freight train path** that a **user** is required to surrender in accordance with these **capacity use rules**;
 - (iii) with respect to a **passenger service**, any **freight train path**;
 - (iv) with respect to an application for a **scheduled train path**, any other **freight train path**;
- (i) **binding protocol** means a protocol that has been approved by the **Commission** under section 6.4, and includes a protocol containing amendments approved by the **Commission** in accordance with section 6.6;

- (j) **business unit** means a distinct division, department, branch, group, team or unit of a business or company, or a separate company;
- (k) **conditional**, in respect of a **freight train path**, means the entitlement of a **user** to use a **train path** on a **rail network** of an **access provider** which **train path**:
 - (i) does not conflict with a **passenger train path** or a **scheduled train path**; and either
 - (ii) provides for optional destinations; or
 - (iii) permits the **train path** to be re-allocated:
 - (A) on the basis of seasonal or intermittent requirements; or
 - (B) in order to provide reserve or surge capacity;
- (l) **declared rail transport service** means a rail transport service declared by an Order under section 38I of the Act;
- (m) **existing arrangement** means a contract or agreement between the **access provider** and a **user** for the provision of **declared rail transport services** (which includes, for the avoidance of doubt, the provision of **declared rail transport services** by the **access provider** to itself or to a **related body corporate** under a memorandum of understanding) that commenced before the commencement date of these **capacity use rules** and that is still in force;
- (n) **flexible**, in respect of a **freight train path**, means the entitlement of a **user** to a **train path**:
 - (i) which does not conflict with a **passenger train path** or a **scheduled train path**; and
 - (ii) which, for a particular day, the **line** entry and exit time (nominated by the **access provider**) is a time as close as possible to the **line** entry and exit time requested by the **user** but not less than 48 hours prior to the requested **line** entry time; and
 - (iii) where that entitlement arises other than pursuant to an access agreement with the **access provider**;
- (o) **force majeure** event means any circumstances beyond the reasonable control of a person (including a **business unit** of an **access provider**) which occur without the negligence of that person (including a **business unit** of an **access provider**) and includes inevitable accident, storm, flood, fire, earthquake, explosion, peril of navigation, hostility, war (declared or undeclared), insurrection, sabotage, executive or administrative order or act of either general or particular application of any government prohibition or restriction by domestic or foreign laws, regulations or policies (other than laws specifically for that purpose passed by the Commonwealth), quarantine or customs restrictions, strike, lockout or industrial dispute, break-down or damage to or confiscation of property but does not include breakdown or delay of any **rolling stock** operated by the **user**;
- (p) **freight services** means **rail transport services** that are not **passenger services** or **rail transport services** that are provided by means of a **terminal**;
- (q) **freight train path** means an entitlement of a **user** to use a **train path** on a **rail network** of an **access provider** to provide **freight services**, and includes a **scheduled train path** and an other **freight train path**;
- (r) **good industry practice** means all those practices followed in the commercial railway industry when an activity is undertaken in accordance with all applicable **legislation** and **standards** and with due care and skill;

- (s) **legislation** means Commonwealth, Victorian or local government legislation including regulations, orders, by-laws, rules and other subordinate legislation or other document enforceable under any such legislation, regulations, orders, by-laws, rules or subordinate legislation;
- (t) **line** in respect of the **rail network** of an **access provider**, means the rail path between two locations on the **rail network** that may be the subject of a **train path** and that has a common volume of capacity, identified in accordance with the protocol referred to in section 6.3(a)(i);
- (u) **master train timetable** means the timetable prepared and maintained in accordance with section 3.1(a);
- (v) **network map** means the map prepared and maintained in accordance with section 3.2;
- (w) **other activity** means any activity carried out by an **access provider** other than an **access activity**;
- (x) **passenger services** means railway services for the carriage of passengers by **train** between locations on the **rail network** of an **access provider**;
- (y) **passenger train path** means either:
- (i) an entitlement of a **user** under an access agreement to use a **train path** on a **rail network** of an **access provider** to provide **passenger services** which has a fixed **line** entry and exit time and fixed intervals for passenger stops; or
 - (ii) a passenger train path specified in the timetable approved by the Director of Public Transport, as amended from time to time, under section 10 of the **Transport Act 1983**;
- (z) **principle of passenger priority** means the giving of priority to the provision of **declared rail transport services** to **passenger service users** over the provision of **declared rail transport services** to **other users**;
- (aa) **rail network** means the **rail infrastructure** used to provide **declared rail transport services**;
- (bb) **related body corporate** has the meaning set out in the **Corporations Act 2001** (Cth);
- (cc) **relevant capacity allocation activity** means:
- (i) assessing the **capacity** of a **rail network**;
 - (ii) allocating the **capacity** of a **rail network**;
 - (iii) allocating **train paths**;
 - (iv) any activity that is ancillary to any activity referred to in paragraphs (i) to (iii);
- (dd) **reserved**, in respect of a **train path**, means the future entitlement of a **user**, including an **access provider** or a **related body corporate** of an **access provider**, to use a **train path** on the **rail network** of the **access provider** and is only received where there are reasonable contractual commitments for its future use;
- (ee) **rolling stock** means locomotives, carriages, wagons, rail cars, rail motors, light rail vehicles, light inspection vehicles, rail/road vehicles, trolleys and any other vehicle that operates on or uses the rail track;
- (ff) **rolling stock interface standards** means the rolling stock interface standards that an **access provider** is required to prepare and maintain under and in accordance with the **network management rules**;
- (gg) **scheduled**, in respect of a **freight train path**, means the entitlement of a **user** to use a **train path** on a **rail network** of an **access provider** for **freight services** which has a fixed **line** entry and exit time;

- (hh) **standard** means any standard or code of practice issued from time to time by Standards Australia (an incorporated body formerly known as the Standards Association of Australia), the Association of American Railroads, the International Union of Railways, British Standards, Federal Railroad Administration, the Australasian Railway Association or such similar body to the extent that the standard or code is applicable to the Victorian railway industry;
- (ii) **train** means a locomotive and with or without wagons used to operate **train services**;
- (jj) **train path** means a right (whether arising under an agreement or otherwise) to operate **rolling stock** between particular locations on a **rail network** at particular times;
- (kk) **train service** means a **train** run by a **user**, an **access provider** or a **related body corporate** of an **access provider** by which that person provides railway **freight services** or **passenger services**;
- (ll) **unscheduled**, in respect of a **freight train path**, means a **conditional train path**, a **flexible train path** or any other **train path** that is not a **passenger train path** or a **scheduled train path**;
- (mm) **user**, when used in these **capacity use rules**, means any person, including the **access provider** or a **related body corporate** of the **access provider** who:
- (i) acquires or uses a **declared rail transport service** or is a party to an agreement, arrangement or understanding under which they acquire or use a **declared rail transport service**; or
 - (ii) has a right to be provided a **declared rail transport service** under a **dispute resolution decision**; and
- (nn) **utilisation**, with respect to a **train path**, means the frequency with which the **train path** is used. A **train path** is used when a **train service** or **train** is:
- (i) presented at the scheduled **line** entry point;
 - (ii) exits at the scheduled **line** exit point;
 - (iii) the times of entry or exit are not so dissimilar to the scheduled line entry and exit times so as to require the issue of a separate or new **train path**; and
 - (iv) the relevant **train service** or **train** operates reasonably in accordance with the terms of the access agreement or **existing arrangement** or **dispute resolution decision** applicable to that **train** or **train service** on that **train path**.

For the avoidance of doubt, there is no failure to use a **train path** as contemplated in paragraphs (i), (ii) and (iii) if the failure occurs:

- (v) because an **access provider** and a **user** agree to substitute an alternative **train path**; or
- (vi) because of a **force majeure** event or because the **access provider** does not make the **rail network** available to the **user**, other than as a result of an act or omission of the **user**.

Dated 1 January 2006

GREG WILSON
Chairperson
Essential Services Commission

Rail Corporations Act 1996
VICTORIAN RAIL ACCESS REGIME
Network Management Rules

1 Background

1.1 Legislative Background

Section 38U of the **Rail Corporations Act 1996** provides for the Commission to make network management rules in accordance with the procedures set out in section 38N. Section 38U provides:

38U. Network management rules

- (1) The Commission must make rules for or with respect to the carrying out of a relevant rail network management activity.
- (2) The Commission may make rules—
 - (a) for or with respect to requiring an access provider to prepare and maintain protocols for the management of a rail network;
 - (b) for or with respect to requiring an access provider to comply with protocols referred to in paragraph (a);
 - (c) that confer a function or power on or leave anything to be decided by the Commission in relation to any matter or thing specified in sub-section (1) or this sub-section, including the power to approve protocols referred to in paragraph (a) consistent with the rules.
- (3) Rules made under this section—
 - (a) must be consistent with the principle of passenger priority; and
 - (b) must prohibit an access provider from, while carrying out a relevant network management activity, unreasonably favouring itself or another person over any other person.

Note: The procedure for making of the network management rules is set out in section 38N. These network management rules are made pursuant to section 38U.

1.2 Purpose

The purpose of these **network management rules** is to:

- (a) achieve transparency in the conduct of **relevant rail network management activities**, by requiring an **access provider** to establish and make publicly available a set of **binding protocols** and certain other documents relating to the management of the **rail network**, which together comprise a statement of the principles and practices that will be applied to the real time management of the **rail network**; and
- (b) ensure that **access providers** carry out **relevant rail network management activities** in a non-discriminatory manner as between the **access provider** (including any **related body corporate** of the **access provider**) and other persons.

1.3 Application

Subject to section 11.2, these **network management rules** apply in their entirety to all **access providers**.

1.4 Commencement

These **network management rules** commence with effect from 1 January 2006.

