Review of the *Railways (Access) Code 2000*

Final Report

December 2015

Economic Regulation Authority
WESTERN AUSTRALIA

This document is available from the Economic Regulation Authority's website at www.erawa.com.au. For further information, contact:

Economic Regulation Authority
Perth, Western Australia
Phone: (08) 6557 7900

Contents

INTRODUCTION

1. The Authority is required to undertake a review of the Code on the third anniversary of its commencement and every five years thereafter. The Code commenced on 1 September 2001.

2. The purpose of this review of the Code is to assess the suitability of the provisions of the Code to give effect to the Competition Principles Agreement (**CPA**) in respect of railways to which the Code applies.

3. The CPA provides a framework to allow third parties to access nationally significant infrastructure facilities that exhibit natural monopoly characteristics and cannot be duplicated economically.

4. The Economic Regulation Authority (**Authority**) has prepared this Report based on its review of the Code for provision to the responsible Minister pursuant to the provisions of section 12 of the *Railways (Access) Act 1998* (**Act**).

5. The Authority published an Issues Paper in February 2015 and invited submissions on matters raised in that Issues Paper and any other relevant matters. In May 2015, further submissions were invited on specific matters and matters raised in the initial submissions.

6. A Draft Report was published in September 2015 and further submissions were received in response to that report.

Background

7. The main object of the Act is to establish a rail access regime that encourages the efficient use of and investment in railway facilities by facilitating a contestable market for rail operations.

8. Part 2 of the Act provides for the establishment of the Code as subsidiary legislation. The Code contains provisions as set out under the requirements of Part 2 of the Act, including the process for the negotiation of access agreements between the railway owner and the entity seeking access, the arbitration of disputes during the course of such negotiations and the regulator's role in this process.

9. The Authority is the regulator responsible for administering the regime.

10. In October 2004, the Authority commenced its first review of the Code. The Final Report of this review was provided to the Treasurer on 23 September 2005 and, following the Treasurer's approval, it was published by the Authority on 5 December 2005.

11. Following consideration by the Government and a further round of public consultation by the Treasurer in accordance with section 10 of the Act, the Treasurer gazetted amendments to the Code on 23 June 2009.

12. In October 2009, the Authority commenced its second review of the Code. A Final Report of the review was provided to the Treasurer on 20 December 2011 and following the Treasurer's approval, the Authority published the Final Report on 7 February 2012.

13. No further consultation on the recommendations of the Final Report of December 2011 has been undertaken by the Government.

Legislative Requirements

14. As noted above, the Authority is required to undertake a review of the Code on the third anniversary of its commencement and every five years thereafter.[1]

15. The Authority is required to prepare a report on the review and give it to the responsible Minister (the Treasurer) for consideration.[2] The Act does not require the Government to take any action in response to the Authority's Review.

16. Copies of the Act and the Code are available on the Authority's website (www.era.wa.gov.au).

Scope of the Review

17. Part 2 of the Act sets out provisions relating to the establishment of a Code.

18. Section 4(1) of the Act states that "The Minister is to establish a Code in accordance with this Act to give effect to the Competition Principles Agreement in respect of railways to which the Code applies".

19. The primary purpose of this review of the Code is to assess the suitability of the provisions of the Code to give effect to the CPA in respect of railways to which the Code applies.[3]

20. Under the Act, a requirement of a review of the Code is to seek public comment on the effectiveness of the regime.

21. The CPA is defined in the Act as "the Competition Principles Agreement made on 11 April 1995 by the Commonwealth, the States and the Territories as in force for the time being".

22. The CPA is part of the National Competition Policy (NCP), which was formulated and signed by all Australian Governments.[4] The NCP is underpinned by three separate inter-governmental agreements:

    (a) The CPA

    (b) The Conduct Code Agreement

    (c) The Agreement to implement the NCP and related reforms.

[1] Section 12(1) of the Act.

[2] Section 12(6) of the Act.

[3] Section 12(2) of the Act.

[4] Further information on the CPA, third party access and state based access regimes is available from the National Competition Council at http://ncc.gov.au/articleZone.asp?articleZoneID=64

23. The CPA provides a framework to allow third parties to access nationally significant infrastructure facilities that exhibit natural monopoly characteristics and cannot be duplicated economically.[5]

24. The definition under the Act means that the relevant version of the CPA made on 11 April 1995, for the purpose of the Code review, is the most recent version of the Agreement. The Authority understands that the CPA, as amended at 13 April 2007, is the most recent version.[6]

25. As noted previously, the Act requires the Authority's review of the Code to assess the suitability of the provisions of the Code to give effect to the CPA in respect of railways to which the Code applies. Therefore, under the scope of this review, the Authority can only give consideration to proposed amendments to the Code that are not inconsistent with the CPA (as amended to 13 April 2007) or with relevant provisions of the Act, including those set out under Part 2 of the Act ("Establishment of Code").

26. The sections of Part 2 of the Act that are relevant include section 4(2)(d) relating to the regulator's supervisory role, section 5 "Criteria to be considered in applying Code to particular routes", and sections 11 and 11A, which relate to consultation on amendment or replacement of the Code.

27. The Code refers to five regulatory instruments (Segregation Arrangements, Costing Principles, Train Path Policy, Train Management Guidelines, and Over-payment rules) that may provide a greater level of detail to enable implementation of specific principles contained in the Code. These instruments are able to be amended on the direction or with the agreement of the regulator.

28. Consequently, these instruments will be reviewed and where necessary refined in a separate process with key stakeholders. Comments on issues relating to regulatory instruments made during this process may inform any subsequent reviews of those instruments.

29. Nonetheless, the focus of this review is on the potential for refinements to the Code to improve the Code's ability to give effect to the CPA.

Objectives of third party access

30. The broad objective of third party access under the CPA is to encourage the efficient use of nationally significant network assets to promote competition in related markets.

31. The provisions of the CPA most relevant to this review are those provisions contained in Clause 6 under the heading "Access to Services Provided by Means of Significant Infrastructure Facilities".[7] Clauses 6(c), 6(e) and 6(f) are of particular relevance to this review.

32. Clause 6(c) of the CPA requires that, for an access regime to conform to the principles set out in Clause 6, it should apply to significant facilities that would not be

[5] This framework is outlined at clause 6(4) of the CPA.

[6] The amended Competition Policy Agreement document is available at http://ncp.ncc.gov.au/docs/Competition%20Principles%20Agreement,%2011%20April%201995%20as%20amended%202007.pdf

[7] See COAG Competition Principles Agreement, at: http://ncp.ncc.gov.au/docs/Competition%20Principles%20Agreement,%2011%20April%201995%20as%20amended%202007.pdf

economic to duplicate; that are necessary to permit effective competition in upstream or downstream markets; and for which safe access may be economically provided.

33. Clause 6(e) of the CPA requires that an access regime should, among other things, provide for a negotiate/arbitrate approach to access that incorporates a right to negotiate access and dispute resolution provisions. Clause 6(e) requires that the owners of facilities promote access and do not hinder access and that accounting separation applies to those elements of a business that are covered by the regime.

34. Clause 6(f) requires that an access regime incorporates the following principles:

- An object clause that promotes the economically efficient use of, operation and investment in significant infrastructure thereby promoting effective competition in upstream or downstream markets.
- Access prices that meet the efficient costs of providing access, allow multi-part pricing and price discrimination, do not allow a vertically integrated operator to discriminate in favour of its downstream operations, and provide incentives to reduce costs.

SUBMISSIONS RECEIVED

35. On 23 September 2015, the Authority published a Draft Report and invited submissions in response to that report.

36. Eight submissions were received in response to the Authority's Draft Report. These were received from:

- Australian Rail Track Corporation (ARTC))
- Aurizon
- Brockman Mining Australia (Brockman)
- Brookfield Rail (BR)
- Cooperative Bulk Handling (CBH)
- Roy Hill Infrastructure PL (Roy Hill)
- The Pilbara Infrastructure (TPI)
- WA Farmers (WAF)

37. These submissions have been published on the Authority's website.

RECOMMENDATIONS

38. In this Final Report, discussion of issues is presented under the same headings used in the Draft Report. The Draft Report provided recommendations under some of these headings. The order of these headings has been altered in this report to provide some continuity between related issues. A small number of issues were raised in submissions which were not discussed in the Draft Report. Treatment of these issues is at the final section of this report "Other Matters Raised in Submissions".

Object of Railways Access Regime

Key Issues

39. The CPA requires that an access regime has an objects clause that promotes the economically efficient use of, operation and investment in significant infrastructure thereby promoting effective competition in upstream or downstream markets.

40. The Code does not have an objects clause, and the objects clause in the Act applies, which is:

> The main object of this Act is to establish a rail access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations.

41. One submission received in response to the Issues Paper commented that the objects clause in the Act should refer specifically to upstream and downstream markets.

42. The National Competition Council, when it last considered the suitability of the WA rail access regime as an effective regime, reported that the objects clause in the WA Act was sufficient to meet the requirement that the regime includes an appropriate objects clause.

43. The Authority did not make a recommendation in the Draft Report in relation to this issue.

Comments in Submissions

44. BR commented that it agrees with the ERA's assessment of this issue in the Draft Report.

Authority Assessment

45. The Authority has not made a recommendation in relation to this issue.

Scope of Railway Regulation

Key Issues

46. The Act and the Code apply to below-rail facilities. Railway infrastructure is defined in section 3 of both the Act and the Code to include: railway track, tunnels and bridges, control systems, associated plant and equipment; and specifically excluding: rolling stock, freight centres, terminal yards and depots.

47. This issue has been revisited a number of times in consideration of the railway owner's regulatory instruments, and has also been the subject of regulatory decisions made in respect of railways to which the WA Code does not apply. The Act is particular about the definition of 'railway infrastructure' that applies to the regime, and non-railway infrastructure is specifically excluded.[8]

[8] Act section 3(h)-(i).

48. One submission received in response to the Issues Paper commented that the decisions of the ERA and any arbitrator should take into account the whole supply chain.

49. The Authority is aware of an Australian Competition Tribunal ruling that "end effects", and in particular port operations, should not be ignored in assessing capacity for the purposes of rail access. The Authority has included provisions in regulatory instruments for some railway owners, where appropriate, to take account of shipping timetabling requirements and 'committed capacity'.

50. The Authority did not make a recommendation in the Draft Report in relation to this issue.

Comments in Submissions

51. BR commented that it agrees with the ERA's assessment on this issue in the Draft Report.

52. Brockman submitted that 'end effects' and port operations are not relevant to the consideration of capacity where the access sought will not extend to the loading or unloading systems of the relevant below-rail infrastructure.

Authority Assessment

53. The Authority has not made a recommendation in relation to this issue.

Prescriptiveness of the Regime

Key Issues

54. The WA rail access regime is 'light-handed', which means that it does not determine terms and conditions for a standard service in relation to an access proposal, but instead establishes boundaries for negotiations on price. The regime allows for negotiations between the railway owner and proponent on the terms and conditions for access, and for arbitration where the terms and conditions cannot be agreed.

