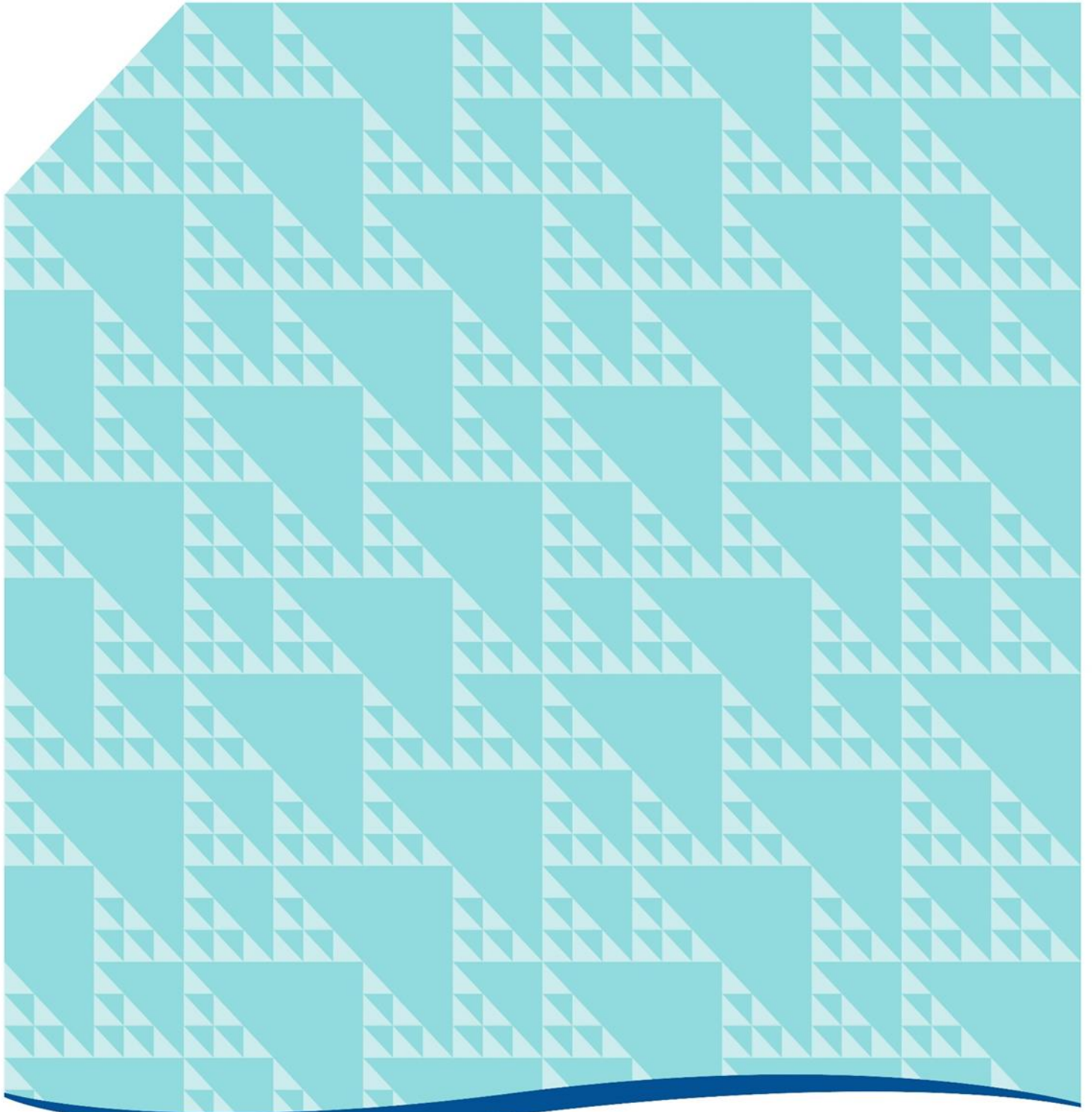


1 August 2018

Tasmanian Rail Access Framework Policy



Executive summary

The Tasmanian Rail Access Framework Policy provides a valuable resource for the below-rail operator and access seekers on the Tasmanian Rail Network. The policy sets out the roles and responsibilities of each party in the context of the Tasmanian Government's Statement of Expectations for TasRail.