2. General obligations of an access provider with respect to relevant rail network management activities

2.1 Obligations of an access provider with respect to relevant rail network management activities

In carrying out a **relevant rail network management activity**, an **access provider** must, subject to all relevant **legislation** (including in relation to safety):

- (a) not unreasonably favour itself or another person (including any **related body corporate** of the **access provider** or a **business unit** of the **access provider** that carries out **other activities**), over any other person;
- (b) act in a manner that is consistent with the **principle of passenger priority**;
- (c) use all **reasonable endeavours** to promote the compatibility in operations of its **rail network** with the operations of any other **rail network** of an **access provider** that interfaces with the **access provider's rail network**; and
- (d) use **all reasonable endeavours** to maximise the use of the **rail network**.

2.2 Access agreements and other arrangements for the provision of declared rail transport services

An **access provider** must ensure that any contract, agreement, arrangement or understanding between that **access provider** and an **access seeker** or a **user** for the provision of **declared rail transport services** is consistent with these **network management rules**.

3. Operating Handbook

3.1 Obligation to prepare operating handbook

- (a) An **access provider** must prepare and maintain an operating handbook.
- (b) The operating handbook must contain a copy of:
 - (i) each **binding protocol** that the **access provider** is required to prepare and maintain under sections 4 and 8 of these rules and that the **Commission** has approved under these rules;
 - (ii) protocols made under section 5 of these rules; and
 - (iii) the **rolling stock interface standards**.
- (c) If a **binding protocol** or other protocol made under section 5 is varied, or if the **rolling stock interface standards** are varied, the **access provider** must update the operating handbook accordingly.

3.2 Publication of protocols and operating handbook etc

- (a) An **access provider** must:
 - (i) make available for inspection at its offices; and
 - (ii) publish on its website,
a copy of the operating handbook, as updated from time to time.

4. Protocols for the management of a rail network

4.1 Short term scheduling and planning train services

- (a) An **access provider** must prepare and maintain protocols for the short-term scheduling and rescheduling of **train paths** and the short-term planning of **train services**.
- (b) Without limiting paragraph (a), protocols made under paragraph (a) must:
 - (i) require an **access provider** to prepare a **daily train plan** on a weekly basis;

- (ii) require that the **daily train plan** be consistent with the **master train timetable**, subject to specific exceptions identified in the protocols, which may include **rail network possessions** (as described in section 4.5) and the allocation of **unscheduled train paths**;
- (iii) require that the **daily train plan** be accurate with respect to all information known at the time of its preparation;
- (iv) require that where an **access provider** has varied an allocated **train path**, the **access provider** amend the **daily train plan** accordingly;
- (v) require an **access provider** to undertake **real-time scheduling** and planning of **train services** in accordance with the **daily train plan**;
- (vi) require that if the **daily train plan** varies from the **master train timetable**:
 - (A) the **access provider** must use **all reasonable endeavours** to minimise disruption to **users**;
 - (B) the **access provider** must apply the following order of priorities when rescheduling **train paths**:
 - (1) first, **passenger train paths**;
 - (2) second, **scheduled freight train paths**; and
 - (3) third, **unscheduled freight train paths**;
- (vii) specify the principles and procedures that the **access provider** will apply in undertaking **real-time scheduling** and planning of **train services**;
- (viii) specify the circumstances in which an **access provider** must obtain the consent of **users** to a **train path** allocation in the **daily train plan** that differs from the **master train timetable**;
- (ix) specify the circumstances in which the **access provider** will make available an **unscheduled train path** to a **user** on the request of a **user**; and
- (x) require an **access provider** to use **all reasonable endeavours** to accommodate a request of a **user** under paragraph (ix), subject to meeting existing **train path** commitments under the **master train timetable**.

4.2 Train control services

- (a) An **access provider** must prepare and maintain protocols with respect to **train control services**, including protocols for giving directions to **train operators** with respect to the operation of or the granting of permission to operate **rolling stock**, including a **train** or a **train service**, between particular locations on the **rail network** of the **access provider** at particular times.
- (b) Without limiting paragraph (a), protocols made under paragraph (a) must:
 - (i) specify the requirements that a **train operator** must satisfy before the **train operator** is permitted to enter the **rail network** of the **access provider**, including any requirement to comply with any **rolling stock interface standards** of the **access provider**, to provide a **train manifest** to the **access provider** and to have a **train path**;
 - (ii) require that **train operators** who use the **rail network** of the **access provider** comply immediately with a direction given by a **train controller**;
 - (iii) require an **access provider**, when providing **train control services**, to use **all reasonable endeavours** to facilitate the running of **train services** and **trains** in accordance with the allocated **train paths** and scheduled **line** entry and exit times set out in the **daily train plan**, subject to:
 - (A) safety considerations;

- (B) matters outside the control of the **access provider**;
- (C) requisite notice from the **train operator** and presentation of the **train operator's train service** or **train on time** at the scheduled **line** entry point;
- (D) emergencies and **force majeure events**; and
- (E) other reasonable matters identified in the protocols;
- (iv) specify the practices and procedures that the **access provider** will apply in order to facilitate the running of **train services** and **trains** in accordance with the allocated **train paths** and scheduled **line** entry and exit times set out in the **daily train plan**;
- (v) specify the train control practices and procedures that the **access provider** will apply in circumstances where, as a result of a matter outside the control of the **access provider**, an emergency or a **force majeure event**:
 - (A) the provision of **declared rail transport services** is interrupted or prevented or restricted; and
 - (B) the **access provider** is required to resolve competing interests of **users**; and
- (vi) require an **access provider**, in the circumstances set out in paragraph (v), to:
 - (A) comply with the **train path priorities**;
 - (B) subject to paragraph (A), use **all reasonable endeavours** to minimise disruptions to **train paths** and **train services**; and
 - (C) subject to paragraph (A), use **all reasonable endeavours** to provide to each affected **user** an alternative **train path**.

4.3 Protocols for managing operational conflicts

- (a) An **access provider** must prepare and maintain protocols for the management of operational conflicts, including protocols for the real time re-allocation of **train paths**:
 - (i) in circumstances where a **train service** or **train**:
 - (A) is or, in the reasonable opinion of the **access provider**, is likely to be delayed or cancelled; or
 - (B) arrives late or early at the scheduled **line** entry point; and
 - (ii) in the event of a conflict between a **healthy train service** or **train** and an **unhealthy train service** or **train** or between a **healthy train service** or **train** and a **train service** or **train** that is **running ahead**, or between an **unhealthy train service** or **train** and a **train service** or **train** that is **running ahead**.
- (b) Protocols made under paragraph (a)(i) must require the **access provider** to:
 - (i) use **all reasonable endeavours** to accommodate a **train service** or **train** that arrives late or early at the scheduled **line** entry point;
 - (ii) comply with the **train path priorities**;
 - (iii) subject to paragraph (ii), use **all reasonable endeavours** to minimise disruptions to **train paths** and **train services**; and
 - (iv) subject to paragraph (ii), use **all reasonable endeavours** to provide to each affected **user** an alternative **train path**.
- (c) Protocols made under paragraph (a)(ii) must require the **access provider**:
 - (i) first, to give priority to a regular **passenger train service**, and to use **all reasonable endeavours** to facilitate that:

- (A) if the regular **passenger train service** is **healthy** or **running ahead**, that it exits the relevant **line on time**; and
- (B) if the regular **passenger train service** is **unhealthy**, that, after having complied with paragraph (A) with respect to **healthy regular passenger train services**, the **unhealthy regular passenger train service** makes up time;
- (ii) second, having complied with paragraph (i), in respect of any **freight train service**, to use **all reasonable endeavours** to facilitate that:
 - (A) if the **freight train service** is **healthy** or **running ahead**, that it exits the relevant **line on time**; and
 - (B) if the **freight train service** is **unhealthy**, that, after having complied with paragraph (A) with respect to **healthy freight train services**, the **unhealthy freight train service** makes up time.

4.4 Clearing network blockages and failed trains

- (a) An **access provider** must prepare and maintain protocols for giving directions or taking action for the purpose of clearing **rail network** blockages and failed **trains** or failed **rolling stock**.
- (b) Protocols made under paragraph (a) must:
 - (i) require the **access provider** to consult the relevant **train operator** of the failed **train** or failed **rolling stock** with respect to the management of the failure and the **train operator's** recovery plan;
 - (ii) include protocols in relation to:
 - (A) the use of an alternative **train** or alternative **rolling stock** and personnel;
 - (B) the reduction of the loading of the failed **train** or failed **rolling stock**;
 - (C) the continuation of the failed **train** or failed **rolling stock** on the allocated **passenger train path** or the **freight train path** or on an alternative **line** at reduced speed;
 - (D) the amalgamation of the failed **train** or failed **rolling stock** with another **train service**;
 - (E) the clearing of failed **rolling stock** or a failed **train** from the **rail network** of the **access provider**; and
 - (F) other matters relating to the management of the **rolling stock** or **train** failure; and
 - (iii) require an **access provider** to:
 - (A) comply with the **train path priorities**;
 - (B) subject to paragraph (A), use **all reasonable endeavours** to minimise disruptions to **train paths** and **train services**; and
 - (C) subject to paragraph (A), use **all reasonable endeavours** to provide to each affected **user** an alternative **train path**.

4.5 Possessions

- (a) An **access provider** must prepare and maintain protocols relating to the closure or taking **possession** of all or any part of the **rail network** of the **access provider** for the purpose of undertaking repair or maintenance work or upgrading **rail infrastructure**.