55. More prescriptive approaches to regulation are common for railways in other jurisdictions, and range from variations on the negotiate-arbitrate model with narrower negotiation ranges, to full prescription of tariffs which diminish the role of negotiation in arriving at terms and conditions for access.

56. The benefits of a more prescriptive approach are that time consuming negotiation is minimised, and a safety net is provided if parties are unable to otherwise negotiate suitable terms and conditions for access.

57. The CPA outlines a preference for a negotiate-arbitrate approach to establishing fair prices over more prescriptive approaches, such as the setting of benchmark, or reference tariffs by regulators.

58. The ACCC, in administering the 'National Access Regime' provided in Part IIIA of the *Competition and Consumer Act 2012* allows infrastructure providers to submit "access undertakings[9]. The ARTC access undertaking provides standard reference

[9] The ACCC may also consider a proposed undertaking if a service has not been declared under the National Access Regime.

tariffs for reference services, around which negotiations may proceed in a more certain and less time-consuming manner than under a light-handed negotiate-arbitrate regime.

59. Stakeholders who have advocated for a more prescriptive approach have generally done so on the basis that it would provide them with additional bargaining power in negotiations with the railway owner.

60. A number of submissions received in response to the issues paper commented that the current negotiate-arbitrate approach to railways regulation in WA would be improved by increasing cost transparency or addressing "information imbalances". The Authority in its Draft Report noted that commercial negotiations between parties generally require a high level of confidentiality of cost and value information. Making railway owners' commercial information available to access seekers is necessary only where the regulator is required to be more prescriptive in determining terms and conditions, which would otherwise be negotiated between the parties. Disclosing this information enables such determinations to be reviewed.

61. In the Draft Report, the Authority agreed with BR's submission that the benefits of regulated tariffs will outweigh the costs only under certain circumstances, including where:

- There is a significant number of access proposals in relation to a particular service type (that is, homogenous freight tasks). In this situation there is less need for negotiation to meet the circumstances of a particular access seeker, and fewer reference tariffs would need to be established.
- The track condition is close to replacement standard. This is because it is likely that prices would be negotiated close to the ceiling, and the potential for regulatory error in setting a reference tariff would be lessened.
- There is less incentive for the infrastructure provider to negotiate for access to its rail network. For example, this could be due to its vertical integration into competing downstream markets.

62. The Authority also agreed that a negotiate-arbitrate approach is preferable to regulated tariffs where the condition of the track is not at replacement standard or where capital investments to the infrastructure cannot be justified by either the railway owner or the access seeker. Under these circumstances it is less likely that prices will be negotiated close to the ceiling.

63. In 2006, the WA Government was signatory to the Competition and Infrastructure Reform Agreement (**CIRA**), signed by all Australian Governments, which was an agreement to implement, in respect of certain nationally significant routes, a simpler and consistent national system of rail access regulation, using the ARTC undertaking as a model.

64. The Authority made a recommendation in relation to this issue in the Draft Report. That draft recommendation was Recommendation 1, which was:

> *That the Government implement the 2006 Competition and Infrastructure Reform Agreement (CIRA) in respect of the interstate route west from Kalgoorlie, and the TPI railway.*

Comments in Submissions

65. ARTC submitted that it has no objection to the implementation of Recommendation 1 of the Draft Report (submission page 1).

66. Aurizon submitted that it has the following concerns about the level of prescriptiveness of Code provisions in the context of constraining a vertically integrated operator:

- a negotiate-arbitrate model may prove inadequate to alleviate a significant imbalance of market power between parties
- a lack of effective price controls and the wide range between floor and ceiling prices creates a need for economically efficient prices to be set by a regulator
- lack of a prohibition on unfair discrimination, including between access seekers and the access provider's own above rail operations.

67. In relation to Aurizon's comments above, indicating its support of more prescriptive approaches, the Authority has also noted Aurizon's earlier submissions on this issue[10] which supported continuation of the current light-handed approach.

68. Aurizon re-submitted that the Authority should prepare non-binding price guidelines, to "fill the void associated with a lack of regulatory precedent in the determination of price between floor and ceiling costs".

69. Aurizon submitted that it supports the transfer of the interstate route to the national access regime as envisaged under CIRA, but has some reservations in relation to practical difficulties, including an assertion that provision of intrastate services on that route would remain under the WA regime (submission page 7).

70. Aurizon submitted that it would be preferable to transfer all routes covered by the standard gauge lease to the National Access Regime, but acknowledged that some interface issues would exist between regulations for access to services on the standard and narrow-gauge routes (submission page 7).

71. BR submitted that freight tasks on the Eastern Goldfields Route (**EGR**) from Kalgoorlie to Kwinana are not homogenous due to the presence of intrastate services which may use only a portion of the EGR and that these services may be quite variable due to a mix of iron ore, grain and other bulk products and freight. BR also referred to the mix of standard and narrow gauge services offered on the EGR (submission page 3).

72. BR submitted that it is problematic to assume that any route may be considered entirely 'close to replacement condition' and to presume on that basis that a more prescriptive pricing regime would be appropriate for that route (submission page 2).

73. BR submitted that current charges for interstate freight services on the EGR are well below the ceiling price, and are required to be consistent with a wholesale access agreement between BR and the ARTC. BR submitted that any consideration of a change in access regulation on the EGR should relate only to interstate freight services (submission page 3).

74. BR submitted that requiring intrastate users of the EGR to be subject to two regulatory regimes would cause significant regulatory disruption. BR submitted that access to

[10] Draft Report paragraphs 240-243.

services provided by infrastructure are regulated, not access to the infrastructure itself (submission page 4).

75. Brockman submitted that it supported Recommendation 1 of the Draft Report. Brockman submitted that the light-handed negotiate-arbitrate approach does not effectively enable access to TPI's railway, and that the implementation of a reference tariff-based regime (either by the ERA or the ACCC) is more appropriate to that infrastructure than the current less-prescriptive approach (submission page 2).

76. CBH submitted that it agrees with Recommendation 1 of the Draft Report, and also supports the transfer of regulation of the Kalgoorlie to Kwinana route to the ACCC. CBH submitted that Recommendation 1 should also require BR to submit an undertaking to the ACCC for approval. CBH submitted that it supported the transfer of regulation of access to all routes on the BR network to the ACCC (submission page 4).

77. CBH submitted that a prescriptive approach is required across more than the Kalgoorlie-Kwinana route because (1) there is no guidance on how parties should negotiate where track is not close to replacement condition, (2) it is unclear what the relationship between GRV and actual expenditure by the railway owner should be and (3) there are no Code provisions enabling information on marginal costs of access, or capital actually invested to be made available (attachment to submission page 5).

78. TPI submitted that it does not support Recommendation 1 of the Draft Report, and that this recommendation was based only on a very brief statement at paragraph 29 of the Draft Report (submission page 1).[11]

79. TPI submitted that it is wrong to assume that the ARTC Access Undertaking would be appropriate as a model for TPI's railway, and that TPI has a successful track record of commercial agreements for access to its railway (submission page 2).[12] TPI submitted that it was surprised that the ERA did not recommend that the CIRA be implemented also in respect of the Roy Hill Railway (submission page 3).

80. TPI submitted that the National Access Regime with the ACCC as regulator should apply to its railway (submission page 3). This means that the ACCC should accept an application to have that railway declared (by someone other than TPI) or should approve an access undertaking submitted by TPI.

81. WAF indicated that it supported Recommendation 1 of the Draft Report that the EGR move from regulation under the Code to ACCC regulation similar to that of the ARTC (submission page 3).

Authority Assessment

82. The Authority has received a range of comments in submissions in response to Recommendation 1 of the Draft Report. These comments addressed issues of interstate and intrastate services on the EGR, the applicability of the recommendation to Pilbara railways, and a wider application of a more prescriptive approach.

[11] Recommendation 1 of the Draft Report was based on the arguments put in paragraphs 278-286 of the report, which were summarised in paragraphs 26-31 of that report.

[12] TPI has not negotiated access (defined in section 3 of the Code as: the "use of railway infrastructure") to its railway, but provides limited haulage services.

The EGR and Interstate Services

83. The Authority has noted BR's submission that consideration of a change in regulation on the EGR to an alternate form based on the ARTC interstate freight access undertaking should relate only to interstate freight services.

84. Section 4(3) of the Act states:

> Provision may be made in the Code to exclude its application to interstate services, and for that purpose, to define what is an interstate service.

85. In relation to the views of some stakeholders that Recommendation 1 of the Draft Report entailed the 'handing over' of regulation of certain routes to the ACCC, the Authority has noted that the CIRA was not that regulation of those routes be handed over to the ACCC, but was that:

> *The parties agree to implement a simpler and consistent national system of rail access regulation, using the Australian Rail Track Corporation access undertaking as a model.*

Recommendation 1 in the Draft Report was not necessarily that routes be removed from Schedule 1 of the Code, or that they be handed over to the ACCC for regulation, but that the CIRA be implemented in respect of those routes.

86. The Draft Report identified some options for the implementation of the CIRA, including removing the identified routes from Schedule 1 of the Code. Further options available to implement the CIRA include amending the Code to:

- enable a more prescriptive approach based on the ARTC model to apply to certain routes under the Code. This option would not result in the removal of the interstate route from the WA access regime.
- remove the Code's application to interstate services, which would leave these services open for an application for declaration under the National Access Regime (Part IIIA of the *Competition and Consumer Act 2012*) or for BR to lodge an undertaking with the ACCC.

87. The benefits of the CIRA reform are a simpler and consistent approach to access regulation on the interstate route across all jurisdictions.

88. The Authority has noted that the Queensland interstate standard gauge track between Brisbane and the NSW border was transferred to the ARTC under a long-term lease arrangement in January 2010. This lease arrangement has resulted in the Western Australian part of the interstate route being the only part remaining outside the administrative control of the ARTC.

89. The Authority is not aware of what if any moves have been made by the WA Government to implement the CIRA agreement since 2006. The Authority considers that in making the agreement the Government may have considered a range of practical options for its implementation.

90. The Authority has noted the COAG Reform Council report of 2009 which recommended the ARTC model should not be applied in Western Australia until it can be demonstrated that the benefits of the change outweigh the costs.[13]

91. The Authority has noted BR's submission that the benefits of regulated tariffs will outweigh the costs only under certain circumstances, including where:[14]

- there are homogenous freight tasks
- the track condition is close to replacement condition
- there is less incentive for the infrastructure provider to negotiate for access

92. The Authority considers that a more prescriptive approach should apply generally within the WA rail access regime[15] but not to the extent that it would result in the regulator prescribing reference tariffs for all services. However, the Authority considers there may be a net benefit from having prescribed reference tariffs for interstate services west of Kalgoorlie.

93. The Authority understands that the condition of the EGR is broadly comparable to the condition of the remainder of the interstate rail track between Perth and Brisbane. On this basis, the application of more prescriptive tariffs would be no more problematic in respect of the route west of Kalgoorlie as it is to the remainder of the Perth-Brisbane route.