The policy sets out the access charges that are to be charged by the below-rail operator to existing above-rail operations on the Tasmanian Rail Network, and any future access seekers that will operate equivalent or similar services. Additional costs may be passed on to access seekers (such as for capital upgrades and ongoing costs brought about by alternative uses) and can be negotiated with the below-rail operator through access or commercial negotiations.

The policy incorporates principles of the National Access Regime and Competition Principles Agreement and features a cost effective dispute resolution process that aims to avoid the need for parties to spend significant resources – which has historically been seen as a significant barrier for new access seekers.

The policy will operate in parallel with the legislative requirements under the Rail Safety National Law. While the policy aims to set out expectations and improve the transparency of the duties and obligations of the below-rail operator and access seekers, it does not bypass the requirements under the Rail Safety National Law. The policy supports an access seeker's right to negotiate for access, but does not impose an obligation upon the below-rail operator to grant access.

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Background

Existing policy framework

The Tasmanian Rail Network

The Tasmanian Rail Network (TRN) plays a key role in the state's land freight network, connecting industry to Tasmania's key freight hubs and northern ports. The operational network is a single line, narrow gauge system, extending from Brighton to Western Junction and to the Port of Bell Bay in the north east and Burnie in the northwest. Connections are also provided to Fingal in the east and Boyer in the Derwent Valley. The Melba Line (formerly named the Emu Bay Line) connects the West Coast to Burnie. The lines comprising the TRN are set out in Schedule 1 of the *Rail Infrastructure Act 2007*.

Below-rail assets include 611 kilometres of operational track and 232 kilometres of non-operational track. The operational network is accredited and utilised for freight services. The TRN operates under the *Rail Infrastructure Act 2007* and the Rail Safety National Law.

Ownership

The 2007 Access Declaration was established when the below-rail assets were transferred from a private company (Pacific National) to the Tasmanian Government but above-rail operations remained in private ownership (Pacific National). Following a decision by Pacific National to cease Tasmanian operations in December 2009 the Tasmanian Government acquired the rail operations and the Melba Line. This brought all of the operational rail freight network under common ownership.

The TRN is currently owned and operated by the state-owned company Tasmanian Railway (TasRail), which operates as a vertically integrated 'above-rail' (train services) and 'below-rail' (rail network) business. Under this business model, TasRail, as the below-rail network operator, charges users of the network (including its above-rail arm) for services provided.

Government expectations

As owners of TasRail the Tasmanian Government sets out its broad policy expectations of the business through a Statement of Expectations. The most recent Statement of Expectations was issued on 18 April 2012 and includes the following statements relevant to an access framework:

- The principal purpose of TasRail is to provide rail freight services in Tasmania.
- The focus of the business should be on operating a safe, reliable and efficient rail freight service and on increasing the company's share of the Tasmanian freight market.
- Expansion activities should only be undertaken where supported by commercial outcomes or where approved by the portfolio Minister and the Treasurer.
- TasRail should only upgrade the network for specific third party access where the upgrade is funded from the party seeking access.

- Below-rail access fees must be transparent and levied on above-rail operations of the company in the same manner as imposed on third parties in accordance with the approved Tasmanian Rail Access Framework.
- TasRail is to manage access arrangements, including pricing, to all access seekers (including itself) in accordance with the Tasmanian Rail Access Framework.

Investment

The TRN has attracted significant attention over the past decade, moving from a privately-owned business characterised by under-investment, to a Tasmanian Government-owned entity that has attracted higher levels of funding to deliver renewed infrastructure and rolling stock. The TRN operates as a freight rail network, with investment focussed on improvement of the efficiency, reliability and safety of freight rail services.

The recent investment by the Tasmanian and Australian governments in Tasmania's rail infrastructure and rolling stock has significantly improved safety and reliability across the network.