- (b) Without limiting paragraph (a), protocols made under paragraph (a) must:
- (i) specify the circumstances in which an **access provider** may close or take **possession** of all or any part of the **rail network** of the **access provider** for the purpose of undertaking repair or maintenance work or upgrading **rail infrastructure**;
 - (ii) include protocols for:
 - (A) the procedures and practices that the **access provider** will apply in relation to the closure or taking **possession** of all or any part of the **access provider's rail network** for the purpose of undertaking repair or maintenance work or upgrading **rail infrastructure** or for the purpose of any **alteration to rail infrastructure** that is being undertaken or occurs; and
 - (B) the operation of **train services, trains** and **rolling stock** on the **rail network** of the **access provider** where repair or maintenance work is being undertaken or any **alteration to rail infrastructure** is being undertaken or occurs; and
 - (iii) where the closure or **possession** or proposed closure or **possession** of the **rail network** is reasonably likely materially to affect **train paths**, require the **access provider** to:
 - (A) notify each affected **user** and **access seeker** prior to the commencement of the works or the closure or taking **possession** of all or any part of the **rail network**, which notice must include a description of the extent and nature of the works, the likely duration of the works, the likely duration of any proposed closure or taking **possession** of all or any part of the **rail network**, the potential effect on **train paths** and the proposed alternative arrangements;
 - (B) consult with each affected **user** and **access seeker**;
 - (C) comply with the **train path priorities**;
 - (D) subject to paragraph (C), use **all reasonable endeavours** to minimise disruptions to **train paths** and **train services**; and
 - (E) subject to paragraph (C), use **all reasonable endeavours** to provide to each affected **user** an alternative **train path**.
- (c) Protocols made under paragraph (a)(iii) must specify:
- (i) the consultation processes that the **access provider** will follow; and
 - (ii) the minimum notice periods that the **access provider** will give, which may differ according to the circumstances of the proposed closure or **rail network possession**, for example, in respect of scheduled and unscheduled repair or maintenance work.

4.6 Management of incidents that affect or may affect the operation or safe operation of a rail network

- (a) An **access provider** must prepare and maintain protocols for the management of an emergency or a **force majeure event** on the **rail network** of the **access provider**.
- (b) Protocols made under paragraph (a) must:
 - (i) specify procedures for the following matters, without limitation:
 - (A) the closure or taking **possession** of all or any part of the **rail network** of the **access provider**;

- (B) the provision of **declared rail transport** services during the emergency or **force majeure event**; and
 - (C) the measures that the **access provider** is taking or will take to reinstate the **rail network** or make it available; and
- (ii) require an **access provider** to:
- (A) comply with the **train path priorities**;
 - (B) subject to paragraph (A), use **all reasonable endeavours** to minimise disruptions to **train paths** and **train services**; and
 - (C) subject to paragraph (A), use **all reasonable endeavours** to provide to each affected **user** an alternative **train path**.

4.7 Protocols for the management of certain activities on a rail network

- (a) An **access provider** must prepare and maintain other protocols for the management of and the safe, efficient and reliable operation of the **rail network** of the **access provider**.
- (b) Protocols made under paragraph (a) must:
- (i) specify procedures for the following matters, without limitation:
- (A) the management of historic **trains**, special loadings or the carriage of certain loads on the **rail network**, including dangerous goods or hazardous materials;
 - (B) the use of the **rail network** of the **access provider** for military or defence purposes; and
 - (C) the use of a **rail network** of the **access provider** for safety or testing or driver training or other similar purposes; and
- (ii) require an **access provider** to:
- (A) comply with the **train path priorities**;
 - (B) subject to paragraph (A), use **all reasonable endeavours** to minimise disruptions to **train paths** and **train services**; and
 - (C) subject to paragraph (A), use **all reasonable endeavours** to provide to each affected **user** an alternative **train path**.

5. Communications protocols

5.1 Communications between access providers, users and train operators

- (a) An **access provider** must prepare and maintain protocols for communications between an **access provider** and a **train operator**.
- (b) Without limiting paragraph (a), protocols made under paragraph (a) must:
- (i) require **train operators** to:
- (A) submit a **train manifest** to the **access provider** in the form and at the times notified in advance by the **access provider** to the **train operator**; and
 - (B) establish and maintain a 24 hour communications link with the **train controller** of the **access provider**, of a type specified by the **access provider**;
- (ii) in relation to any matter requiring a direction to be given by a **train controller** of the **access provider** to a **user** or **train operator**:
- (A) specify the procedures and practices that the **access provider** and the **train controller** will follow, and the form of communication, for the giving of the direction, according to the circumstances of the direction;

- (B) require the **train controller** to notify the **user** or **train operator** as soon as reasonably practicable after becoming aware of the need to give a direction;
- (iii) in relation to any circumstance or matter that will or may require the variation of a **train path** or that will or may affect the provision of **declared rail transport services**, and as soon as reasonably practicable after the **access provider** becomes aware of such circumstance or matter, require the **access provider** to notify each affected **user** and **access seeker** of the circumstance or matter, which notice must include details of:
 - (A) the circumstance or matter;
 - (B) the likely impact on **train paths** or the provision of **declared rail transport services**;
 - (C) the likely duration of the circumstance or matter, including, if applicable, the likely duration of any closure or **possession** of any part of the **rail network** of the **access provider**;
 - (D) the provision of **declared rail transport services** during the duration of the circumstance or matter, if applicable;
 - (E) the measures that the **access provider** is taking or will take to reinstate the **rail network** or make it available, if applicable;
 - (F) proposed alternative arrangements; and
 - (G) any other matter that the **access provider** considers relevant; and
- (iv) without limiting paragraph (iii), in relation to any circumstance or matter that will or may require the variation of a **train path** or that will or may affect the provision of **declared rail transport services**, specify the circumstances in which the **access provider** must consult with each affected **user** and **access seeker** (for example, where the **access provider** proposes to take **possession** of all or any part of the **rail network** to undertake maintenance work), and the consultation process that will apply, including any timing requirements.

5.2 Communications with other access providers and operators of networks

- (a) Where a **rail network** of an **access provider** interfaces with another **rail network** (whether or not a **rail network** as defined in the **Act**), the **access provider** must prepare and maintain protocols for:
 - (i) communications with the operator of the other network; and
 - (ii) the coordination and management of the interface between the networks.
- (b) Protocols made under paragraph (a) must:
 - (i) require the **access provider** to establish and maintain a 24 hour communications link with the operator of the other network;
 - (ii) include protocols for, without limitation:
 - (A) the procedures governing communications between the **access provider** and the operator of the other network, including communications between **train controllers** (whether or not **train controllers** as defined in these rules); and
 - (B) the provision of **declared rail transport services** at the interface between the networks.

5.3 Continuous recording of data

Subject to compliance with relevant **legislation**, an **access provider** must record all voice and data transmissions relevant to the operations of **train services**, **trains** and **rolling stock** movements, including transmissions to and from train controllers (whether or not **train controllers** as defined in these rules), **train operators**, other **access providers**, operators of other rail networks (whether or not a **rail network** as defined in the **Act**) and the police.

6. Rolling stock interface standards

(a) An **access provider** must establish and maintain documented **rolling stock interface standards**.

(b) The **rolling stock interface standards** must:

- (i) specify the minimum **rolling stock** standards, axle loads and clearances required for operation on the **rail network** of the **access provider**, and the rules or procedures of the **access provider** relating to constraints in operation;
- (ii) contain information about the **rail infrastructure** which is sufficient to inform the **access seeker** or **user** about the compatibility of its **train** or **rolling stock** with the **rail network** of the **access provider**;
- (iii) specify the circumstances in which an **access provider** may require a **user** to provide to the **access provider** information about the **rolling stock** the **user** proposes to use on a **train path** that has been allocated to that **user**;
- (iv) specify the information that the **access provider** may require a **user** to provide to the **access provider** under paragraph (iii);
- (v) require a **user** to provide to the **access provider** the information referred to in paragraph (iv);
- (vi) specify the time within which the **user** must provide the information referred to in paragraph (iv); and
- (vii) specify the consequences of a failure by the **user** to provide all or any of the information referred to in paragraph (iv); and
- (viii) require a **train operator** to ensure that its **rolling stock** at all times complies with the **access provider's** minimum **rolling stock** standards and that the **rolling stock** can be operated on the **train path** allocated to that **user** safely, reliably and in accordance with the scheduled **line** entry and exit times for the **train path** allocated to that **user**.

(c) Protocols made under section 6(b):

- (i) must require an **access provider** to consult with the **user**;
- (ii) may permit the **access provider** to refuse to make the allocated **train path** available to that **user** in respect of that **rolling stock** in the circumstances defined in the protocol;
- (iii) must require an **access provider** to notify the **user** of any modifications required to be made to the **rolling stock** to make the **rolling stock** comply with the requirements of the **access provider**; and
- (iv) must require an **access provider** at all times to act in good faith.

7. Safe working systems etc

(a) An **access provider** must document the signalling systems, safe working systems and operational systems with respect to each **rail network** of the **access provider**.

(b) The documentation referred to in paragraph (a) must contain:

- (i) a description of each system, including sufficient information about each to enable **access seekers** and **users** to understand their nature and substance; and

- (ii) the **access provider's** requirements for compliance with each system.
- (c) If the **access provider** varies, amends or replaces any of the signalling systems, safe working systems or operational systems, the **access provider** must amend the documentation referred to in paragraph (a) accordingly.

Note: An **access provider** is required to include this documentation in the information pack provided to access seekers under section 2 of the **negotiation guidelines**.

8. Complaints

8.1 Protocol for addressing complaints

- (a) An **access provider** must prepare and maintain protocols for addressing complaints from a **user** or **access seeker** about an alleged failure of the **access provider** to comply with these rules.
- (b) Protocols made under paragraph (a) must require an **access provider** to:
 - (i) address each complaint in good faith; and
 - (ii) report to the **Commission** each such complaint and the measures taken by the **access provider** in response to such complaint.

9. Consistency of protocols, standards and systems with legislation

- (a) Protocols and **binding protocols** made under section 4, 5 and 8;
- (b) the **rolling stock interface standards** made under section 6; and
- (c) the signalling systems, safe working systems and operational systems referred to in section 7,

must be consistent with section 2.1 and must comply with relevant **legislation**, all applicable **standards** and **good industry practice**.