94. The Authority has noted BR's reference to the wholesale agreement between BR and ARTC, which suggests that a complementary undertaking is achievable.

95. The Authority considers that the ideal outcome would be for BR to submit an undertaking to the ACCC for administration of the interstate services under the National Access Regime. The Authority's preferred option to implement the CIRA is therefore to amend the Code to remove its application to interstate services. This option would not affect the regulation of intra-state services on the EGR.

96. This option would enable the regulation of services on the EGR to be made consistent with the ARTC undertaking. The Authority recognises that it is the prerogative of the railway owner to submit an access undertaking, and that declaration under the National Access Regime does not require the railway owner to do this.

97. The Authority has noted BR's submission that BR allows train paths on the EGR to be sold by the ARTC under a wholesale agreement, and that the price terms of that agreement are less than would be consistent with a 'ceiling cost' determined by the Authority. In and of itself, this raises the possibility that BR may not be motivated to offer an undertaking consistent with its current wholesale arrangements with ARTC.

98. The Government may therefore consider making the removal of the interstate route or interstate services from the Code contingent on BR offering an undertaking under the National Access Regime.

99. The Authority notes that there may be a period when the Code's certification as an effective access regime lapses, and therefore the interstate services may be the subject of an application for declaration. If the interstate services on the EGR are

[13] 2009 COAG Reform Council Report: Report to the Council of Australian Governments on Implementation of the National Reform Agenda, March 2009, pp. 58-59.

[14] Attachment to June 2015 submission, p. 16.

[15] See from paragraph 108 in this report.

declared under the National Access Regime, and an undertaking is not offered by BR, then the default negotiate-arbitrate provisions of the National Access Regime would apply. These provisions are more light-handed than the current WA rail access regime and would be less prescriptive than the WA rail access regime that would result if the Government were to implement the recommendations proposed in this report.

Pilbara Railways

100. The Authority recognises that consistency with the ARTC undertaking is not an important criterion in respect of railways in the Pilbara. For this reason, the Authority has removed reference to the TPI railway from Recommendation 1 as it appears in the Draft Report.

101. The Authority considers that railways in the Pilbara meet the three criteria referred to in paragraph 91 above which would indicate that the benefits of a more prescriptive approach will exceed the costs. For this reason, the Authority considers that a more prescriptive approach to regulating access to the railways in the Pilbara would improve the operation of the Code.

102. The Authority considers that a more prescriptive approach to regulation of Pilbara railways may be achieved within the WA rail access regime. In this report, the Authority has recommended a more prescriptive valuation approach to apply within the WA Code.[16]

103. The Authority has noted that TPI considers that the WA rail access regime should not apply to its railway, but that the National Access Regime should apply to all four Pilbara railways. This outcome could only occur if the TPI railway were removed from the WA rail access regime, and/or if an application to have the railway declared under the National Access Regime was successful (such an application could only occur if the WA rail access regime is not certified as an effective access regime). If this outcome were to eventuate, the negotiate-arbitrate scheme embodied in the National Access Regime, which is less prescriptive than the WA regime, would apply until such time as an undertaking was accepted by the ACCC, if it were offered by TPI.

104. The Authority has noted TPI's argument that its railway should not be subject to the WA rail access regime. Nonetheless, TPI is a signatory to a State Agreement wherein TPI has agreed that its railway will be subject to the WA regime. The removal of the TPI railway from the WA regime would therefore require legislative amendment to that Agreement Act. The Authority considers that this is not a matter for this Code Review but for TPI to discuss with the WA Government should TPI wish to pursue this further.[17]

Intra-state services on the SW Freight Network

105. The Authority has considered Aurizon's concerns in respect of intrastate traffic on the EGR, and notes that currently the only intrastate traffic that uses the EGR and another part of the freight network is the iron ore traffic east of Koolyanobbing (which

[16] See section on estimating capital costs, from paragraph 108.

[17] The Roy Hill Railway is subject to the WA rail access regime under similar circumstances.

also uses the Kalgoorlie-Esperance route) and some CBH narrow gauge paths.[18] Neither of these users have expressed concerns in relation to the prospect of these services being regulated under the National Access Regime.

106. In relation to BR's reference to the "broad range of various bulk products and general freight" which use both the EGR and other routes on the BR network, the Authority is not aware of any intrastate traffic (using other parts of the BR network) entering the EGR except at Avon (Northam).[19]

107. The Authority considers that a more prescriptive approach should apply generally within the WA rail access regime. This would mean that any services, other than the interstate services, would be subject to a more prescriptive form of regulation within the WA rail access regime. This matter is discussed in the following section of this report commencing at paragraph 108.

Authority Recommendation

Recommendation 1

The Government consider options to bring interstate services offered by Brookfield Rail on the interstate route under regulations consistent with the ARTC undertaking, in line with the 2006 Competition and Infrastructure Reform Agreement.

Clause 2 Schedule 4 – is there a better means of estimating capital costs than the GRV method?

Key Issues

108. The approach of the WA rail access regime is "light-handed", which means that the regulator sets a range within which parties negotiate a price and does not prescribe terms of prescribing terms and conditions for access. The negotiating range is the range of costs between "incremental costs", being usually only operating costs associated with the proposed operations, and "total costs" which is all costs including capital costs and operating costs associated with all operations on the route.

109. Parties can negotiate a price for a route that incorporates a capital component that varies depending on the number of operators on the route and the condition of the asset.

110. For the purposes of establishing the capital component of total costs, the Code currently requires that a "Gross Replacement Value" method (GRV) be used, which is the cost to replace the asset with a new asset. The GRV does not necessarily relate to the asset's current condition or the economic value a user may expect to extract from use of the asset.

[18] Both Cliffs Resources (Koolyanobbing) and CBH also each operate one standard gauge path per day (which requires use of the EGR only). The dual gauge portion of the EGR is between Avon and Kwinana, and CBH bring some narrow gauge trains from the narrow gauge network onto the EGR at Avon.

[19] Cliffs Resources loads on at Koolyanobbing which is on the EGR, but does not bring trains from elsewhere on the freight network to the EGR.

111. Other railway access regimes in Australia establish the capital component of total costs based on an asset value that is rolled forward over time, established in the first instance on a 'Depreciated Optimised Replacement Cost' (DORC) basis. This was referred to in the Draft Report as the 'DORC approach' to valuation.

112. The DORC approach aims to determine a precise capital value for the asset at a point in time and over time incorporating depreciation of, and efficient additions to, the asset stock. The capital component of costs under a DORC approach therefore better reflects the value of the regulated assets.

113. The Authority recognises the limitations of relying upon a depreciated value to reflect the condition of an asset (or the standard of a service), and that the written down value of an asset does not necessarily align with the condition of the asset. For example, it is possible that a route could have a written down asset value of zero and still retain some economic value to users.

114. The Authority did not make a recommendation in relation to this issue in the Draft Report.

Comments in Submissions

115. BR submitted that it agrees with the ERA's assessment on this issue and agreed that the DORC approach to establishing capital costs is not broadly compatible with a light handed negotiate-arbitrate approach, on the grounds that DORC reflects asset condition, and that asset condition is better allowed for in negotiations than in the ceiling price (submission page 8).

116. Brockman submitted that its view was that a DORC approach for establishing floor and ceiling prices is more appropriate as it would (1) align the WA regime with other regimes in Australia and (2) provide more certainty in prices over time, as GRV valuations can result in significant moves in access prices (submission page 5).

117. CBH submitted that it does not agree with the Authority that the DORC approach to establishing capital costs is not compatible with a light-handed, negotiate-arbitrate approach (attachment to submission page 7). CBH gave the reasons for this as (1) there are still many other elements subject to negotiation in an access agreement even if DORC is used to establish capital costs, and (2) the ERA appears to be implying that a ceiling price based on brand new assets should be used just to open up the prospect for negotiating a price below the ceiling.

118. CBH submitted that the GRV method is a barrier to effective negotiations and the establishment of efficient prices consistent with the objectives of the CPA (attachment to submission page 1). CBH submitted that the effectiveness of negotiations could be improved by reducing information asymmetry between the parties, and that the Authority understates the preconditions for effective negotiation to occur, especially where the condition of the infrastructure is poor and the scope for negotiation is wider (attachment to submission page 25).

119. CBH submitted that the use of a GRV approach to degraded infrastructure did not provide meaningful signals, especially where there are few (or no) other prospective operators. This is because if an operator were required to pay even a small fraction of the ceiling cost it would not be able to operate profitably (submission page 18). CBH provided other comments relating to revenues accrued to BR for past access, which are not relevant to this review.

120. CBH noted the statement by the Authority that: [20]

> "It would be expected that rail access would be less regulated than electricity or gas access due to the competition to rail from other transport services. This competition should provide for a greater degree of countervailing market power",

and agreed that intermodal transport could limit the extent of monopoly pricing (attachment to submission page 3). CBH commented, however, that it was difficult to see how an access price developed merely to avoid road bypass would promote efficient use of the infrastructure, or be of general benefit to the public. CBH commented that such a view would imply that the Code is redundant for vertically separated rail networks, as no rational railway owner would price at a level that induces modal bypass (attachment to submission page 4 and page 9).

121. CBH submitted that it accepts that there is no direct link between prices in an access agreement and the ceiling cost, however, CBH considers it a strange conclusion to draw that, in a negotiation between floor and ceiling prices, increases in the ceiling price would not affect the negotiated outcome (attachment to submission page 9).

122. CBH submitted that there is a need for the Code to make a more rigorous approach to regulating the availability, quality and standard of access services. This would entail (1) incorporating minimum standards the railway owner must meet, (2) ensuring pricing by the railway owner reflects the level of service and (3) obliging the railway owner to undertake 'prudent' expenditure (submission page 24).

123. Aurizon submitted that a requirement to negotiate prices below a ceiling level provides leverage to the railway owner due to information asymmetry, and that the railway owner can overstate the quality of its asset condition, resulting in an ex-poste change in service quality (submission page 10). Aurizon submitted that the Code should include a requirement for mandatory asset condition and performance reporting in order to overcome the information imbalance which is highly pertinent to the negotiated price outcome, and which can inform an arbitrator in making a determination on the standard of infrastructure (submission page 11).

Authority Assessment

124. The Authority has noted BR's comments that DORC reflects asset condition, and that asset condition is better allowed for in negotiations than in the ceiling price. Other submissions indicated a preference that asset condition be allowed for in the ceiling price rather than in negotiations.

125. The Authority has noted Brockman's comments that adoption of a DORC capital valuation would align the WA regime with other regimes in Australia. The Authority has also noted comments in other submissions that a DORC approach to determining capital costs is compatible with a negotiate-arbitrate approach.

126. The Authority considers the current WA regime to be a light-handed form of regulation. Not only are terms and conditions free to be negotiated between the parties, but the negotiation boundaries set by the floor and ceiling prices are very broad, as the total cost (which determines ceiling price) is specified to include capital costs sufficient to replace the existing route with a brand new route.

[20] Draft Report page 3.