Rail market

The TRN currently operates freight rail services, with only one company (TasRail) operating above-rail services in the state. The existing customer base for freight rail services in Tasmania is small with a small number of large bulk freight customers accounting for a high proportion of total volumes.

During the 10 year period that the current access declaration has been in place, no other freight operator has applied for access to the network. There are currently no indications that a third party will seek access for freight rail services in the foreseeable future.

The TasRail above-rail business pays the established access fees to the below-rail business, as would any access seeker. Work undertaken by the Department of State Growth indicates that demand for rail freight services is highly price sensitive and the contestable freight market is small.

TasRail, as the network operator, is responsible for granting access to the TRN and terminals to rail operators seeking access to the network. There has been interest from tourism operators for use of the network, however there are also rail safety accreditation and insurance requirements which none of the proponents have been able to satisfactorily conclude.

Existing legislative framework

The TRN, operated by TasRail, has a number of governing pieces of legislation. These are briefly described below.

Rail Infrastructure Act 2007

The *Rail Infrastructure Act 2007* provides for and facilitates the operation of the TRN, including its attendant land and infrastructure. The TRN is defined in Schedule 1 of the Act and includes operational and non-operational lines. The Tasmanian Rail Access Framework Policy will apply to the TRN.

Rail Safety National Law

The 2007 framework referenced the state-based *Railway Safety Act 1997* (Tas) in terms of rail operators' accreditation and insurance arrangements. However, this legislation has been repealed and the safety regulation environment has been updated.

Following a Council of Australian Governments (COAG) commitment to national reform of rail safety regulation, the Office of the National Rail Safety Regulator (ONRSR) was established and commenced operation in 2013 with responsibility for regulatory oversight of rail safety law across jurisdictions. The ONRSR is responsible for rail safety regulation in Tasmania through the *Rail Safety National Law (Tasmania) Act 2012*. This Act applies the Rail Safety National Law, set out in the *South Australian Rail Safety National Law (South Australia) Act 2012*, in Tasmania. All rail operations in Tasmania must comply with the Rail Safety National Law, including the requirements for accreditation and insurance.

Rail Company Act 2009

The *Rail Company Act 2009* establishes TasRail as a state-owned company for the purposes of acquiring, owning and operating a rail business in Tasmania. The Act establishes TasRail's principal objectives, namely to:

- operate a rail business in Tasmania, effectively and efficiently;
- operate its activities in accordance with sound commercial practice; and
- maximise sustainable returns to its shareholder members.

Review and consultation process

In identifying the most appropriate rail access framework for Tasmania, the Department of State Growth undertook extensive desktop research as well as holding two rounds of stakeholder consultation:

- a preliminary round primarily seeking views from tourist and heritage railway operators which helped form a discussion paper; and
- a wider public consultation seeking feedback on draft recommendations within a discussion paper. The "2017 Review of Tasmania's Rail Access Framework Discussion Paper" can be found on the Department of State Growth website¹.

¹ https://www.stategrowth.tas.gov.au/policies_and_strategies/2017_review_of_tasmanias_rail_access_framework

Access framework policy

Principles

On the basis of research and consultation, the following high level principles were developed and underpin the Tasmanian Rail Access Framework Policy.

1. The principles of the National Access Regime and Competition Principles Agreement apply in Tasmania regardless of the form of the access framework.
2. All accredited operators should be able to share the capacity of the upgraded TRN.
3. The role of the below-rail operator is to manage the requirements of all above-rail operators in a way that maximises the utility of the railway network for its users, which includes giving priority to freight, works and other users (in that order).
4. Access fees are set by the Tasmanian Government and will be substantially lower than they otherwise would be under approaches used elsewhere in Australia because maintenance and capital contributed by Australian and Tasmanian governments are not reflected in the network charges.
5. The network operator retains residual discretion, that is, the access framework does not provide a contractual obligation but rather provides third party operators with a right to negotiate access and to seek arbitration if they are unable to secure appropriate train paths in a timely manner or if the terms of the negotiated access are considered to be unfair.
6. The expectation that the benefits derived from government investment in improving infrastructure will be passed onto end customers.
7. The pathway to seeking access should be clear and easily understood by third party operators, with publicly available documents to support this process.
8. The access framework should be supported by a simple, low cost and independent dispute resolution process.
9. The below-rail and above-rail businesses of TasRail should be treated separately for the purposes of determining the cost base for access charges and in assessing applications for access to the TRN.