10. Submission and approval of protocols

10.1 Submission of protocols to Commission for approval

- (a) An **access provider** must submit to the **Commission** for approval at the same time as it is required to submit a proposed access arrangement any proposed protocols that the **access provider** is required to prepare and maintain under sections 4 and 8 of these rules.
- (b) The **Commission** must make a decision whether or not to approve any proposed protocol provided to it under paragraph (a) as a **binding protocol**.
- (c) If the **Commission** makes a decision to approve a proposed protocol, that protocol will be a **binding protocol** for the purposes of these rules.
- (d) If the **Commission** is not satisfied that a proposed protocol:
 - (i) provides for the matters listed in these rules; and
 - (ii) is consistent with the objectives set out in section 38F of the **Act**,
 the **Commission** may reject the proposed protocol.
- (e) If the **Commission** rejects a proposed protocol:
 - (i) the **Commission** must return the proposed protocol to the **access provider** with a notice in writing that outlines the matters that must be addressed for the **Commission** to approve the proposed protocol as a **binding protocol**;
 - (ii) the **access provider** must amend the proposed protocol to address the matters specified by the **Commission** under paragraph (i); and
 - (iii) the **access provider** must submit the amended proposed protocol to the **Commission** within 14 days after receipt of the notice referred to in paragraph (i).

- (f) Subject to paragraph (g), if the **Commission** decides to reject the amended proposed protocol submitted to the **Commission** in accordance with paragraph (e)(iii), the process in this section will continue to apply until the proposed protocol is accepted as a **binding protocol**:
 - (i) with such alterations and modifications as are necessary; and
 - (ii) as if the amended proposed protocol were a proposed protocol submitted for approval under paragraph (a).
- (g) If the **Commission** has rejected the amended proposed protocol (as described in paragraph (e)(iii)) twice on the basis that it is not satisfied that it complies with paragraph (d), then following the second rejection the **Commission** may either:
 - (i) return the amended proposed protocol to the **access provider** for reconsideration (in which case the process in paragraph (f) above will apply); or
 - (ii) amend the amended proposed protocol so that it complies with paragraph (d) and is consistent with the objectives set out in section 38F of the **Act**.

10.2 Access provider's obligation to comply with protocols and standards

The **access provider** must comply with:

- (a) each **binding protocol** on and from the date the **Commission** approves the proposed protocol as a **binding protocol** or approves a variation to the **binding protocol** (as applicable);
 - (b) protocols made under section 5; and
 - (c) the **rolling stock interface standards**,
- subject to doing so being in compliance with all relevant **legislation** (including in relation to safety).

10.3 Commission to approve variations to protocols

- (a) An **access provider** may apply to the **Commission** to vary a **binding protocol**.
- (b) The variation must be consistent with these rules.
- (c) An application must:
 - (i) be in writing;
 - (ii) include a description of the proposed variation; and
 - (iii) state the reasons for the proposed variation.
- (d) The **Commission** must make a decision whether or not to approve a variation to a **binding protocol**.
- (e) If the **Commission** considers that the variation that is the subject of the application is a material variation, section 10.1 applies to that variation:
 - (i) with such alterations and modifications as are necessary; and
 - (ii) as if:
 - (A) the proposed variation to be made were a proposed protocol submitted for approval under section 10.1(a); and
 - (B) a decision under this section were a decision under section 10.1.
- (f) If the **Commission** decides to approve a variation to a protocol, the variation takes effect on and from the date of the decision.

10.4 Copies of variations to other protocols and standards

If an **access provider** varies:

- (a) protocols made under section 5; or
- (b) the **rolling stock interface standards**,

the **access provider** must provide a copy of the varied protocols or standards (as relevant) to the **Commission**. For clarification, the **Commission** is not required to approve such variations.

11. Application**11.1 Application of network management rules to joint ventures**

- (a) This section applies if there is more than one **access provider** in connection with **rail infrastructure**, including if:
- (i) the relevant **rail infrastructure** is owned or operated by two or more persons as a joint venture or partnership; or
 - (ii) the **rail infrastructure** is owned and operated by different persons; or
 - (iii) **rail infrastructure** is legally owned by a person or persons on trust for others.
- In such a case each **access provider** in connection with the **rail infrastructure** is referred to in this section as a **participant**.
- (b) If these rules require or permit something to be done by the **access provider**, that thing may be done by one of the **participants** on behalf of all the **participants**.
- (c) If a provision of these rules refers to the **access provider** bearing any costs, the provision applies as if the provision referred to any of the **participants** bearing any costs.

11.2 Waiver of rules

The **Commission** may at its sole discretion and by notice in writing to an **access provider** waive any of an **access provider's** obligations under these rules where the **Commission** considers this would be consistent with the **Commission's** statutory objectives and that compliance with the obligation would not be necessary to achieve the purpose of these **network management rules** as set out in section 1.2.

12. Definitions

In these rules, unless the context otherwise requires:

- (a) terms that appear **like this** and that are not otherwise defined in these rules have the same meaning as in the **Act**; and
- (b) in deciding whether an **access provider** has used **all reasonable endeavours**, regard shall be had to relevant **standards, good industry practice** and other regulatory requirements, the performance of other **access providers** and to interstate, national and international benchmarks;
- (c) **access seeker** when used in these rules means a person, including a **business unit** or **related body corporate** of the **access provider**, seeking to be provided a **declared rail transport service** by an **access provider**;
- (d) **Act** means the **Rail Corporations Act 1996** (Vic);
- (e) **alteration** in respect of **rail infrastructure**, means any addition to, extension to, modification of, replacement of, recovery of, repair of, maintenance of, removal from, deletion to, destruction of, damage to, loss of or inability to use that **rail infrastructure**;
- (f) **binding protocol** means a protocol that has been approved by the Commission under section 10.1;
- (g) **business unit** means a distinct division, department, branch, group, team or unit of a business or company, or a separate company;
- (h) **conditional**, in respect of a freight train path, means the entitlement of a **user** to use a **train path** on a **rail network** of an **access provider** which **train path**:
 - (i) does not conflict with a **passenger train path** or a **scheduled train path**; and
 - (ii) provides for optional destinations; or
 - (iii) permits the **train path** to be re-allocated:
 - (A) on the basis of seasonal or intermittent requirements; or
 - (B) in order to provide reserve or surge capacity;

- (i) **daily train plan** means the document prepared by an **access provider** under section 4.1(b) that details the scheduled times for all **train services** on the **rail network** of the **access provider** and any **possessions** of the **rail network** of that **access provider** for a particular day on the specified portion of the **rail network**;
- (j) **flexible**, in respect of a **freight train path**, means the entitlement of a **user** to a **train path** which:
 - (i) does not conflict with a **passenger train path** or a **scheduled train path**;
 - (ii) for a particular day, the **line** entry and exit time (nominated by the **access provider**) is a time as close as possible to the **line** entry and exit time requested by the **user** but not less than 48 hours prior to the requested **line** entry time; and
 - (iii) the entitlement of a **user** to a **train path** in circumstances where that entitlement arises other than pursuant to an access agreement with the **access provider**;
- (k) **force majeure event** means any circumstances beyond the reasonable control of a person (including a **business unit** of an **access provider**) which occur without the negligence of that person (including a **business unit** of an **access provider**) and includes inevitable accident, storm, flood, fire, earthquake, explosion, peril of navigation, hostility, war (declared or undeclared), insurrection, sabotage, executive or administrative order or act of either general or particular application of any government prohibition or restriction by domestic or foreign laws, regulations or policies (other than laws specifically for that purpose passed by the Commonwealth), quarantine or customs restrictions, strike, lockout or industrial dispute, break-down or damage to or confiscation of property but does not include breakdown or delay of any **rolling stock** operated by the **user**;
- (l) **freight services** means **rail transport services** that are not **passenger services** or **rail transport services** that are provided by means of a **terminal**;
- (m) **freight train path** means an entitlement of a **user** to use a **train path** on a **rail network** of an **access provider** to provide **freight services**, and includes a **scheduled train path**, a **conditional train path** and a **flexible train path**;
- (n) **good industry practice** means all those practices followed in the commercial railway industry when an activity is undertaken in accordance with relevant **legislation** and all applicable **standards** and with due care and skill;
- (o) **healthy**, in respect of a **train service** or **train**, means a **train service** or **train** that has entered the **rail network** or **line** of an **access provider on time**, or if it has entered the **rail network** or **line** late has made up time, or if it has entered the **rail network** or **line** early has lost time, such that in the reasonable opinion of the **access provider** it is running **on time** and there are no indications that it will not exit the **rail network** or **line on time**, or it has entered the **rail network** or **line** of an **access provider on time**, has lost time en-route and is not **on time** as a result of “below rail” causes;
- (p) **legislation** means Commonwealth, Victorian or local government legislation including regulations, orders, by-laws, rules and other subordinate legislation or other document enforceable under any such legislation, regulations, orders, by-laws, rules or subordinate legislation;
- (q) **line** in respect of the **rail network** of an **access provider**, means the rail path between two locations on the **rail network** that may be the subject of a **train path** and that has a common volume of capacity identified in accordance with the protocol referred to in section 6.3(a)(i) of the **capacity use rules**;