127. A heavy-handed form of regulation typically prescribes a tariff, i.e. the regulator sets a benchmark tariff for a benchmark service, or the railway owner submits an undertaking which nominates terms and conditions.

128. A rolled-forward capital value, incorporating depreciation, would reflect the written-down value of the route rather than the replacement value. The use of a rolled-forward capital value for assets within a negotiate-arbitrate regulatory framework would represent a move part-way along the continuum between light and heavy handed approaches. Such an approach allows negotiations to occur, but better reflects the value of the asset in negotiations, by prescribing an upper limit to price negotiations which takes explicit consideration of the depreciation of the asset.

129. The Authority has noted that the WA regime is the only Australian regime which uses GRV capital valuation within a negotiate-arbitrate framework. The Authority acknowledges that an Established Asset Base (EAB) approach reduces the scope for negotiation, and that a negotiate-arbitrate approach utilising an EAB capital valuation would be more prescriptive, to the extent that the process would describe depreciated capital value at the outset.

130. The Authority has previously commented that the effectiveness of the Code has not yet been fully tested, as there has not yet been a Code negotiation process which has concluded. On this basis, it has been difficult for the Authority to judge whether or not the GRV approach is, in practice, an effective approach within the negotiate-arbitrate model.

131. The Authority acknowledges that there has been a high degree of uncertainty in relation to the likely outcome of negotiations expressed by the majority of stakeholders who have provided submissions, and that this indicates a reduced level of confidence in the Code. The Authority has noted in other parts of this report that the market's confidence in the Code is impacted by delays occasioned in the negotiation process (which have not always been Code related), amongst other things.

132. The Authority has noted the comments provided by CBH which relate to the lack of meaning of a GRV based ceiling price, and lack of relevance of bypass costs to negotiations.

133. The Authority has decided to recommend that Schedule 4 of the Code[21] be amended to prescribe a capital valuation method which explicitly accounts for depreciation of the asset.

134. The replacement of GRV with an EAB that takes into account the depreciated value of the asset, and which would be determined by the Regulator at the time of an access proposal, would reduce the uncertainty associated with asset valuation, and might facilitate a quicker conclusion to negotiations. It would also result in a greater disclosure of some railway owner information, which would further reduce uncertainty.

135. The Authority considers that the impact on total costs of adopting an EAB approach would be most apparent on the routes in Schedule 1 of the Code which are the so-called "Tier 3 routes". The Authority expects that the impact on total costs for the majority of the Freight network would be much less significant, due to the generally high track standard prevailing on the network.

[21] Principally clause 2 of Schedule 4.

136. The Authority has noted that there are provisions in the regulatory arrangements put in place in other states for a "ceiling price" to be established on an EAB basis, within a negotiate-arbitrate approach. In those jurisdictions, the determination of a ceiling price, as a "maximum allowable revenue" determination, is calculated to apply over a fixed regulatory period by incorporating projections of capital expenditure, depreciation and operating amounts over the period.

137. The Authority does not consider that the determination of Total Costs (as the maximum allowable revenue) over a fixed regulatory period is warranted as it would involve an unnecessary increase in prescriptiveness within the negotiate-arbitrate framework. The Authority considers that the EAB approach may be incorporated into the existing negotiate-arbitrate approach prescribed in the Code.

138. The approach could operate as follows:

- The initial asset bases would need to be established. This requirement is discussed further from paragraph 141 below.

When access is sought under the Code:

- The EAB would be established by the railway owner on the basis of an opening value, capital additions and depreciation. Depreciation would be calculated for each class of assets using the remaining economic life.[22]
- All determinations of efficient capital cost (including capital additions) and operating costs made by the railway owners would be approved by the regulator, as currently.[23]
- Capital costs for each asset class would then be established via an annuity calculation using the remaining economic life and the WACC, in the same way as currently described in clause 2 of Schedule 4 to the Code (using an EAB instead of GRV).
- Negotiations may proceed on the basis of total costs, and applying only to assets which exist on the ground at the time. The costs associated with any required extensions and expansions would be considered as currently for negotiation purposes, and would be incorporated into Total Costs for the purposes of administering the Over-payment Rules in the same way as they are currently, that is by a redetermination of costs after the new assets are installed.

139. The Authority considers that utilising an EAB in this way would enable the negotiate-arbitrate process to be preserved, while minimising the increase in prescriptiveness and changes to existing Code provisions.

140. The Authority notes that the adoption of an EAB approach to determining capital costs would require the incorporation of procedures for merits review in the Code, to allow the Regulator's decisions on capital additions and depreciation to be tested if the parties require it. The inclusion of provisions for merits review would necessarily involve the introduction of potential for delays associated with that process. These

[22] The method of depreciation would be consistent with the depreciation profile underlying an annuity calculation, taking account of cyclical maintenance required to achieve the economic life.

[23] Capital contributions are currently considered for the purposes of Over-payment rules, as a source of revenue, in order to incorporate all assets into the GRV 'bypass cost'. Discounting capital values by the extent of contributions may be a preferred approach if the calculation of capital value is refocussed - by adoption of a EAB - from defining bypass cost to defining railway owner's outlays.

additional delays may to an extent offset any reduction in timing promoted by the determination of capital values on an EAB basis.

141. The Authority considers that establishing an opening depreciated value for all routes on the SW freight network is best established by the WA Government as owners/managers of the lease arrangement, because the lease contains the confidential provisions requiring performance and track standard reporting. The WA Government, as the original owner/lessor of the network, may have an owner's perspective of the history of the network and the value of individual routes at the time of the sale of the lease, and the changes in the value of network assets since the lease was entered into.

142. For all other railways, where the railway owner is the actual owner (and not a lessee), the Authority considers that the railway owner should provide a schedule of written down asset values to establish an opening EAB.

143. In all cases, the determination of opening asset values by railway owners would be subject to review and approval by the ERA,[24] and may require independent technical and economic advice to be provided.[25]

Disclosure of railway owner's information and reporting on performance standards

144. A number of submissions have argued that the current GRV-based negotiate-arbitrate model could be improved by increasing disclosure of the railway owner's information, or "reducing the information asymmetry in negotiations". The Authority does not agree with this view and has concluded that the requirement for information disclosure increases with the degree of prescriptiveness in the regulator's role. The Authority considers that determining capital values on an EAB basis would require a greater level of information disclosure than under the current GRV-based approach.

145. In relation to CBH's contentions (outlined in paragraph 121 above) that the Code should impose performance criteria on the owner of the freight network lease, the Authority has noted that the lease agreement contains performance criteria, and provision for a five yearly review of performance. The Authority considers that this is a commercial matter for consideration by the two parties to the lease, and not by the Authority.

146. Aurizon made similar comments (outlined in paragraph 122 above) and commented that the Code should require condition reporting, in order to assist parties to negotiate efficient prices on the basis of the standard of the track. This matter is likewise an issue for consideration in conjunction with the proper management of the lease, and its reporting provisions, by the WA Government.

147. The Authority considers that, in line with stakeholders preferences, the utilisation of an EAB approach will provide an increased level of prescriptiveness in relation to the economic value of assets, and increased transparency in relation to asset values. This may lessen the usefulness of performance standards reporting to a proponent.

[24] As part of a review of Costing Principles which would be consequently required, or as an element of the first costs determination in response to an access proposal.

[25] The establishment of an initial capital base might be made subject to criterion similar to those of the (now repealed) WA Gas Code, to avoid claims that a price paid for assets can be used as an opening value.

Authority Recommendation

Recommendation 2

Clause 2 of Schedule 4 be amended to provide for an Established Asset Base (EAB) valuation in place of the Gross Replacement Value (GRV) approach currently prescribed in that clause.

Other parts of the Code be amended to accommodate an EAB basis for valuation.

Merits Review

Key Issues

148. The WA rail access regime does not currently include provisions for a merits review process. The Authority has received submissions to this review commenting that a merits review process would be beneficial.

149. The Authority has previously recommended that a formal process for merits review would not provide reassurances either to railway owners or access seekers in the context of a light handed regulatory regime, where the role of the regulator in establishing the price is limited and that role is undertaken by the parties in negotiation or by the arbitrator.

150. Three submissions were received in response to the Issues Paper which indicated a view that the regulator's decisions should be open to review. One submission received in response to the Issues Paper suggested that merits review should apply to Arbitrators' decisions in the WA regime.

151. In the Draft Report, the Authority concluded that, if the regime were more prescriptive, and if the role of the regulator was to determine the price, then a merits review process may be warranted.

152. The Authority did not make a recommendation in relation to this issue in the Draft Report.

Comments in Submissions

153. BR submitted that the Authority at paragraph 36 of its Draft Report states that the arbitrator effectively takes the role of merits review in a less prescriptive regime. BR submitted that section 29 of the Code requires an arbitrator to take into account and give effect to matters determined by the Regulator. BR submitted that, in this sense, the arbitrator has no capacity to perform a merits review of the findings of the Regulator, including of the broad parameters for negotiation (submission page 4).

154. CBH submitted that there is scope for limited merits review of arbitration decisions, and that merits review of arbitrator determinations is provided for under Part IIIA of the CCA, which is a "light-handed" negotiate-arbitrate regime (submission page 14).

155. CBH submitted that merits review of arbitrator decisions is warranted given the potentially large gap between floor and ceiling prices, and the significant room for flexibility in interpreting pricing principles. CBH submitted also that merits review of arbitrators' determinations is appropriate where there is limited regulatory

intervention, but significant consequences of an unfavourable decision (submission page 14).

156. Roy Hill submitted that merits based review should be introduced to reduce the risk of regulatory error. Roy Hill submitted that this has been supported by both railway owners and access seekers in previous submissions to this review (submission page 1).

Authority Assessment

157. The Authority has noted comments from all stakeholders that additional merits review procedures are required to be applied to determinations by the Regulator.

158. The Authority does not agree with stakeholders that the decisions currently made by the Regulator warrant a review process. In paragraph 36 of its Draft Report, the Authority stated that the Regulator does not determine precise tariffs, but only broad cost parameters relating to price boundaries for negotiation. These broad negotiation boundaries have a limited bearing on a final negotiated price, and it is the arbitrator's decision (in the absence of a negotiated price) that determines a fair outcome to the process.

159. In the previous section the Authority has recommended that an EAB approach be taken to determining capital values as a component of total costs. By using this approach to determining costs, the regulator's decisions would appropriately be open to review, due to the increased prescriptiveness of determining capital costs using an EAB approach, as opposed to the GRV approach.

160. The Authority has therefore decided to recommend that, if Recommendation 5 is adopted, and Schedule 4 is amended to incorporate an EAB approach to determining capital costs, that the Code also be amended to incorporate a new part providing for a merits review process.

161. The Authority considers that part 5 (Merits Review and other non-judicial review) of the *National Gas Law* might form a model for a new part to the Code providing for merits review. The Authority is aware that the AEMC provides a review mechanism in Part 5 of the NGL, and that a Western Australian body such as the Electricity Review Board or the State Administrative Tribunal might appropriately undertake this role in the Western Australian jurisdiction.