Access requirements

There are two steps to gaining access to the Tasmanian Railway Network:

- Gaining accreditation from the Office of the National Rail Safety Regulator (ONRSR); and
- Signing an access agreement with the below-rail operator.

These can be done concurrently.

Gaining formal accreditation from the ONRSR is linked to a specific section of railway. It is essential that access seekers can provide assurance that they have the ability to meet the requirements set by the below-rail operator to access that part of the track.

To facilitate this process and minimise expense, TasRail, as the below-rail access provider, will provide a preliminary indicative agreement with a prospective access seeker once the access seeker has met the necessary commercial and governance requirements to operate on the track. This is so the ONRSR can commence assessing competency to manage the risks associated with operating on the track as part of the accreditation process, consistently with the requirements under the Rail Safety National Law.

The scope of the ONRSR is to ensure the competency of the operators, the suitability of equipment to be used by the operator and the governance and management of the operator.

Access provider

Infrastructure

Principles:

- 1. The principles of the National Access Regime and Competition Principles Agreement apply in Tasmania regardless of the form of the access framework.*
- 2. All accredited operators should be able to share the capacity of the upgraded TRN.*
- 3. The role of the below-rail operator is to manage the requirements of all above-rail operators in a way that maximises the utility of the railway network for its users, which includes giving priority to freight, works and other users (in that order).*

The following principles should apply to the infrastructure:

- Management of railway infrastructure assets is to be done in accordance with relevant national and international standards.
- Wherever possible, there should be a clear separation between the below-rail operations and the above-rail commercial service to allow differentiation between costs (including insurance).
- Infrastructure should be fit for the purpose identified by the Government priorities in its Statement of Expectations, with upgrades targeted to support commercial activities.
- Third party access seekers are required to fund any upgrades necessary to operate on the existing network.

Access

Principles:

- 5. The network operator retains residual discretion, that is, the access framework does not provide a contractual obligation but rather provides third party operators with a right to negotiate access and to seek arbitration if they are unable to secure appropriate train paths in a timely manner or if the terms of the negotiated access are considered to be unfair.*
- 6. The expectation that the benefits derived from government investment in improving infrastructure will be passed onto end customers.*
- 7. The pathway to seeking access should be clear and easily understood by third party operators, with publicly available documents to support this process.*

TasRail, as the below-rail operator provider, is to produce and make publicly available:

1. A document setting out the requirements to access the network including, but not limited to:
 - Commercial terms
 - Safety management requirements
 - Communication standards
 - Compatibility requirements (such as technical specifications of the below-rail infrastructure)
2. A sample access agreement to assist in clarifying roles and responsibilities of the below-rail infrastructure provider and the access seeker.

This could be facilitated by:

- Dedicated portal for access seekers with a guide to requirements and process.
- Provision for indicative access approval to facilitate accreditation.
- Giving an undertaking for clear and detailed response to applications within defined timeframes and provision for internal appeal and further guidelines for external appeal.
- Use of powers to delegate maintenance under accreditation under rail safety law.

Contractual terms

Principles:

1. The principles of the National Access Regime and Competition Principles Agreement apply in Tasmania regardless of the form of the access framework.

Contractual terms are to be in accordance with indicative track access agreement as published by the ACCC – see the ACCC website.²

Access pricing

Principles:

4. Access fees are set by the Tasmanian Government and will be substantially lower than access charges elsewhere in Australia because maintenance and capital contributed by the Australian and Tasmanian governments are not reflected in the network charges.

