

Dear Economic Regulation Authority,

I refer to your Issues Paper entitled *Review of the Railways (Access) Code 2000* of February 2015. May I point out a passage in the Issues Paper that requires correction, please?

In paragraph 72 on page 11, the following passage appears:

“The Code is subsidiary legislation required by the Act, meaning that it was not tabled in Parliament, and can be amended or disallowed by the Government without reference to the Parliament. Hansard records in the WA Parliament:

... the Code is not appropriate as regulation and is more a manual on the provision of access and a way of setting up the process and procedures. It is comparable in this way to industry Codes of Conduct which are typically determined by the executive Government. The Code deals with matters such as information about the regime, the time lines, the role of the arbitrator, what must be included in an agreement, and the framework within which prices should be set. The proposed status of the Code has precedents in other states.

The NSW Access Code, which was used as a model for the WA Code, requires only government gazettal. In Victoria, the Act provides the Governor in Council, on the minister's recommendation, with the power to declare rail transport services and specify pricing and other principles to be applied in an access regime outside the parliamentary process. Likewise, the South Australian Railways (Operations and Access) Act requires only the Government to proclaim any changes to the application of the access regime and the assignment of the regulator to a nominated authority. Finally, any changes to the code that are required to comply with the National Competition Council requirements to ensure certification of the regime should be able to be implemented without the risk of subsequent amendments through the parliamentary process.”

The words in bold in the above passage are not correct. Section 9 of the *Railways (Access) Act 1998* provides as follows:

“9 . Code is subsidiary legislation

- (1) The Code is subsidiary legislation within the meaning of the [Interpretation Act 1984](#) .
- (2) The Code is to be laid before each House of Parliament within 6 sitting days of that House next following publication of the Code in the *Gazette* .
- (3) Notice of motion to disallow the Code or any part of the Code may be given in either House of Parliament within 10 sitting days of that House after the Code has been laid before it under subsection (2).
- (4) Within 10 sitting days of a House of Parliament after notice of motion has been given in that House under subsection (3), that House may pass a resolution disallowing the Code or any part of the Code.
- (5) If the Code is not laid before both Houses of Parliament under subsection (2), or is disallowed by either House under subsection (4), the Code ceases to have effect, but without affecting the validity or curing the invalidity of anything done or the omission of anything in the meantime.
- (6) If a resolution has been passed under subsection (4), notice to that effect is to be published in the *Gazette* within 21 days.
- (7) In this section —

the Code includes —

- (a) an amendment of the Code; or
- (b) a code repealing and replacing the Code.”

From section 9 above, it is clear that, contrary to the statement in paragraph 72, any amendment to the Code must be laid before Parliament, and is subject to disallowance by it. In the above extract from paragraph 72, the paragraph goes on to quote a passage from Mr Omodei’s speech in Parliament. However this passage sets out the Government’s original position, not the provision in the Bill as finally passed. Section 9 as originally drafted only contained the text of subsection (1), and not subsections (2) to (7). However the Legislative Council amended the section to insert those subsections, as Mr Omodei acknowledges later in the debate (see Hansard. Legislative Assembly. Government Railways (Access) Bill 1998. In Committee. Mr P Omodei. 18 November 1998. Page 3690/1. See also Hansard. Legislative Council. Government Railways (Access) Bill 1998. In Committee. 28 October 1998. Page 2742/1.).

Therefore may I respectfully suggest that, when further documents are produced as part of the review, the incorrect statements contained in paragraph 72 be deleted, and the power of Parliament to disallow amendments to the Code be explicitly acknowledged.

For your consideration.

Kind regards,
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