162. In relation to CBH's submission, the Authority agrees that the CPA provides scope for limited review of arbitrators' decisions. The ACCC in the administration of the National Access Regime acts itself as an arbitrator for disputes, and has a tribunal established for that purpose. In the WA law, the regulator does not act as an arbitrator, and all disputes are conducted in accordance with the *Commercial Arbitration Act 2012*. Part 7 of that Act provides for appeals against an arbitrator's award.

Authority Recommendation

Recommendation 3

If Recommendation 2 is adopted, that the Code also be amended to include a new Part providing for merits review or other non-judicial review of the Regulator's cost determinations.

Enforcement of Railway Owners obligations

Key Issues

163. The Act provides for the application of penalties for non-compliance by the railway owner with some parts of the Act. The regulator is responsible for monitoring and enforcing compliance by railway owners with the Act and the Code. Access seekers are able to seek injunctive relief in respect of disputes between themselves and a railway owner in respect of a railway owner's obligations under the Code.

164. Two submissions received in response to the Issues Paper, both from access seekers, argued that a tighter enforcement regime is required. One of these submissions commented that the regular's powers to monitor and enforce the regime should be increased.

165. In the Draft Report, the Authority concluded that access seekers are as well-placed as the regulator to prosecute any failure on the part of railway owners to meet their obligations under the Code. The Code gives access seekers their own right to injunctive relief, which enables the regulator to remain impartial in inter-party disputes. The Authority considers that its own power of injunctive relief is a last resort, when the railway owner may be in default of its obligations in some respect and when there is no access proposal in the course of resolution.

166. The Authority did not make a recommendation in relation to this issue in the Draft Report.

Comments in Submissions

167. BR submitted that it agrees with the ERA's assessment on this issue (submission page 5).

168. Brockman submitted that it does not agree that access seekers are as well placed as the Authority to prosecute failure on the part of railway owners to meet their obligations under the Code. Brockman stated that junior resource developers do not have the resources to enforce compliance using court proceedings.

169. Brockman submitted that the powers conferred on the Authority to enable it to discharge the functions pursuant to Part 3 of the Act are much broader than the rights of access seekers, including in relation to access to information and rights of entry. Brockman stated that injunctive relief is not the only enforcement option available to the Authority (submission page 3).

170. CBH submitted that the Authority's unwillingness to take a proactive role in enforcement provides railway owners with greater scope to "push" proponents outside the Code by making the Code process as difficult as possible (submission page 14).

171. CBH submitted that a decision not to take enforcement action is necessarily partial, as it is, in effect, a presumption that the Code has not been breached. CBH argued that this approach does not provide a 'deterrence' factor to dissuade railway owners from further breaches (submission page 15).

172. CBH submitted that in the case of repeated minor breaches, have a significant cumulative effect on a process, including causing delay, and that a private operator cannot justifiably seek to enforce the Code in every instance a breach occurs.

173. In that regard, CBH referred to paragraph 52 of the Draft Report and quoted that the Authority:

> considers that "repeated failure to comply with obligations to provide information" or "any conduct that has the effect of repeatedly and unnecessarily delaying an access proposal" is clearly conduct that hinders the making of an agreement

174. CBH submitted that a breach of the prohibition against preventing or hindering access is an offence and therefore only enforceable by the Authority. CBH submitted that there is insufficient regard paid to the fact that such conduct may cumulatively amount to an offence under section 34A of the Act (submission page 15).

175. CBH submitted that the Code should be amended to introduce a "tighter, more streamlined enforcement regime, with clearer obligations". CBH submitted that the consequences for failing to comply with the Code should be more significant, and the ERA's enforcement powers need to be increased, so that it may take a more active role (submission page 24).

Authority Assessment

176. The Authority has noted that CBH's comment that the regulator's enforcement powers need to be increased in order for the regulator to take a more active role in enforcement.

177. The Authority has also noted CBH's view that a decision not to take enforcement action is necessarily partial, as it is, in effect, a presumption that the Code has not been breached. The Authority considers that by the same token a decision to take enforcement action presumes that a breach has occurred.

178. The Authority considers that in most cases, the parties to a negotiation under the Code are as well-placed as the Regulator to pursue a breach of any provision of the Code, and that the current enforcement provisions in the Code are adequate. Further, it would be difficult for the Authority to judge the merits or otherwise of an allegation of a Code breach in the course of a negotiation process and where doing so may result in further delays to a negotiation process.

179. For these reasons, the Authority has not made a recommendation in relation to this issue.

180. In relation to the Act, the Authority acknowledges that breaches of certain provisions in the Act would be considered an offence, and that the regulator is authorised to commence proceedings in relation to that offence

Segregation Arrangements

Key Issues

181. Railway owners must segregate their "access-related" functions from their other functions. This requirement is described in the Act (sections 28-34). The Act requires that railway owners segregate their functions in order to protect access seekers' confidential information, to avoid conflicts of interest when a related party to the railway owner has its own above-rail operations to ensure that other operators are treated fairly and to ensure that accounts and records are provided separately for their access and non-access functions.

182. Railway owners are required under the Act to segregate their access-related functions from their non-access related functions. "Access-related functions" is defined in the Act[26] to mean "the functions involved in arranging the provision of access to railway infrastructure under the Code". "Non-access functions" therefore encompass all other functions, including arranging the provision of access to infrastructure outside of the Code.

183. The Authority received three submissions addressing this issue in response to the Issues Paper. One submission from a railway owner argued that the segregation arrangements provisions in the Act go well beyond the requirements of the CPA. Two submissions suggested that the scope of segregation arrangements provisions should be widened to recognise the range of factors that above-rail operators compete on (including the design and construction of rolling stock).

184. The Authority did not make a recommendation in relation to this issue in the Draft Report.

Comments in Submissions

185. BR submitted that Hansard records indicate the aim of segregation was to separate the above rail operations from the below rail operations of a vertically integrated privatised railway. BR's submission suggested that the aim of segregation is to prevent the combination of functions that are present in a vertically integrated business (submission page 5).

186. Brockman submitted that the Code is not sufficiently prescriptive in respect of the requirements under section 28 and should include specific provisions aimed at ensuring that railway owners' segregation arrangements must include a prohibition on conducting business with related parties other than on an arms-length basis, an obligation not to unfairly discriminate and an obligation to schedule trains in an equitable and non-discriminatory manner (submission page 3).

187. CBH agreed with the Authority's interpretation of the definition of "access-related functions" as provided in section 24 of the Act, which is:

> *The functions involved in arranging the provision of access to railway infrastructure under the Code*

and noted that this definition is not reflected in any Segregation Arrangements currently approved by the Authority (submission page 15).

[26] Section 24.

188. Roy Hill submitted that Segregation Arrangements should not be imposed on a railway owner prior to the owner receiving an access proposal. Roy Hill submitted that after an access proposal has been received, the access seeker must be responsible for any additional costs imposed on the railway owner's business flowing from those segregation arrangements (submission page 2).

Authority Assessment

189. BR did not state in its submission that it disagreed with the Authority's interpretation of the definition of "access-related functions" as provided in section 24 of the Act.

190. In relation to BR's submission referring to the aim of segregation recorded in Hansard, the Authority is aware of the limited assistance that Hansard can provide in construing the meaning of a provision. For example, in recent cases the High Court has emphasised that the task of statutory construction starts and ends with the text of the provision, and while the wider context (including second reading speeches) may, in some cases, assist in understanding the policy behind a statute, such extrinsic materials "cannot be relied on to displace the clear meaning of the text"[27]

191. Further, the Authority notes that the Code was amended after its promulgation by the addition of section 4A which makes it clear that nothing in the Code applies to agreements made outside the Code. Section 24 of the Act has been amended in 2000 and 2003 and defines access-related functions in conjunction only with the making of access agreements under the Code.

192. In relation to Brockman's submission, the Authority considers that the duties of a railway owner under sections 28 (the duty to segregate) and 29 (Powers of the regulator in relation to segregation) of the Act refer to section 33 of the Act thereby requiring a duty of fairness.

193. A requirement not to discriminate between operators, including between an operator and a railway owner's own above-rail operations, is required at section 16(2) of the Code "General duties of a railway owner in negotiations". Clause 13 of Schedule 4 to the Code limits discrimination in price between operators and other entities. The Authority does not consider it necessary for further anti-discrimination provisions to be added to the provisions for segregation arrangements in the Act.

194. In relation to Roy Hill's submission, it is a requirement of the Act that a railway owner has segregation arrangements in place. The Authority does not consider it appropriate for segregation arrangements not to be in place prior to an access proposal being lodged, due to the review period of some months required to approve segregation arrangements.

195. The Code does not provide an explicit mechanism for recovering segregation costs directly from access seekers. Railway owners may include the cost of segregation in the costs determined by the railway owner or the regulator, the extent that these are corporate services or other allowable overheads costs. The Authority does not consider that it is necessary for Schedule 4 of the Code to be amended to incorporate specific provisions relating to the inclusion of regulatory costs in costs determined for the purpose of the floor and ceiling price test.

196. The Authority has not made a recommendation in relation to this issue.

[27] Alcan v. Commissioner of Territory Revenue (2009) 239 CLR 27 @ [47].

Prohibitions on hindering or preventing access

Key Issues

197. Under the Act, a railway owner must not hinder or prevent either access to which a person is entitled, or the making of an access agreement. A person who has access is likewise prohibited from hindering access by another person.

198. A submission to the Issues Paper suggested that the Code should expand on the prohibition of hindrance, due to the scope for railway owners to cause unnecessary delays. In particular, the submission suggested that 'hindering or preventing access' should include (a) "repeated failure to comply with obligations to provide information" and (b) "any conduct that has the effect of repeatedly and unnecessarily delaying an access proposal".

199. The Authority did not make a recommendation in relation to this issue in the Draft Report.

Comments in Submissions

200. BR submitted that it agreed with the ERA's assessment on this issue in the Draft Report (submission page 6).

Authority Assessment

201. The Authority considers that "repeated failure to comply with obligations to provide information" or '"any conduct that has the effect of repeatedly and unnecessarily delaying an access proposal" is clearly conduct that hinders the making of an agreement and that the provisions of the Act would not be improved by the addition of these words.

202. The Authority has not made a recommendation in relation to this issue.

Section 8(4) and 8(5) - when can an extension and expansion be proposed?

Key Issues

203. The Code provides at section 8(4) for an access proposal to specify an extension or expansion and at section 8(5) for an extension or expansion to be specified in the course of negotiations on the ground that it would be necessary to accommodate the proposed rail operations if it was not specified in the initial proposal.

204. The validity of an access proposal has been challenged in the courts on the basis that an expansion was not specified as part of the proposal.

205. The Authority has received a number of submissions to this review addressing this issue. Some submissions commented that an extension or expansion should be able to be proposed at any time after the making of a proposal and that an access proposal should not be invalidated on the basis that the proponent has not identified any investment required to accommodate its proposal. One submission noted that in other jurisdictions the railway owner is responsible for identifying any required investment and for advising the proponent accordingly.