9. The below-rail and above-rail businesses of TasRail should be treated separately for the purposes of determining the cost base for access charges and in assessing applications for access to the TRN.

Rail Access charges have been determined on the basis of historical maintenance and service data, provided by TasRail, and will be set for five years. The determined access charges are applicable for all services on the TRN, assuming the operations remain relatively consistent with the current use. Any significant change to the use of the TRN may require access charges to be re-determined to ensure additional costs are considered - refer to the *Timeline and Review of the Policy (Trigger Events)* section. Change in use of a discrete section of the TRN may

² See <https://www.accc.gov.au/system/files/Indicative%20access%20agreement%20%28clean%29.pdf>

require additional charges to be passed on to access seekers (such as for capital upgrades and ongoing costs brought about by the alternative use) and can be negotiated with the below-rail operator through access or commercial negotiations.

The rail access charge contains a flagfall and variable rate, and is applied consistently for any section of the TRN that is accessed. The flagfall rate is fixed per service and is irrespective of the service length or mass carried. The variable rate is applied per 1,000 GTK – incorporating mass and service length components.

The charges have been determined to recover approximately 40 per cent of access revenue through the fixed component, and 60 per cent through the variable component. These proportions align with historical average fixed and variable expenditure across the TRN.

Access charges are to be charged as defined in Schedule 1.

Decision making and appeals

Principles:

1. The principles of the National Access Regime and Competition Principles Agreement apply in Tasmania regardless of the form of the access framework.

5. The network operator retains residual discretion, that is, the access framework does not provide a contractual obligation but rather provides third party operators with a right to negotiate access and to seek arbitration if they are unable to secure appropriate train paths in a timely manner or if the terms of the negotiated access are considered to be unfair.

8. The access framework should be supported by a simple, low cost and independent dispute resolution process.

Any element of discretionary use of power should be subject to an appeal process. This consists of firstly a set of service level undertakings by the below-rail operator that identifies the process and time span for determining an application to operate on the railway network. This will include:

- Outline of decision-making process published
- Timely acknowledgement of applications
- Expected timeline for decision-making provided and any delays advised promptly
- Opportunity for providing further information on request to address any gaps
- Detail of appeal rights

Appeal rights to include facility for:

1. Internal review by senior management at no cost
2. If decision sustained, referral to Minister for further consideration at no cost
3. If decision sustained or set aside, referral by either party to independent mediator sourced through Law Council of Tasmania with costs shared by both parties.

Of course, throughout this process, access seekers have a right to seek a declaration from the ACCC.

Under the state-based access policy framework, a simplified and local dispute resolution process will be implemented. This would involve escalation of the matter at various points if required. This may involve some cost to both parties.

The full dispute resolution process is outlined below:

1. The parties will use reasonable endeavours acting in good faith to settle the dispute as soon as practicable.
2. Formal process will be instigated by either party providing the other with a notice of dispute in writing.
3. The dispute resolution process, with appropriate time frames for each step, will follow the order of negotiation and then mediation:
 - 3.1 The dispute will first be the subject of negotiation - senior representatives from each party will meet and use reasonable endeavours acting in good faith to resolve the dispute by joint discussions.
 - 3.2 Should these negotiations fail to resolve the dispute, the second stage will be mediation:
 - 3.2.1 The dispute will be referred to the chief executive officers of both parties who will attempt to resolve the dispute, including by informal mediation.
 - 3.2.2 Should negotiations between chief executive officers be unsuccessful, the negotiations will be referred to the portfolio Minister.
 - 3.2.3 If the dispute is not resolved after being referred to the portfolio Minister, the dispute will be referred to formal mediation in Tasmania, to be mediated by a single mediator appointed by agreement of the parties or if they fail to agree, a mediator appointed by the President of the Law Society of Tasmania acting on the request of either party.
4. Conditions relevant to the mediation process would include:
 - 4.1 Mediation will be conducted by a mediator under the “Guidelines for Legal Practitioners Acting as Mediators” of the Law Society of Tasmania (whether or not the mediator is a legal practitioner).
 - 4.2 The parties may appoint a person, including a legally qualified person to represent it or assist it in the mediations.
 - 4.3 Each party will bear its own costs relating to the preparation for, and attendance at, the mediation.
 - 4.4 The costs of the mediator will be borne equally by the parties.