- (r) **master train timetable** means the **master train timetable** that an **access provider** is required to prepare and maintain under the **capacity use rules**;
- (s) **on time** in respect of a **train service** or **train** means within a certain number of minutes of the scheduled **line** entry or expected **line** exit time as applicable the number of minutes to be specified by the **access provider** in the operating handbook;
- (t) **passenger services** means railway services for the carriage of passengers by **train** between locations on the **rail network**;
- (u) **passenger train path** means either:
- (i) an entitlement of a **user** under an access agreement to use a **train path** on a **rail network** of an **access provider** to provide **passenger services** which has a fixed **line** entry and exit time and fixed intervals for passenger stops; or
 - (ii) a passenger **train path** specified in the timetable approved by the Director of Public Transport, as amended from time to time, under section 10 of the **Transport Act 1983**;
- (v) **possession** means the closure of a section of track to **train** operations to allow work to be carried out on that section of track;
- (w) **principle of passenger priority** means the giving of priority to the provision of **declared rail transport services** to **passenger service users** over the provision of **declared rail transport services** to **other users**;
- (x) **rail network** means the **rail infrastructure** used to provide **declared rail transport services**;
- (y) **real-time scheduling** means the process of co-ordinating arrival and departure times for **train services** at the beginning, intermediate and destination locations of a **train** journey, where this process takes place on the day of the **train service** in question.
- (z) **related body corporate** has the meaning set out in the **Corporations Act 2001** (Cth);
- (aa) **relevant rail network management activity** means—
- (i) scheduling and planning **train services**;
 - (ii) an activity carried out for the provision of **train control services**, including **train** traffic management;
 - (iii) the management of the interaction of **rail infrastructure** and **rolling stock**;
 - (iv) the management of incidents that affect or may affect the operation or safe operation of a **rail network**;
 - (v) any activity that is ancillary to an activity referred to in paragraphs (i) to (iv);
- (bb) **rolling stock** means locomotives, carriages, wagons, rail cars, rail motors, light rail vehicles, light inspection vehicles, rail/road vehicles, trolleys and any other vehicle that operates on or uses the rail track;
- (cc) **rolling stock interface standards** means the standards that an **access provider** is required to prepare and maintain in accordance with section 6;
- (dd) **running ahead**, in respect of a **train service** or **train**, means a **train service** or **train** that has entered the **rail network** or **line** of an **access provider** before its scheduled entry time or is making up time en-route and in the reasonable opinion of the **access provider** is expected to exit the **rail network** or line earlier than its scheduled exit time;
- (ee) **scheduled**, in respect of a **freight train path**, means the entitlement of a **user** to use a **train path** on a **rail network** of an **access provider** for **freight services** which has a fixed entry and exit time;
- (ff) **standard** means any standard or code of practice issued from time to time by Standards Australia (an incorporated body formerly known as the Standards Association of Australia), the Association of American Railroads, the International

- Union of Railways, British Standards, Federal Railroad Administration, the Australasian Railway Association or such similar body to the extent that the standard or code is applicable to the Victorian railway industry;
- (gg) **train** means a locomotive and with or without wagons used to operate **train services**;
- (hh) **train control services** means services involving the giving of directions or the granting of permission to operate **rolling stock** on a **rail network** consistent with the safe and efficient operation of that **rolling stock** and that **rail network**;
- (ii) **train controller**, in respect of an **access provider**, means a person at a train control centre of the **access provider** who carries out one or more of the following activities:
- (i) performing **train control services**;
 - (ii) managing and monitoring **train** movements and all other operation of **rolling stock** on the **rail network** of the **access provider** and any activities affecting or potentially affecting such **train** movements and **rolling stock** operation;
 - (iii) managing incidents that occur or may occur on the **rail network** of the **access provider**;
- (jj) **train manifest** means a written notice (including, if agreed, in electronic form) prepared by a **user** in relation to a **train service** or **train** and containing a complete list of all of the freight or container units being carried by a service on a given date, itemised by the wagons on which they are being carried;
- (kk) **train operator** means a **user** who runs or a person who runs a **train service** or **train** or operates **rolling stock** on a **rail network**;
- (ll) **train path** means a right (whether arising under an agreement or otherwise) to operate **rolling stock** between particular locations on a railway at particular times;
- (mm) **train path priorities** means the order of priorities for the scheduling and rescheduling of **train paths** or **train services** and for the provision of alternative **train paths**, as set out in section 4.1(b)(vi)(B);
- (nn) **train service** means a **train** run by a **user** (including a **train operator**), an **access provider** or a **related body corporate** of an **access provider** by which that person provides railway **freight services** or **passenger services**;
- (oo) **unhealthy**, in respect of a **train service** or **train**, means a **train service** or **train** that has not entered the **rail network** or **line** of an **access provider** on time or has lost time en-route as a result of “above rail” causes, so that in either case it is not, in the reasonable opinion of the **access provider**, expected to exit the **rail network** or **line on time**;
- (pp) **unscheduled**, in respect of a **freight train path**, means a **conditional train path**, a **flexible train path** or any other **train path** that is not a **passenger train path** or a **scheduled train path**; and
- (qq) **user**, when used in these rules, means any person, including the **access provider** or a **related body corporate** of the **access provider** who:
- (i) acquires or uses a **declared rail transport service** or is a party to an agreement, arrangement or understanding under which they acquire or use a **declared rail transport service**; or
 - (ii) has a right to be provided a **declared rail transport service** under a **dispute resolution decision**.

Dated 1 January 2006

GREG WILSON
Chairperson
Essential Services Commission

Rail Corporations Act 1996
VICTORIAN RAIL ACCESS REGIME
Negotiation Guidelines

1. Background

1.1 Legislative Background

Section 38V of the **Rail Corporations Act 1996** provides that the Commission must make negotiation guidelines, in accordance with the procedures in section 38N. Section 38V provides as follows:

38V. Negotiation guidelines

- (1) The Commission must make guidelines for or with respect to—
- (a) the information an access provider must provide to an access seeker, including information that relates to—
 - (i) the management of the capacity of a rail network; and
 - (ii) the availability of train paths; and
 - (iii) timetabling; and
 - (b) the procedure under which an access seeker may make an application for the provision of a declared rail transport service to it by an access provider; and
 - (c) the procedure and method as to how an access provider will assess and determine applications referred to in paragraph (b); and
 - (d) specifying a period of time within which an access provider must assess and determine applications referred to in paragraph (b); and
 - (e) prohibiting an access provider from requiring or requesting the following persons to identify a consignee—
 - (i) an access seeker seeking the provision of declared rail transport services for the purpose of providing freight services; or
 - (ii) a user using declared rail transport services for the purpose of providing freight services.
- (2) The Commission may make guidelines for or with respect to—
- (a) fees or levies that an access provider may charge for assessing and determining applications referred to in sub-section (1)(b);
 - (b) fees or levies that an access provider may charge an access seeker for information relating to a declared rail transport service;
 - (c) prohibiting fees or levies of the kind referred to in paragraphs (a) and (b) if those fees or levies exceed an amount specified in the guidelines;
 - (d) interconnection.

Note: The procedure for the making of the negotiation guidelines is set out in section 38N. These negotiation guidelines are made pursuant to section 38V.

1.2 Purpose

- (a) These guidelines establish requirements that must be observed by **access providers** and **access seekers**.
- (b) In addition to meeting the **Commission's** obligations under section 38V, these **negotiation guidelines** are intended to facilitate commercial negotiation and encourage access to **declared rail transport services** and **interconnection** to be made available on fair and reasonable terms. The **negotiation guidelines** also provide information to assist the parties to understand their rights and obligations under the legislative framework.

- (c) The **Act** requires **access arrangements** and specified decisions of the **Commission** to be consistent with these **negotiation guidelines**. For example:
- (i) paragraph 38X(1)(e) of the **Act** requires that **access arrangements** describe procedures and methods by which the **access provider** will assess and determine applications for the provision of a **declared rail transport service**, and subsection 38X(4) requires such procedures and methods to be consistent with these **negotiation guidelines**; and
 - (ii) draft decisions made by the **Commission** under section 38ZB, and final decisions under section 38ZF, must be consistent with these **negotiation guidelines**.

1.3 Commencement

These **negotiation guidelines** commence with effect from 1 January 2006.

1.4 Good faith

When following the procedures and carrying out the obligations specified in these **negotiation guidelines**, **access providers** and **access seekers** must act in good faith.

2. Information provided by access provider

- (a) An **access provider** must publish on its website, and make available for inspection at its offices, a copy of each **access arrangement** of that **access provider** approved under section 38ZF, made under section 38ZJ or 38ZL or deemed by operation of section 38ZK of the **Act**.

Note: Under section 38W, an **access provider** must prepare a proposed access arrangement in relation to each **declared rail transport service** they provide or are capable of providing.

- (b) In respect of each **access arrangement** of an **access provider**, the **access provider** must prepare and maintain an information pack that must be made available to an **access seeker** on request by the **access seeker** within 5 **business days** of the date that the **access provider** receives the request. For clarification, such a request may be made by an **access seeker** prior to submitting an access application.
- (c) An information pack referred to in paragraph (b) must contain the following:
- (i) a copy of the relevant **access arrangement** and **access arrangement information**;
 - (ii) a detailed diagrammatic map and a physical description of the **rail network** to which the **access arrangement** relates, including in the case of **terminals** information about the location of fixed plant and equipment and in any other case information about the infrastructure, speed limits, gradients, curves and track standards, track quality and axle load limitations;
 - (iii) a description of the **rail network's** signalling systems, safe working systems and operational systems;
 - (iv) a copy of the **statement of capacity allocation protocols** and **operating handbook** (including a copy of the **access provider's rolling stock interface standards**);
 - (v) a copy of the **access provider's master train timetable**;
 - (vi) a copy of the prescribed form for an access application;
 - (vii) a copy of the **access provider's** standard terms and conditions in relation to the relevant **declared rail transport services**; and

- (viii) the name and contact details of an employee of the **access provider** who has primary responsibility for responding to questions from **access seekers** prior to the lodgement of access applications under section 3 of these guidelines.

Note: For the purposes of paragraph (c)(i), the contents of **access arrangements** are described in section 38X of the **Act**, and include the terms and conditions for the provision of the relevant **declared rail transport service**. **Access arrangement information** is defined in section 38A of the **Act**.