206. A number of submissions have suggested that, to the extent that section 8 may be ambiguous, it should be clarified.

207. The Authority expressed a view in the Draft Report that the failure to specify an extension or expansion in an access proposal cannot invalidate an access proposal, and that the Code does not require amendment to clarify section 8(5) which clearly states that:

> *The fact that an extension or expansion is not specified in a proposal as mentioned in subsection 4 does not prevent the proposal of such an extension or expansion being made in the course of negotiations under Part 3 on the grounds that such an extension or expansion would be necessary to accommodate the proposed rail operations.*

208. The Authority did not make a recommendation in relation to this issue in the Draft Report.

Comments in Submissions

209. BR submitted that it agreed with the Authority's assessment on this issue in the Draft Report (submission page 6).

210. CBH submitted that section 8(5) arguably only allows an extension or expansion to be proposed in the course of negotiations, that is, once the duty to negotiate in good faith begins. CBH submitted that section 8(5) arguably does not allow, for example, a proponent to respond to a section 15 request by a railway owner with an extension or expansion proposal (submission page 16).

211. CBH submitted that it would be helpful for the Code to be amended to make it clear that a proponent can propose an extension or expansion at any time (submission page 16).

Authority Assessment

212. The Authority agrees with CBH's submission that the current Code provisions do not allow a proposal for extension or expansion to be made, otherwise than in the course of negotiations.

213. The Authority acknowledges that CBH's submission is consistent with submissions made by other stakeholders in response to the Issues Paper, as detailed in the Draft Report.

214. The Authority therefore considers that it is appropriate to recommend that the Code be amended to enable a proposal of an extension or expansion to be made at any time after the making of a proposal.

Authority Recommendation

Recommendation 4

Section 8(5) of the Code be amended to allow for a proposal of an extension or expansion to be made at any time after the making of a proposal under section 8 of the Code on the grounds that such an extension or expansion would be necessary to accommodate the proposed rail operations.

Section 10 - when is section 10 relevant?

Key Issues

215. Section 10 of the Code requires the railway owner to seek approval from the regulator to enter into negotiations on a proposal, under circumstances where providing the proposed access may preclude any further access to the existing infrastructure.

216. Section 10 is relevant when it is possible to provide adequate 'capacity' to accommodate the proposed access, but not possible to provide any further capacity.

217. Section 10 existed in the Code prior to amendments made in 2003, which introduced provisions for extensions and expansions.

218. The Office of the Rail Access Regulator issued a section 10 decision in 2002 that approved the commencement of negotiations in relation to an access proposal, despite there being no provisions for extensions and expansion in the Code at that time, on the basis that it was not in the public interest to do so unless it was technically not feasible to augment the capacity of the route.

219. The Authority received a number of submissions in response to the Issues Paper which addressed this issue. All except one submission agreed that section 10 should be clarified. One submission commented that it should be removed from the Code.

220. In the Draft Report, the Authority concluded that reference to section 10 is not appropriate where a route may be expanded, and that the commercial objectives of the infrastructure provider should be relied on to ensure that capacity is allocated to its highest value use.

221. The Authority made a recommendation in relation to this issue in the Draft Report. That recommendation was Recommendation 2, which was:

> *Section 10 should be removed from the Code.*

Comments in Submissions

222. BR submitted that it agreed with the Authority's assessment on this issue in the Draft Report (submission page 6)

223. Brockman submitted that it supports the recommendation that section 10 be removed from the Code (submission page 3).

224. CBH submitted that it supports the recommendation that section 10 be removed from the Code (submission page 4).

225. Roy Hill submitted that it agrees with Recommendation 2 of the Draft Report (submission page 2).

Authority Assessment

226. The Authority has received a number of submissions addressing this issue. Most of these submissions have suggested that the wording of section 10 should be clarified, especially in the context of economic expansions.

227. Submissions from railway owners have highlighted that section 10 serves to ensure the allocation of scarce capacity to its highest value use. One railway owner submitted that the fact that an extension or expansion may accommodate a proposal does not necessarily result in the expanded capacity becoming an unlimited resource, and that the regulator should be able to assess whether or not the proposed access is allocating limited capacity to its highest value use.

228. Another railway owner has commented that other jurisdictions do not address this issue and rely on the commercial objectives of the infrastructure provider to ensure capacity is allocated to its highest value use.

229. The Authority has previously issued a section 10 decision (in 2013) that approved the commencement of negotiations in relation to an access proposal on the basis that there was no evidence that the route in question could not be expanded and that future access would not be precluded by the proposed operations.

230. The Authority notes that section 10 existed in the Code prior to amendments made in 2003, which introduced provisions for extensions and expansions.

231. The Office of the Rail Access Regulator issued a section 10 decision in 2002 that approved the commencement of negotiations in relation to an access proposal, despite there being no provisions for extensions and expansion in the Code at that time, on the basis that it was not in the public interest to do so unless it was technically not feasible to augment the capacity of the route.

232. The Authority considers that reference to section 10 is not appropriate where a route may be expanded, and – where it cannot be - that the commercial objectives of the infrastructure provider should be relied on to ensure that capacity is allocated to its highest value use.

Authority Recommendation

Recommendation 5

Section 10 of the Code be removed.

Sections 14 & 15 – Can a railway owner challenge the validity of a proposal prior to receiving the required information from the proponent?

Key Issues

233. Sections 14 and 15 of the Code entitle the railway owner to require a proponent to show that it has management capability to undertake operations on the proposed route and to show that its proposed operations are within the capacity of the route or expanded route. A railway owner is required to inform the proponent of its requirements under these sections, if any, when it responds to an access proposal.

234. Sections 14 and 15 provide for matters of financial capability and route capacity to be addressed after a proposal has been made (as described in Part 2 of the Code) but before negotiations commence (described in Part 3).

235. Section 18 of the Code allows the railway owner to express dissatisfaction with the proponent's response to its section 14 and 15 information requirements, and for the proponent to declare itself in dispute with the railway owner if the proponent does not consider the railway owner's dissatisfaction is justified.

236. The Authority received a number of submissions on this matter. Most submissions supported the view that the railway owner should not be able to challenge the validity of a proposal before it has received the information it requires under sections 14 and 15.

237. In the Draft Report, the Authority concluded that it is clear that sections 14 and 15 are threshold issues for negotiation only. The Authority noted that the validity of a proposal is established when the proponent meets the requirements of section 8, and that meeting the railway owner's requirements under section 14 and 15 is not a criterion for making a valid proposal.

238. In the Draft Report, the Authority concluded that timeframes should be established in the Code to indicate when the information required by the railway owner under sections 14 and 15 should be provided by the proponent. This would reinforce the status of sections 14 and 15 as threshold requirements for negotiations.

239. The Authority suggested a 30 day timeframe as appropriate, and sought further comment on appropriate timeframes in this respect.

240. The Authority also concluded that the railway owner should provide the proponent with information sufficient to undertake a capacity assessment, and that the railway owner's reasonable costs in doing so should be covered.

241. The Authority made a recommendation in relation to this issue in the Draft Report. That recommendation was Recommendation 3, which was:

> *Sections 14 and 15 of the Code should be clarified to indicate a timeframe for the provision of the information required by the railway owner by those sections.*
>
> *The Code at section 15 should require the railway owner to provide any required information necessary for the proponent to undertake a capacity assessment, and that the proponent must cover any reasonable costs incurred by the railway owner in providing this.*

Comments in Submissions

242. BR submitted that it agreed that the Code should require the railway owner to provide any information necessary for the proponent to undertake a capacity analysis and that the proponent should cover any costs incurred by the railway owner in doing so (submission page 6).

243. BR submitted that information required to be provided by the railway owner should exclude any commercially confidential information (submission page 6).

244. BR submitted that it agrees that a timeframe should be established in the Code to indicate when the information required by the railway owner under section 15 should be provided by the proponent (submission page 7).

245. BR submitted that the gathering, transmission and analysis of the information relating to section 15 of the Code may take a substantial period of time, and that the 30 day period suggested by the Authority was insufficient for those purposes. BR suggested that parties should be able to agree on a timeframe, and that a default period of 90 days should apply (submission page 7).

246. Brockman submitted that it supports Recommendation 3 of the Draft Report. Brockman submitted that it considers that the 30 days suggested by the Authority as a timeframe for provision of section 15 information by the proponent is not sufficient (submission page 3).

247. Brockman submitted that - in its own experience – provision of expert reports on these matters take months not days, and depends on the quality and timing of the information provided by the railway owner. Brockman indicated that its ability to meet section 14 and 15 requirements has been delayed by legal disputes (submission page 4).

248. Brockman submitted that it accepts that sections 14 and 15 are “threshold issues” for negotiation, but that such threshold requirements must be clear and prescriptive. Brockman submitted that sections 14 and 15 should be amended to show what must be demonstrated to show ‘sufficient financial resources’ and how capacity is to be assessed (submission page 4).

249. CBH commented that the Authority did not provide any indication of an appropriate timeframe for provision of section 15 information by the proponent (submission page 4).

250. CBH submitted that its view was that sections 14 and 15 should be removed from the Code, and that the matters dealt with by those sections can be addressed either in negotiations or by arbitration (submission page 4).

251. CBH submitted that the Code does not provide guidance on the level of information required by the railway owners under sections 14 and 15, that there is no express requirement for the railway owner to act reasonably. CBH submitted that the process for meeting section 14 and 15 requirements may be drawn out, and that there is no obligation on the railway owner to negotiate until these requirements are met (submission page 4).

252. CBH commented that in its own experience, the process of meeting section 15 requirements took 12 months, involved legal disputes, and that it is unlikely that this

delay would have been reduced by imposing timelines on the proponent to provide the information (submission page 5).

253. CBH submitted that it cannot identify any basis in the CPA for the requirements of sections 14 and 15 (submission page 5).

254. CBH submitted that if a proponent is required to comply with a notice under section 15, then it should be able to do so on the information that is already available under section 7A of the Code – for which the railway owner is already entitled to impose a reasonable charge (submission page 5).

255. CBH submitted that the recommendation in the draft report does not indicate what kind of additional information might be provided, and that it is therefore unclear what 'reasonable costs' may entail (submission page 5).

256. Roy Hill submitted that it should not be required to participate in negotiations with a third party who cannot first establish the financial capacity to complete the transaction (submission page 2).

257. Roy Hill submitted that the timelines should be imposed on an access seeker to satisfy the railway owner's requirements, if the railway owner is required to indicate those requirements within a certain timeframe[28] (submission page 2).

258. TPI submitted that the matters dealt with in sections 14 and 15 of the Code should be satisfied by the proponent before consideration of its proposal by the railway owner (submission page 3).

259. TPI submitted that the 30 day period suggested by the Authority for satisfaction of section 14 and 15 requirements by the proponent is too long, and that 7 days should be sufficient for a proponent to provide the necessary information, given that these are matters central to the proponent's access proposal. TPI submitted that 7 days was also commensurate with the time given to the railway owner to respond to an access proposal (submission page 2).