Access seekers

In order to facilitate the access process, access seekers should provide proof of compliance with the below-rail operator's access requirements. This will require access seekers to provide evidence against the following types threshold issues (and any others as prescribed in the below-rail operator's access requirements):

- technical requirements (such as key locomotive dimensions that must be compliant with the below-rail track – i.e. track gauge);
- safety management requirements;
- communication and network control systems interface; and
- emergency procedures.

Expectations: clear application process with defined time limits for decisions, full explanation of decisions and review process.

Once an access seeker has demonstrated compliance with the necessary threshold issues, TasRail will be able to grant a preliminary indicative access agreement so that the ONRSR can commence assessing competency to manage the risks associated with operating on the track as part of the accreditation process.

Timeline and review of the policy

The Tasmanian Rail Access Framework Policy will commence on 1 August 2018 and will apply over five financial years until 30 June 2023, including the applicable access charges as defined in Schedule 1. However, the policy may be amended following any significant events that would trigger a review of the policy.

In the interim period, the policy will be reviewed annually with relevant access and usage data provided by the current below-rail provider, TasRail.

Trigger events

Examples of events that may result in a review of the policy include, but are not limited to:

- Significant change to Tasmanian Government policy affecting funding of TasRail as a government-owned business.
- Significant change in the rail freight market in Tasmania that affects overall usage of the TRN.
- Significant change to capital funding that would likely affect ongoing maintenance costs of the TRN.
- Change in use of the TRN (such as commencement of passenger services).
- A currently non-operational line becoming operational.
- A new line being added as part of the TRN.
- Significant change to relevant parts of the Statement of Expectations for TasRail.

Strategic Infrastructure Corridors (Strategic and Recreational Use) Act 2016

The Strategic Infrastructure Corridors (Strategic and Recreational Use) Act 2016 provides an alternative mechanism to access parts of the TRN under certain circumstances and in some cases may be a more appropriate framework for some parties to seek access.

The Act provides a framework to facilitate the alternative use of non-operational rail lines on the TRN, and to provide for their ongoing management. This includes that a corridor may be leased for the purposes of tourist or heritage rail.

Once land has been declared to form a strategic infrastructure corridor, it will change its status from being a railway and will no longer be administered under the governance and management framework applicable to the TRN. Rather, the land will be administered under the Act, which establishes a framework to reserve the corridor as a key strategic asset for the state and to provide for its ongoing management.

Until such time as land is declared to form a Strategic Infrastructure Corridor, it remains as part of the TRN, leased to TasRail for operation and management.

The Tasmanian Government is open to considering alternative uses of non-operational railway lines on the TRN, including for potential heritage and tourist rail services. As such, this Act may provide an alternate pathway for tourist and heritage rail proponents to access non-operational lines.

Schedule I: rail access charges

The rail access charges to be charged to above-rail operations on the Tasmanian Rail Network following the commencement date (1 August 2018) and for the remainder of 2018-19 are:

Segment	Flagfall (per service)	Variable (per '000 GTK)
Tasmanian Rail Network	\$ 205.71	\$ 2.11

Charges for following financial years will be indexed in accordance with the Australian Bureau of Statistics Consumer Price Index, Australia March publication (Cat. No. 6401.0) - All Groups CPI (Hobart).

$$Charges_{y_n-y_{n+1}} = Charges_{2018-19} \times \frac{index\ number_{Hobart, March\ y_n}}{index\ number_{Hobart, March\ 2018}}$$

Where:

- $Charges_{y_n-y_{n+1}}$ is the rail access charge to apply in the financial year starting in year 'n';
- $Charges_{2018-19}$ is the rail access charge for 2018-19, as prescribed in the above table;
- $index\ number_{Hobart, March\ y_n}$ is the published All Groups CPI Index Number for Hobart in the March quarter of year 'n' (immediately preceding the financial year the charges will apply); and
- $index\ number_{Hobart, March\ 2018}$ is the published All Groups CPI Index Number for Hobart in March 2018 = 111.1³.