- (d) At the time an information pack is available to an **access seeker** under paragraph (c) above, the **access provider** must also advise the **access seeker** that further information may be available under sections 3 and 5 of the **capacity use rules**.
- (e) Following the provision of an information pack under paragraph (b), if an **access seeker** makes a request for further information of a type described in paragraph (f) or (g) and provides the **access provider** with a description of the service it is considering seeking (including, except in the case of **terminals**, origin and destination points, frequency and timing between origin and destination points), the **access provider** must use **all reasonable endeavours** to provide the information requested to the **access seeker** in writing within 14 days after receiving the request for further information and the description of the service from the **access seeker**.
- (f) If an **access seeker** is seeking access to a **declared rail transport service** other than a **terminal service** and has made a request for further information (and has provided a description of the service it is considering seeking) in accordance with paragraph (e), the **access provider** must provide the following information in accordance with paragraph (e) if and to the extent requested by the **access seeker**:
 - (i) whether there is likely to be sufficient **available capacity** on the **rail network** to provide the **declared rail transport service** and, if so, the **train paths** that are likely to be available to the **access seeker**;
 - (ii) if there is not sufficient **available capacity** to provide that service, what **available capacity** exists on the relevant part of the **rail network** and, in general terms, what upgrades of the **rail network** would be required to provide that service;
 - (iii) a copy of the **access provider's** standard terms and conditions in respect of that **declared rail transport service**;
 - (iv) a description of any reasonably expected upgrades or modifications of the relevant part of the **rail network**;
 - (v) for each relevant **line**, typical sectional running times for the dominant or relevant train type using that **line**;
 - (vi) a copy of the **access provider's** protocols for undertaking an assessment of works required to provide **additional capacity** to meet an **access seeker's** request made pursuant to paragraph 4.4 of these guidelines;
 - (vii) an estimate of the access charge that would apply to the relevant service and an explanation as to how that charge has been calculated, with reference to the reference tariffs set out in the **access arrangement** and any relevant **internal transfer terms**; and
 - (viii) information about such other matters as an **access seeker** would reasonably require for the purpose of making an application for access as specified in the **access arrangement**.

- (g) If an **access seeker** is seeking access to a **terminal service**, and has made a request for further information (and has provided a description of the service it is considering seeking) in accordance with paragraph (e), the **access provider** must provide the following information in accordance with paragraph (e) if and to the extent requested by the **access seeker**:
- (i) whether there is capacity to provide access to that **terminal**;
 - (ii) a description of the relevant **terminal** of the **access provider**, including the layout of the **terminal** and interface with roads, ports or other relevant infrastructure used to access the **terminal**, and a description of any operational constraints to roadside access to the relevant **terminal**;
 - (iii) an estimate of the access charge that would apply and an explanation as to how that charge has been calculated, with reference to the reference tariffs set out in the **access arrangement** and any relevant **internal transfer terms**; and
 - (iv) information about such other matters as an **access seeker** would reasonably require for the purpose of making an application for access as specified in the **access arrangement**.

3. Access application by access seeker

- (a) An access application must be in the form prescribed in the **access arrangement**.
- (b) In addition to the obligation in paragraph (a), an **access provider** may require that access applications made by an **access seeker** contain information about or relating to the **access seeker's** proposed service. This may include:
 - (i) a description of the proposed rail operation to be carried out by the **access seeker**, including points of origin and destination on the **access provider's rail network**, frequency and timing between the points of origin and destination, any stops en-route between origin and destination and the duration of any such stops;
 - (ii) details of the proposed **rolling stock**, including the nature and number of wagons, the number of locomotives and performance characteristics and axle loads and evidence that the **access seeker's rolling stock** complies with the requirements of the **access provider** specified in the information pack provided under section 2(b);
 - (iii) the type of freight to be carried (to the extent necessary to determine which reference tariff would apply if the **access provider's access arrangement** provides for different reference tariffs to apply depending on the type of freight to be carried) including tonnage, seasonal variations, handling requirements and any safe working requirements;
 - (iv) a statement of the additions and variations to the terms and conditions specified in the **access arrangement** that are proposed by the **access seeker** for the carrying out of the proposed rail operation, including the proposed period of the proposed access agreement;
 - (v) evidence of the **access seeker's** managerial and financial ability to carry on the proposed rail operation, including evidence that:
 - (A) the **access seeker's** management and staff have the necessary knowledge and experience to carry out the proposed rail operation; or
 - (B) the **access seeker** will be able to and will engage the services of another person whose management and staff have the necessary knowledge and experience to carry out the proposed rail operation; and

- (C) the **access seeker** has the necessary financial resources to carry on the proposed rail operation, including the ability of the **access seeker** to meet its financial obligations to the **access provider** under an access agreement and to any other persons (including excesses under insurance policies);
 - (vi) evidence that the **access seeker** has or will have the **accreditation** necessary lawfully to operate the service it is proposing to operate;
 - (vii) the **access seeker's** contact details;
 - (viii) the **access seeker's** requirements in relation to a request for access to a **terminal** of the **access provider**; and
 - (ix) any other information reasonably required by the **access provider** to assess and respond to an access application.
- (c) In addition to the obligation in paragraph (a), an **access provider** may require that access applications made by an **access seeker**:
- (i) specify the type of **train path** to which access is sought, being a "passenger train path", a "scheduled train path" or an "unscheduled train path" (as these terms are defined in the **capacity use rules**); and
 - (ii) provide information to the **access provider** as to the likely usage of the **train path**, which information may include (for example):
 - (A) a contractual commitment to transport passengers or freight (if such commitment has been entered into);
 - (B) an anticipated change in demand associated with a committed upgrade or expansion to plant;
 - (C) market growth or trend data; and
 - (D) a need for conditional or surge capacity based on historical usage patterns, market characteristics or other constraints such as shipping.
- (d) For the avoidance of doubt, an **access provider** may not require or request an **access seeker** seeking the provision of **declared rail transport services** for the purpose of providing **freight services** to identify a consignee.

4. Assessing and determining an application for access

4.1 Acknowledgment of receipt of application

- (a) The **access provider** must, by notice in writing to the **access seeker**, acknowledge receipt of an access application within 5 **business days** of receipt.
- (b) The **access provider** must, by notice in writing to the **access seeker** within 10 **business days** of receipt of an **access application** (or such longer period as the parties may agree), advise the **access seeker** that either:
 - (i) the **access seeker's** access application is in the form prescribed in the **access arrangement** and contains the information referred to in section 3 that the **access provider** requires an access application to contain; or
 - (ii) the **access seeker's** access application is not in the form prescribed in the **access arrangement** or does not contain the information referred to in section 3 that the **access provider** requires an access application to contain (in which case the **access provider** may reject the **access application**).
- (c) If the **access provider** rejects an access application in accordance with paragraph (b), the **access provider** must, in the notice to the **access seeker** provided under paragraph (b), specify the additional information the **access provider** reasonably requires the **access seeker** to provide to the **access provider** for the application to be compliant.

- (d) Having received a notification pursuant to paragraph (c), an **access seeker** may elect to:
- (i) give further information to the **access provider**, in which case, paragraphs (a), (b) and (c) shall apply to the provision of such further information with such alterations and modifications as are necessary;
 - (ii) refer the matter to the **Commission** as an **access regime dispute** under section 38ZV of the **Act**; or
 - (iii) accept the rejection and not proceed further with that access application.
- Note: Under section 38ZZA, the **Commission** may decide not to make a decision in respect of an **access regime dispute** (described as a “dispute resolution decision” in section 38ZZA).
- (e) If the **access provider** does not reject the access application within 10 **business days** of receipt of the access application or such longer period as the parties agree, the **access provider** is deemed to have given an acknowledgment under paragraph (b)(i).

4.2 Assessment of access application

- (a) Within 20 **business days** of issuing a notice to the **access seeker** under section 4.1(b)(i), or the date on which the **access provider** is deemed to have done so under section 4.1(e), the **access provider** must determine, consistent with the **access arrangement**, the **capacity use rules** and any protocols made under those rules, whether there is sufficient **available capacity** to meet the **access seeker’s** request and, by notice in writing to the **access seeker**, advise the **access seeker** accordingly.
- (b) Subject to section 4.2(e), if the **access provider** determines under paragraph (a) that there is sufficient **available capacity** to meet the **access seeker’s** request, the **access provider** must include in the notice provided to the **access seeker** in accordance with paragraph (a), the proposed terms and conditions, including price, upon which the **access provider** will make the **declared rail transport service** requested available.
- (c) If the **access provider** determines under paragraph (a) that there is not sufficient **available capacity** to meet the **access seeker’s** request (after assessing available capacity in accordance with section 4 of the **capacity use rules**), the **access provider** must, within 25 **business days** of issuing a notice to the **access seeker** under section 4.1(b)(i) or within 25 **business days** of the date on which the **access provider** is deemed to have done so under section 4.1(e):
- (i) provide reasons why the **declared rail transport service** cannot be made available to meet the **access seeker’s** request;
 - (ii) if part but not all of the **access seeker’s** request can be satisfied from **available capacity**, subject to section 4.2(e), notify the **access seeker** of the terms and conditions, including price, upon which the **access provider** will make the **declared rail transport service** requested available to the extent of the **access provider’s available capacity**; and
 - (iii) if works are required to provide **additional capacity** necessary to meet the **access seeker’s** request in full, at the time of providing the notice under section 4.2(c)(ii), either:
 - (A) provide the **access seeker** with an outline of the works, and an indicative assessment of the cost of such works, required to provide **additional capacity** necessary to meet the **access seeker’s** request; or

- (B) offer to undertake an assessment of the works required and the costs of those works in accordance with the protocols prepared and maintained by the **access provider** under section 4.4.
- (d) If an **access provider** does not comply with the **capacity use rules** and any protocols made under those rules (and approved by the **Commission**) when assessing an access application under section 4.2(a), the **access seeker** may refer the matter to the **Commission** as an **access regime dispute** under section 38ZV of the **Act**.
- Note: Under section 38ZZA, the **Commission** may decide not to make a decision in respect of an **access regime dispute** (described as a “dispute resolution decision” in section 38ZZA).
- (e) When assessing an access application, an **access provider** may reject an access application if:
- (i) the **access seeker** does not have or will not have all necessary **accreditation** lawfully to operate the service it is proposing to operate;
 - (ii) the **access seeker’s rolling stock** does not comply with the requirements of the **access provider** specified in the **access provider’s information pack**;
 - (iii) either the management and staff of the **access seeker** do not have the necessary knowledge and experience to carry on the proposed rail operations, or the **access seeker** will not be able to engage the services of another person whose management and staff have the necessary knowledge and experience to carry on the proposed rail operations; or
 - (iv) in carrying on the proposed rail operations, the **access seeker** does not have the necessary financial capability to meet its financial obligations to the **access provider** under an access agreement and the financial obligations it owes to any other persons (including excesses under insurance policies).
- (f) If the **access provider** determines to reject an access application under paragraph (e), the **access provider** must, within 25 **business days** of issuing a notice to the **access seeker** under section 4.1(a) or within 25 **business days** of the date on which the **access provider** is deemed to have done so under section 4.1(e), notify the **access seeker** of its determination and provide reasons why the **declared rail transport service** cannot be made available to meet the **access seeker’s** request.