260. TPI submitted that the railway owner should not be required to provide "any required information necessary for the proponent to undertake a capacity assessment" as this would allow a proponent to make unlimited arbitrary requests for information, which are not necessary to assess the capacity of the railway (submission page 2).

261. TPI submitted that section 7A of the Code already requires the railway owner to make available to information necessary to enable the proponent to undertake a capacity assessment, in conjunction with information contained in the railway owner's Train Path Policy and Train Management Guidelines (submission page 2).

Authority Assessment

262. The Authority agrees with the submissions of CBH and TPI that section 7A already requires the railway owner to provide information sufficient for a proponent to undertake a capacity assessment. The Authority has noted that section 7A provides for the railway owner to make a reasonable charge for provision of that information.

[28] Roy Hill appears to have responded to Recommendation 3 on the basis that the "timeframe for the provision of the information required by the railway owner" means a timeframe for the railway owner to indicate its requirements, and not for the access seeker to provide that information in response, which was the meaning of the recommendation.

263. On this basis, the Authority considers that the railway owner should not be permitted by section 18 of the Code to indicate dissatisfaction with the proponent's response if the adequacy of that response is limited by the information provided in accordance with section 7A.

264. The Authority agrees with Brockman's submission that the reasonable requirements of a railway owner in respect of sections 14 and 15 should be prescribed in those sections.

265. The Authority has noted BR's submission that 90 days should be a default timeframe for provision of information by the railway owner and response by the proponent to a section 15 request. The Authority has noted Brockman's submission that a proponent may require months to respond to a section 15 request. The Authority has noted TPI's submission that 7 days is a reasonable timeframe for a proponent's response to a section 15 request.

266. The Authority considers that imposing a timeframe for response to a section 14 or 15 request would address a reasonable concern that progression of negotiations should not be delayed by the proponent's response to a request.

267. The Authority considers that the information provided by the railway owner in accordance with section 7A of the Code would reasonably be expected to have been fully assessed by the proponent prior to the lodgement of a proposal under section 8. There is no time restriction on the proponent in making a proposal after receiving section 7A information, and a proponent would be expected to obtain technical advice in relation to that material prior to lodging a proposal.

268. The Authority therefore considers that a 7 day timeframe for a response to a railway owner's section 14 or 15 request is sufficient.

269. The Authority considers that - in the same way that negotiations on a proposal should not be delayed by a proponent's response to a railway owner's section 14 and 15 request - negotiations on a proposal should not be delayed by a railway owner being unreasonably dissatisfied with a proponent's response to a section 14 or 15 request.

270. The Authority therefore considers that section 18 of the Code should be amended to ensure that the railway owner cannot be dissatisfied with a proponent's response to its section 14 and 15 requirements, if the preliminary information provided by the railway owner (under section 7A) is not adequate to enable the proponent to respond to the railway owner's satisfaction.

Authority Recommendation

Recommendation 6

Sections 14 and 15 of the Code be amended to indicate a timeframe of seven days for the provision by the proponent of the information required by the railway owner.

Section 18 be amended such that the railway owner cannot be dissatisfied with a proponent's response, if the preliminary information provided under section 7A is not adequate to enable the proponent to respond to the railway owner's satisfaction.

Section 16 – What does the term "unfairly discriminate" mean?

Key Issues

271. The Code requires a railway owner to make all reasonable endeavours to avoid unnecessary delays and to meet the requirements of a proponent whose proposal complies with the Code.

272. Section 16 of the Code specifies that a railway owner should not be unfair in relation to allocation of train paths, management of train control and operating standards. This means that it is permissible for a railway owner to discriminate against a proponent, but not "unfairly". A definition of "unfair" is not provided in the Code.

273. The (now repealed) *Gas Transmission Regulations 1994* (WA), and the CPA section 6(e)(9), provide a list of considerations that should be taken into account when deciding on terms and conditions for access. Clause 13(b) of Schedule 4 to the Code provides limitations on reasonable discrimination between operators in the application of pricing.

274. In its second review of the Code (December 2011) the Authority recommended (Recommendation 7) that Section 16 of the Code be amended to provide a non-exclusive list of considerations a railway owner should be allowed to take into account when discriminating between operators.

275. In the Draft Report for this review of the Code, the Authority noted that all submissions agreed that section 16 should be clarified. The Authority agreed with submissions that a list of examples of 'fair discrimination' would not improve the flexibility of the Code. However, the Authority did not consider that inclusion of a list of examples of 'unfair discrimination' is required, as the remedy for unfair discrimination by a railway owner can be pursued by the access seeker through legal means, and would need to be examined in order to determine whether there is a case to be made for unfair discrimination.

276. The Authority did not make a recommendation in the Draft Report in relation to this issue.

Comments in Submissions

277. BR submitted that, notwithstanding its previous comments on this matter, it agrees with the Authority's finding on this issue. BR submitted that if ultimately any accusation were to be heard in the courts in any case, then the Code is capable of entertaining a variety of circumstances by virtue of its general definition of 'unfairly discriminate' (submission page 7).

278. Brockman submitted that a non-exhaustive list of 'unfair discriminations' would not reduce the flexibility of the Code and may provide useful guidance (submission page 4).

279. CBH submitted that it is not necessary for the Code to be amended to define unfair discrimination, or to provide examples. CBH submitted that it would be useful for the Authority to publish non-binding and non-exhaustive regulatory guidelines about what may constitute 'unfair discrimination' (submission page 16).

280. CBH submitted that it does not agree with the proposal that unfair discrimination should be limited to where "(a) it has a material adverse effect on an access seeker; and (b) it has substantial impact on competition in the relevant market".[29] CBH submitted that those criteria unnecessarily limit the scope of the prohibition, and there are no grounds for concluding the existing prohibition (which has never been enforced by court action) requires such a limit (submission page 16).

281. Roy Hill submitted that the reasons which give rise to permissible discrimination should be prescribed in the Code, and should be construed in light of the commercial risks that the access provider incurred in developing the assets. Roy Hill referred to the list of reasons for permissible discrimination provided in the attachment to TPI's further submission to the Issues Paper at paragraph 3.1 (submission page 3).

282. WAF submitted that clarification of the term 'unfair discrimination' in Section 16 of the Code would be welcome. WAF did not provide suggestions for specific provisions (submission page 2).

Authority Assessment

283. The Authority agrees with submissions that a list of examples of 'fair discrimination' would not improve the flexibility of the Code. Neither does the Authority consider that inclusion of a list of examples of 'unfair discrimination' is required, as the remedy for unfair discrimination by a railway owner can be pursued by the access seeker through legal means, and would need to be examined in order to determine whether there is a case to be made for unfair discrimination.

284. The Authority has therefore not made a recommendation in relation to this issue.

[29] Submitted by Aurizon: referred to in the Draft Report at paragraph 355.

Part 3 – should Part 3 prescribe a time limit for the conclusion of arbitration?

Key Issues

285. There are no time limits prescribed in Part 3 of the Code for the conclusion of arbitration proceedings. The Authority received a number of submissions in response to the issues paper addressing this issue.

286. Submissions from railway owners commented that it is not appropriate for arbitrary time limits to apply to the arbitration process, as this could restrict the capacity and freedom of an arbitrator to properly consider the claims and evidence on all matters that could be presented.

287. All other submissions indicated that time limits should be prescribed for arbitration. Some of these submissions expressed the view that it would not be appropriate to impose a 'blanket' timeframe in the Code as the issues in each arbitration would vary in nature and complexity. It was submitted that a timeframe should be determined at the start of each arbitration to reflect the individual circumstances of the dispute along with provision to vary this timeframe with the agreement of both parties.

288. Consistent with the view that a timeframe should be established for each arbitration according to the circumstances of each dispute, the Authority notes that there is currently provision in section 28 of the Code for a preliminary conference to be held as a first step in arbitration. The purpose of this preliminary conference is to establish timeframes for the conduct of the arbitration and the arbitrator's determination.

289. The Authority did not make a recommendation in relation to this issue in the Draft Report.

Comments in Submissions

290. BR submitted that it agrees with the Authority's finding on this issue in the Draft Report (submission page 7).

291. CBH submitted that an arbitration, whether subject to a time limit or not, will necessarily involve some form of 'preliminary conference' to program the matter to hearing. CBH submitted that this does not replace the benefits that an overall time limit would provide, which would require the parties to program the matter to conclusion within that time limit (submission page 17).

292. CBH submitted, as it has done in an earlier submission, that consistent with clause 2.6 of the CIRA, Part IIIA of the CCA and other regimes, a time limit should be introduced to promote economically efficient outcomes. CBH argued that this is because an arbitrator may not be prepared to adhere to a time limit, if there is not one prescribed (submission page 17).

Authority Assessment

293. The Authority has noted that section 28(2) of the Code requires a preliminary conference to be held, for the purpose of agreeing on a timetable for (a) taking particular steps in the conduct of the arbitration (b) making of the arbitrator's determination.

294. The Authority considers that the parties and the arbitrator are able to establish a timeline for an arbitration which reflects the commercial urgency of the matter, and allows adequate time for the arbitrator to properly deal with the associated issues. The Authority considers that the provisions of section 28(2) of the Code are adequate to ensure that an appropriate timeline for the conclusion of the arbitration is established.

295. The Authority has not made a recommendation in relation to this issue.

Section 50 – should a railway owner be able to declare any information confidential?

Key Issues

296. Section 50 of the Code says that the regulator is not authorised to disclose information that is confidential without the consent of those to whom the protection of confidentiality belongs. The Code does not provide a definition of "confidential". The Act provides a definition of "confidential information", which applies to railway owners' obligations in segregation and therefore relates only to protection of proponents' confidential information.

297. There have been some differing views on the meaning of section 50 as it relates to the disclosure of confidential information that may be disclosed by a railway owner to the regulator when providing costs for routes subject to an access proposal.

298. The cost information required to be provided by the railway owner to both the proponent and the regulator is limited to the calculated costs determined for each route subject to a proposal. The provision of any more detailed or additional information underpinning those calculations is provided at the railway owner's discretion.

299. Railway owners have submitted that there are no provisions of the CPA which say that the regulator should disseminate information, or that any weight should be given to the interests of third parties not directly involved with providing or seeking access. Railway owners submitted that they should be able to require the confidentiality of documents and information that are provided to the regulator.

300. Other submissions have suggested the clauses of the CPA that relate to transparent and efficient regulatory processes are not satisfied when railway owners are able to keep information confidential. The National Gas Law is an example of a jurisdiction where regulators may disclose information to the detriment of the provider of the information, if the regulator considers that the public interest in disclosing that information outweighs the detriment.

301. The Authority considers that confidentiality of information is paramount in ensuring the integrity of negotiations between commercial parties, and that disclosure of a railway owner's costs is warranted only where a more prescriptive regime applies, and where the determination of costs by a regulator displaces negotiated outcomes, and should be explained. The Authority therefore did not make a recommendation in relation to this issue.