Note, this calculation must be done with a consistent index reference period.

³ Index reference period: 2011-12 = 100.0.

Annex I: stakeholder consultation

Preliminary consultation

The Department of State Growth contacted the following 11 tourist and heritage railway operators by email with an attached letter:

1. Association of Tourist Railways
2. Association of Tourist and Rail Heritage Australia (ATHRA)
3. Australian Railway Association
4. Australian Railway Historical Society (Tasmanian Division)
5. Derwent Valley Railway
6. Don River
7. Launceston North East Railway (LNER)
8. Ida Bay Railway
9. Tasmanian Transport Museum
10. Sheffield Steam and Heritage Centre/ Redwater Creek Steam & Heritage Society
11. Wee Georgie Wood Steam Railway

Stakeholders were offered the choice of providing a written response or a having face to face interviews with departmental officers.

Five associations requested face-to-face meetings (ATHRA, Derwent Valley Railway, Don River, LNER and the Tasmanian Transport Museum) and Derwent Valley Railway also lodged a written submission.

Summary of issues

1. Transparent process for applying for access with clarity on requirements for access

A common criticism was that there is no clear guidelines for seeking access on the TasRail website.

2. Ensuring clear separation between the below-rail and above-rail operations of TasRail

Respondents felt that there was a lack of separation between TasRail's below-rail service and above-rail freight operation businesses when considering prospective access seekers.

3. An ability to have provisional access rights granted by below-rail operator to facilitate accreditation

At the moment there is an impasse with respect to getting access without accreditation, which can't be given without access. The Rail Safety National Law states that accreditation must not be granted unless the applicant has demonstrated *“that the applicant is, or is to be, a rail infrastructure manager or rolling stock operator in respect of the railway operations for which accreditation is sought”*.

4. Clear low cost and independent appeal provisions

Respondents felt that approaches for access in the past have been summarily rejected without clear reasons and without an avenue for reconsideration or arbitration. There is a risk that stakeholders may be forced to seek redress through an access declaration by the ACCC, which would be financially burdensome and may potentially cause embarrassment for all parties.

5. Independent costs assessment for remediation of lines

Many respondents felt that one of the barriers to access was the unaudited claims of costs of rehabilitating non-operational lines and that a fair and equitable independent assessment was required that took into account the lower costs for work done on a voluntary basis.

6. Clear policy on government funding of below-rail operations, above-rail operations and tourist and heritage services – and a linkage between the two.

Respondents called for transparency in funding for above and below-rail services and an understanding of assistance available for tourist and heritage services in area such as government assistance for insurance cover.

Consultation on Rail Access Framework Discussion Paper

Stakeholders were broadly supportive of the draft recommendations in the discussion paper. Respondents raised the following issues.

1. The priority of users should be changed

Respondents questioned the priority order of freight, works and other users and noted that this could potentially see a tourist and heritage operator delayed to allow a ballast train conducting non-urgent works.

2. Access provider should hold necessary insurance for passenger operations

Respondents believed the below-rail operator should insure the Tasmanian Rail Network to a standard suitable for all services. This would require TasRail to obtain insurance separately for the below- and above-rail businesses which could be more costly than an integrated insurance package.

3. Below-rail manager should cover all legal costs of any reasonable claim or dispute.

Respondents believed that in cases where the claimant is a not-for-profit organisation, it would be appropriate for the below-rail manager to cover all legal costs of any reasonable claim or dispute as this would prevent potential access agreements from being stifled by financial resources alone.

4. Obligations of access seekers should be highlighted in the Tasmanian Government's published policy

Respondents called for the duties and obligations of access seekers to be initially raised in the Tasmanian Government's published policy, rather than being raised by TasRail on their website. This was to prevent a perception that TasRail was adding artificial barriers as the access provider.



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