4.3 Negotiation protocol

- (a) An **access provider** must develop a **negotiation protocol** that contains the procedure and method for negotiating the terms and conditions of agreements for access to **declared rail transport services** and **interconnection**. In addition to the matters listed in section 4.3(b) below, the **negotiation protocol** must include:
- (i) identified and reasonable time periods within which negotiation about the terms and conditions should be conducted; and
 - (ii) procedures for resolving disputes arising between the **access provider** and the **access seeker** in relation to the terms and conditions of access. Such procedures must specify:
 - (A) the time periods that apply to the notification of a dispute by an **access seeker** to an **access provider**,
 - (B) the period within which the Chief Executive Officers of each of the **access provider** and the **access seeker** (or their nominees) must meet to attempt to resolve a dispute notified under paragraph (A); and

- (C) the alternative dispute resolution process that may be implemented by the parties (including mediation or binding expert determination), prior to the notification of an **access regime dispute** to the **Commission**.
- (b) Following the provision by an **access provider** of a notice under section 4.2(a) or section 4.2(c), the **access provider** must:
- (i) meet and negotiate in good faith with the **access seeker** to seek to reach agreement on the terms and conditions, including price, on which the **access provider** will make the requested **declared rail transport service** available (including if a notice has been provided under section 4.2(c)(ii) of availability or part availability of capacity, in relation to any works required to provide **additional capacity**); and
 - (ii) use **all reasonable endeavours** to meet the requirements of an **access seeker** who has complied with its obligations under the **Act**, these **negotiation guidelines** and the **negotiation protocol**.
- Note: Consistent with paragraph 38X(1)(e) and subsection 38X(4) of the **Act**, the **Commission** expects that the **negotiation protocol** will form part of proposed access arrangements that are provided to the **Commission** for its approval under section 38W. Having regard to section 38ZZA of the **Act** and section 1.4 of these guidelines, the **Commission** also expects both access seekers and access providers to negotiate the terms and conditions of access to **declared rail transport services** in good faith.
- (c) For clarification, if an **access provider** and an **access seeker** are unable to agree as to the terms and conditions (including prices) for the provision of a **declared rail transport service**, including in circumstances where the **negotiation protocol** has been followed by both parties, this will be an **access regime dispute** for the purposes of Division 5 of Part 2 of the **Act**.

4.4 Assessment of works required to provide additional capacity

- (a) An **access provider** must prepare and maintain protocols with respect to undertaking an assessment of works required to provide **additional capacity** to meet an **access seeker's** request for access, which must provide for the following matters, without limitation:
- (i) procedures for assessing the nature of the work required to undertake a detailed assessment of any works required to provide **additional capacity** to meet the **access seeker's** request for access and notifying the **access seeker** of such work;
 - (ii) procedures for carrying out or procuring the carrying out of any detailed assessment of works required to provide **additional capacity** to meet the **access seeker's** request for access;
 - (iii) procedures for allowing the **access seeker** to have input into any detailed assessment of any works required to provide **additional capacity** to meet the **access seeker's** request for access;
 - (iv) timeframes for:
 - (A) carrying out the work referred to in sub-paragraph (i); and
 - (B) providing a detailed assessment of any works required to provide **additional capacity** to meet an **access seeker's** request for access;
 - (v) procedures for varying any timeframe referred to in sub-paragraph (iv) with the consent of the **access seeker**;

- (vi) the basis upon which the **access provider** proposes to allocate any costs incurred in providing a detailed assessment of such works, which must be fair and reasonable having regard to the nature of the request for access, the work undertaken and the benefits to the **access provider** and the **access seeker** of any detailed assessment in relation to works required to provide **additional capacity** to meet the **access seeker's** request for access; and
 - (vii) procedures for resolving any dispute that may arise in connection with any matter referred to in the protocols.
- (b) An **access provider** must submit any protocols that the **access provider** is required to prepare and maintain under paragraph (a) to the **Commission** for approval at the same time as it submits a proposed access arrangement to the **Commission**.
- (c) Any protocol made under paragraph (a) must:
- (i) provide for the matters that these guidelines require the protocol to provide; and
 - (ii) be consistent with these guidelines.
- (d) An **access provider** must comply with any protocol that the **access provider** has submitted to the **Commission** under paragraph (b).
- (e) An **access provider** must:
- (i) make available for inspection at its offices; and
 - (ii) publish on its website,
- a copy of each protocol that the **access provider** is required to prepare and maintain under paragraph (a).
- (f) Paragraphs (a) to (e) apply to the variation of any protocol that the **access provider** is required to prepare and maintain under paragraph (a):
- (i) with such alterations and modifications as are necessary; and
 - (ii) as if that variation were a proposed protocol submitted for approval under paragraph (b).

4.5 Extension of time periods

Any time period referred to in these **negotiation guidelines** may be extended by agreement between the **access provider** and the **access seeker** or, on the application of either of them, by the **Commission** by notice in writing.

5. General obligations

- (a) An **access provider** must not request or require the following persons to identify a consignee:
- (i) an **access seeker** seeking the provision of **declared rail transport services** for the purpose of providing **freight services**; or
 - (ii) a **user** using **declared rail transport services** for the purpose of providing **freight services**.
- (b) In providing information pursuant to section 2, and in assessing and determining applications for access, an **access provider** must not have regard to the interests of itself or a **related body corporate** to the extent that the **access provider** or that **related body corporate** also acts in the capacity of **access seeker** or **user** in priority to the interests of other **access seekers** or **users** with respect to the supply of **declared rail transport services**.

6. Fees and levies**6.1 Fees and levies for the provision of information**

An **access provider** is entitled to charge an **access seeker** a fee for the provision of (and as a pre-condition to providing) an information pack under section 2(a) and the additional information required to be provided under section 2(d), the combined cost of which must not exceed \$1,000. This fee may be refunded by the **access provider** if an access agreement is entered into with the relevant **access seeker**.

6.2 Fees and levies for assessing works

- (a) Where an **access seeker** has accepted the **access provider's** offer under section 4.2(c)(iii)(B) and the **access provider** has carried out the detailed assessment of the works and the cost of the works, the **access provider** may charge a fee for providing such detailed assessment.
- (b) An **access provider** must, on request by the **access seeker**, provide to the **access seeker** in writing a breakdown of the component costs of the fee charged by the **access provider** under paragraph (a).
- (c) A fee charged in under paragraph (a) must be calculated in accordance with the protocols made under section 4.4.

6.3 No other fees or levies

Except as provided in sections 6.1 and 6.2, an **access provider** may not charge a fee or levy for assessing and determining access applications or providing information in relation to a **declared rail transport service**.

7. Interconnection

Note: Under section 38V(2)(d) of the **Act**, the Commission may make guidelines for or with respect to **interconnection**. Under section 38ZT of the **Act**, subject to that section, on receipt by an **access provider** of a notification from an **access seeker** who owns or operates a railway track or railway siding, or intends to own or operate a proposed railway track or railway siding, that the **access seeker** desires to connect that railway track or railway siding to the **access provider's relevant railway track**, the **access provider** must do all things reasonably necessary to enable the **access seeker** to connect the railway track or railway siding, or proposed railway track or railway siding, to the **access provider's relevant railway track**.

7.1 Preliminary information to be provided by an access provider

Upon receipt of an expression of interest by an **access seeker** who owns or operates a railway track or railway siding or who intends to own or operate a proposed railway track or railway siding, that the **access seeker** desires to connect their railway track or railway siding or proposed railway track or railway siding to the **access provider's relevant railway track**, the **access provider** must, within 14 days of receipt of such expression of interest, make available to the **access seeker**:

- (a) overview information about the **access provider's rail network** and **capacity**;
- (b) a description of the physical infrastructure at the location of the proposed **interconnection**;
- (c) the **access provider's** procedural and physical interface arrangements at the site of the **interconnection**;
- (d) the **access provider's** engineering and operational standards; and
- (e) the **access provider's** reliability and safety guidelines, standards or operating procedures.

7.2 Information to be provided by the access seeker

An **access provider** may require an **access seeker** who makes an application for **interconnection** to demonstrate (within 30 days) that:

- (a) the proposed **interconnection**:
 - (i) can be carried out in a technically and economically feasible way; and
 - (ii) will be consistent with the carrying on of safe and reliable rail operations on the line;
- (b) the **access seeker** has obtained and will maintain all **approvals** in relation to the construction, commissioning, operation and maintenance of the **interconnection**;
- (c) the configuration of the **interconnection** to the **access provider's rail network** is such that the **interconnection** will not, by virtue of its existence, reduce the **practical capacity** of that component of the **rail network**;
- (d) either:
 - (i) the management and staff of the **access seeker** have the necessary knowledge and experience; or
 - (ii) the **access seeker** will be able to and will engage the services of another person whose management and staff have the necessary knowledge and experience,to design, construct, commission, operate and maintain the proposed **interconnection**; and
- (e) the **access seeker** has the necessary financial resources to design, construct, commission, operate and maintain the proposed **interconnection**.

7.3 Additional information to be provided by the access seeker

An **access provider** may require an application for **interconnection** to contain the following:

- (a) a description of the **access seeker's** infrastructure and the proposed **interconnection**, including information about the design and construction of the **interconnection**;
- (b) a commissioning plan for the proposed **interconnection**;
- (c) a maintenance plan for the **interconnection**;
- (d) an explanation of how the **interconnection** will comply with the **access provider's** engineering and operational standards;
- (e) an explanation of the procedural and physical interface arrangements of the **interconnection** and an undertaking that such arrangements will comply with all procedural and physical interface arrangements of the **access provider**; and
- (f) an undertaking from the **access seeker** in relation to each of the following matters that:
 - (i) the **access seeker** will bear all construction, operation, maintenance and upgrade costs associated with the **interconnection**; and
 - (ii) the **access seeker** will comply with any reasonable requirements of the **access provider** in relation to the construction of the **interconnection**; and
 - (iii) the **access seeker** will maintain and comply with all **approvals** in relation to the construction, commissioning, operation and maintenance of the **interconnection**.

7.4 Determining application for interconnection

An **access provider** may refuse to consent to an application for **interconnection** in the circumstances permitted under section 38ZT(3) of the **Act**.

7.5 Timeframes

- (a) Upon receipt of an application for **interconnection**, an **access provider** must notify the **access seeker** that it consents or does not consent to the application for **interconnection** within 30 days. This is the time period for the purposes of section 38ZT(3).
- (b) The timeframe stipulated in paragraph (a) may be extended at any time by agreement between the **access seeker** and the **access provider**.

7.6 General obligations

The **access provider** and an **access seeker** must negotiate with each other in good faith.

8. Application

8.1 Application of negotiation guidelines to joint ventures

- (a) This section applies if there is more than one **access provider** in connection with **rail infrastructure**, including if:
 - (i) the relevant **rail infrastructure** is owned or operated by two or more persons as a joint venture or partnership; or
 - (ii) the **rail infrastructure** is owned and operated by different persons; or
 - (iii) **rail infrastructure** is legally owned by a person or persons on trust for others.In such a case each **access provider** in connection with the rail infrastructure is referred to in this section as a participant.
- (b) If these **negotiation guidelines** require or permit something to be done by the **access provider**, that thing may be done by one of the participants on behalf of all the participants.
- (c) If a provision of these **negotiation guidelines** refers to the **access provider** bearing any costs, the provision applies as if the provision referred to any of the participants bearing any costs.
- (d) If a provision of these **negotiation guidelines** refers to the **access provider** doing something, the provision applies as if the provision referred to one or more of the participants doing the thing on behalf of all the participants.

8.2 Waiver

The **Commission** may at its sole discretion and by notice in writing to an **access provider** waive any of an **access provider's** obligations under these **negotiation guidelines** where the **Commission** considers this would be consistent with the **Commission's** statutory obligations and that compliance with the obligation would not be necessary to achieve the purpose of these **negotiation guidelines** as set out in section 1.2.

9. Definitions

In these guidelines unless the context otherwise requires:

- (a) terms which appear **like this** and which are not otherwise defined in these guidelines have the same meaning as in the **Act**; and
- (b) **access arrangement** means an **access arrangement** approved in a final decision under section 38ZF of the **Act**, or made under section 38ZJ or 38ZL of the **Act**, or a proposed access arrangement that is deemed to be an **access arrangement** pursuant to section 38ZK of the **Act**;

- (c) **access arrangement information** means information that an **access seeker** would reasonably require to understand the derivation of the elements of the **access arrangement** so as to form an opinion as to whether the **access arrangement** complies with the requirements in Part 2 of the **Act**;
- (d) **access provider** has the meaning set out in the **Act**;
- (e) **access regime dispute** means:
 - (i) a dispute described in section 38ZU(1) of the **Act**; or
 - (ii) a belief of an access seeker or a user of a kind described in section 38ZU(2) of the **Act** that is taken to give rise to an access regime dispute by operation of that subsection;
- (f) **access seeker** means a person seeking to be provided a **declared rail transport service** by an **access provider**, or a person seeking **interconnection**;
- (g) **Act** means the **Rail Corporations Act 1996** (Vic);
- (h) **accreditation** means accreditation in accordance with Division 3 of Part VI of the **Transport Act 1983**;
- (i) **additional capacity** means:
 - (i) with respect to a rail **line**, any capacity additional to the existing **practical capacity** of the **line**;
 - (ii) with respect to a rail **terminal**, any capacity additional to the existing **practical capacity** of the **terminal**;
- (j) in deciding whether an **access provider** has used **all reasonable endeavours**, regard shall be had to relevant **standards**, **good industry practice** and other regulatory requirements, the performance of other **access providers** and to interstate, national and international benchmarks;
- (k) **approval** means a consent, licence, permit or other approval required by any **legislation** or lawfully required by the Crown in relation to the design, construction, commissioning, operation and maintenance of the **interconnection**, including any:
 - (i) necessary construction or planning approvals including any planning scheme amendment, planning permit or development approval;
 - (ii) approval required under environmental legislation (if any); and
 - (iii) consent, licence, permit or other approval required in respect of any artefacts etc in, on or below the surface of, the site;
- (l) **available capacity** means:
 - (i) with respect to a rail **line**, the availability of **train paths**, as determined in accordance with the **capacity allocation protocols**;
 - (ii) with respect to a **terminal**, the capability of providing **declared rail transport services** at that **terminal** after taking into account existing contractual commitments and any requirements to reserve capacity for prudent operation of the **terminal** in accordance with all applicable **standards** and **good industry practice**;
- (m) **business day** means a day that is not a Saturday, Sunday or public holiday in the State of Victoria;
- (n) **business unit** means a distinct division, department, branch, group, team or unit of an **access provider** or a **related body corporate** of an **access provider**;

- (o) **capacity** means:
- (i) with respect to a rail **line**, the capability of providing **train paths**;
 - (ii) with respect to a **terminal**, the capability of providing **terminal** services;
- (p) **declared rail transport service** means a rail transport service declared by an Order under section 38I of the **Act**;
- (q) **freight service** means a service for the carrying of freight by a railway;
- (r) **good industry practice** means all those practices followed in the commercial railway industry when an activity is undertaken:
- (i) in accordance with all applicable **legislation** and **standards**; and
 - (ii) with due care and skill;
- (s) **interconnection** means the connection of an **access seeker's** railway track or railway siding to an **access provider's** relevant railway track as provided for by section 38ZT of the **Act**;
- (t) **internal transfer terms** means the terms and conditions upon which, including prices, an **access provider** provides a **declared rail transport service** to itself or a **related body corporate**;
- (u) **legislation** means Commonwealth, Victorian or local government legislation including regulations, orders, by-laws, rules and other subordinate legislation or other document enforceable under any such legislation, regulations, orders, by-laws, rules or subordinate legislation;
- (v) **line** in respect of the **rail network** of an **access provider**, means the rail path between two locations on the **rail network** that has a common volume of capacity;
- (w) **master train timetable** means the master train timetable that an **access provider** is required to prepare and maintain under the **capacity use rules**;
- (x) **negotiation protocol** is the document described in clause 4.3(a) of these **negotiation guidelines**;
- (y) **operating handbook** means the operating handbook that an **access provider** is required to prepare and maintain under section 3 of the **network management rules**;
- (z) **practical capacity** means:
- (i) with respect to a rail **line**, the maximum theoretical capacity of a **line** adjusted to reflect the requirements for prudent maintenance and operational contingencies in accordance with **good industry practice**;
 - (ii) with respect to a **terminal**, the maximum theoretical capacity of a **terminal** adjusted to reflect the requirements for prudent maintenance and operational contingencies in accordance with **good industry practice**;
- (aa) **rail network** means the **rail infrastructure** used to provide **declared rail transport services**;
- (bb) **related body corporate** has the meaning set out in the **Corporations Act 2001** (Cth);
- (cc) **rolling stock** means locomotives, carriages, wagons, rail cars, rail motors, light rail vehicles, light inspection vehicles, rail/road vehicles, trolleys and any other vehicle that operates on or uses the rail track;
- (dd) **rolling stock interface standards** means the rolling stock interface standards required to be prepared and maintained by an **access provider** under and in accordance with the **network management rules**;

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- (ee) **standards** means any standard or code of practice issued from time to time by Standards Australia (an incorporated body formerly known as the Standards Association of Australia), the Association of American Railroads, the International Union of Railways, British Standards, Federal Railroad Administration, the Australasian Railway Association or such similar body to the extent that the standard or code is applicable to the Victorian railway industry; and
 - (ff) **statement of capacity allocation protocols** means the statement of capacity allocation protocols required to be prepared and maintained by an **access provider** under the **capacity use rules**;
 - (gg) **terminal** means a facility at which freight is loaded or unloaded from **rolling stock**, or stored, and includes hard stands, equipment and other infrastructure used for the loading or unloading of freight from **rolling stock** at the facility;
 - (hh) **terminal services** mean services provided by means of a **terminal** that has been declared to the **rail infrastructure** under section 38B of the **Act**; and
 - (ii) **train path** means a right (whether arising under an agreement or otherwise) to operate **rolling stock** between particular locations on a railway at particular times.

Dated 1 January 2006

GREG WILSON
Chairperson
Essential Services Commission

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