Comments in Submissions

302. Aurizon submitted that railway owners should be required to disclose detailed information associated with determinations of costs, and that claims of confidentiality should be subject to a demonstration of commercial damage from disclosure. Aurizon submitted that limited disclosure increases the prospect that an alternative set of costs could be valid under a subsequent determination (submission page 10).

303. Aurizon submitted that it was difficult to envisage how a subsequent access seeker would be able to influence the costs determined for a route relevant to its own proposal, where the route is subject to a clause 10 determination from a previous proposal (submission page 10).

304. BR submitted that it agrees with the ERA's finding that no changes are necessary to the Code in relation to this matter (submission page 8).

305. BR submitted a suggestion that the ERA adopt an internal policy of not disclosing information to the access seeker in a cost determination which has been provided on a confidential basis at the railway owner's discretion (submission page 8).

306. CBH submitted that notwithstanding the provision of confidential railway owner data to access seekers in determinations by the Authority, that a "presumption of disclosure" implied by the Code should be clearly specified, and the railway owner's ability to declare information confidential should be expressly constrained. (submission page 17).

307. In relation to the comment in the Draft Report that "the information provided by railway owners in support of their cost determinations has generally been in excess of that required to be provided by the Code", CBH submitted that this does not establish that confidentiality is appropriate (submission page 17).

Authority Assessment

308. In relation to Aurizon's comments, the Authority has noted that the costs determined (by the railway owner) in respect of a route are required to be made available to any person who requests those costs. Those costs need not be detailed or disaggregated costs, but are sufficient to provide a total cost for the route at a point in time.

309. The Authority has noted that a determination of costs is always made in respect of a particular route and in respect of a particular proposal. Cost determinations do not relate to alternate proposals at a future time, and cannot be relied upon for those purposes.

310. The Authority has established a process for the last two cost determinations it has made whereby confidentiality of railway owners' cost information is preserved, but all cost information is disclosed to the access seeker – in the form of an unredacted determination - under terms of a confidentiality agreement between the access seeker and the railway owner.

311. The Authority considers this process strikes an appropriate balance between (a) the function of the regulator described in section 50(2) of the Code to disseminate information to persons who may become involved in negotiations under Part 3 of the Code and (b) to protect the confidential information of a railway owner.

312. The Authority does not consider that a "presumption of disclosure", if it is implicit in the Code, requires the regulator to disclose confidential information to persons other than those who may become involved in negotiations under Part 3 of the Code.

313. The Authority agrees with CBH's assertion that the provision of information by railway owners in excess of the requirements of the Code does not establish that confidentiality is appropriate. In the case of two recent assessments by the Authority, confidentiality has been established on the basis of an agreement by both parties prior to redaction of the determinations for general publication.

314. The Authority acknowledges BR's statement that provision of confidential information to an access seeker provides a disincentive for the railway owner to provide contextual and detailed information that assists the ERA in making its determination.

315. The Authority has not made a recommendation in relation to this issue.

Clause 10 Schedule 4 – is the prescribed 30 day time limit for the making of the Regulator's determination sufficient?

Key Issues

316. The time limit prescribed in the Code for the regulator to approve or make a cost determination is 30 days. This time limit may be extended with the proponent's agreement. The provisions in clause 11 of Schedule 4 provides scope for an extension of the 30 day time limit.

317. The Authority has not been prevented from meeting its obligations under the Code, utilising the existing provisions for time frames.

318. The term "days" is not defined in the Code. By default, therefore, the term "days" must be taken to mean calendar days. The use of calendar days to define timeframes has resulted in inconsistencies and uncertainties in relation to timeframes, especially where these timeframes straddle extended public holidays such as Easter or Christmas.

319. In the Draft Report, the Authority supports the proposition that "days" in the Act and the Code should be defined to mean "business days" for consistency with other regimes, and to alleviate irregular time constraints caused by public holidays at particular times of the year.

320. The Authority made a recommendation in relation to this issue in the Draft Report. That recommendation was Recommendation 4, which was:

> *The term "days" in the Act and the Code should be defined to mean "business days".*

Comments in Submissions

321. BR submitted, in relation to the provision that enables the regulator to extend the timeline for making a determination with the proponent's permission,[30] that it does not agree that it is the proponent's interests that are primarily affected when

[30] Clause 11(2) Schedule 4 to the Code

considering whether delaying an access determination is appropriate. BR submitted that a railway owner may engage significant resources relating to an access proposal, which might not otherwise be required if the railway owner were consulted about extending timeframes. BR also submitted that delays can necessitate the work having to be redone if the initial work becomes out of date (submission page 9).

322. BR submitted that it did not agree with the ERA's assertion that it would not be practical to solicit the railway owner's approval for an extension as well as the proponents; and that this could be done on short notice. BR urged the ERA to ensure that the railway owner becomes aware of a delay to a determination as early as possible (submission page 9).

323. BR submitted that it agreed with recommendation 4 in the Draft Report, and referred to its suggestions in earlier submissions in relation to aligning timeframes with typical commercial timeframes (submission page 9).

324. CBH submitted that the reference to "days" in the Code should mean calendar days, consistent with ordinary use of the term. CBH submitted that there need be no uncertainty about deadlines, as the *Interpretation Act 1984 (WA)* provides that if a deadline falls on an "excluded day" then the deadline is the next day that is not an excluded day. CBH submitted that any shortfall in "available days" may be ameliorated by existing provisions for extension of timeframes in the Code (submission page 6).

325. CBH submitted that there should be no extension to existing timeframes under the Code, and that if "days" in the Code are defined as business days, then the time periods should be shortened accordingly. CBH suggested that, for example, the time for the regulator to make a cost determination should be 30 calendar days or 20 business days (submission page 6).

326. Roy Hill submitted that it agrees with the recommendation to define "days" to mean "business days" (submission page 3).

327. TPI submitted that it supports Recommendation 4 of the Draft Report (submission page 4).

Authority Assessment

328. In relation to BR's comments, the Authority considers that the majority of resources engaged by the railway owner are committed prior to the regulator commencing its assessment of the railway owners costs, and any extension required to facilitate the regulator's assessment will not impact on the railway owner's resources put to providing its costs. Further, the Authority considers that any extension required to allow the regulator to fully assess costs will not be of sufficient duration to affect the currency of those costs.

329. The Authority stated in the Draft Report that it considers it appropriate for the regulator to seek the railway owner's views on whether an extension of time to make a determination is reasonable, but that it does not consider that a requirement to seek the approval of both the proponent and the railway owner would be a practical approach. In particular, this would be the case if agreement could not be reached between the proponent and the railway owner that an extension was required.

330. The Authority has noted the agreement between BR and CBH that definition of "days" in the Code as business days, should be associated with a corresponding adjustment of prescribed days.

331. The Authority considers that timeframes in the Code are adequate and should not be extended.

Authority Recommendation

Recommendation 7

The term "days" in the Act and the Code be defined to mean "business days".

All timeframes in the Code be adjusted accordingly.

In particular, the timeframes prescribed in Part 2 of the Code ("Proposals for access") be amended to:

- Section 7(2) - 10 days
- Section 9(1) - 5 days
- Section 9(2) - 20 days
- Section 9(3a)(3)(a)(i)(I) - 20 days
- Section 9(3a)(3)(a)(i)(II) - 30 days
- Section 9(3a)(3)(a)(ii) - 15 days
- Section 9(3a)(3)(b) - 5 days
- Section 10(3) – 20 days

Part 1 [section 4A] – Parties have the option to negotiate agreements outside this Code

Key Issues

332. Section 4A of the Code was added in 2003 to clarify that, if parties choose to negotiate an agreement for access outside the Code, nothing in the Code applies to the negotiation or any resulting agreement. This means, for example, that the Over-payment rules do not apply to any arrangements made outside the Code.

333. In the Draft Report, the Authority provided an explanation of the administration of overpayment rules and other regulatory instruments in this context.

334. In the Draft Report, the Authority concluded that it is not necessary for it to maintain information on out-of-Code contracts in order to properly audit overpayment accounts, or to maintain a register of out-of-Code contracts.

335. The Authority did not make a recommendation in relation to this issue in the Draft Report.

Comments in Submissions

336. Aurizon submitted that the obligation to not unfairly differentiate between access seekers does not extend to terms and conditions between access negotiated inside and outside the Code. Aurizon submitted that the statement:

> *The Authority does not consider that it is appropriate for the provision of section 16 to apply to commercial agreements outside the Code, or for the regulator to have access to such agreements as a matter of course, as suggested by Aurizon.*

is contrary to the notion that an arbitrator (or the regulator) would have sufficient discretion to obtain details of prices outside of the code under section 29(1) (submission page 8).

337. BR submitted that it agrees with the assessment of the Authority in relation to this matter (submission page 9).

338. CBH submitted that parties that have been negotiating outside the Code should be allowed to bring that negotiation to an arbitration under the Code. CBH submitted that the Authority's conclusion in the Draft Report that "parties negotiating outside the Code have access to arbitration processes through the *Commercial Arbitration Act 2012*, that is, on the same basis as provided for in the Code" is unhelpful, as commercial arbitration outside the Code is only by agreement, and there is little reason for a railway owner to voluntarily submit itself to arbitration (submission page 19).

339. CBH submitted that the ability to negotiate outside the Code undermines the effectiveness of the regime, and provides opportunity and incentive for a railway owner to make a Code process as difficult as possible, and to offer a 'better deal' outside the Code (submission page 19).

340. CBH submitted that the ability to negotiate outside the Code is inconsistent with other access regimes, including Part IIIA of the CCA (submission page 19).

Authority Assessment

341. In relation to Aurizon's submission, the Authority notes that clause 13 of Schedule 4 of the Code requires that in the negotiation of prices, the railway owner must ensure there is consistency in pricing for rail operations[31] carried out by all entities including an associate of the railway owner. Likewise, section 16 of the Code requires the railway owner, in negotiation of an access agreement, to not unfairly discriminate between a proponent and its own operations (or that of an associate) in the allocation of train paths, management of capacity and operating standards.

342. The Authority does not agree with CBH that the ability to negotiate outside the Code is inconsistent with other access regimes, including Part IIIA of the CCA. The Competition Principles Agreement Part 6 requires that:

> *wherever possible, third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access*

and

[31] Rail operations in defined in section 3 of the Code as "the operation of rolling stock on part of the railways network".

where such an agreement cannot be reached, Governments should establish a right for persons to negotiate access

343. The Authority acknowledges that commercial arbitration outside the Code is only by agreement. The Authority considers that the availability of commercial arbitration within the Code process provides an incentive for access seekers to negotiate under the Code and by that fact itself strengthens the effectiveness of the regime. The Authority considers that it is not possible to amend the Code to make provisions for resolution of disputes outside the Code, and that this would be contrary to section 4A of the Code.

344. The Authority has not made any recommendations in relation to this issue.

Part 2A & 2 [sections 6, 7, 7A-E] – Required and Preliminary Information

Key Issues

345. The Code requires that certain information provided by railway owners is required to be kept up to date and in a format available to be provided to any person who requests it. This is referred to as 'required information'. The Code also requires that certain other information must be provided by a railway owner to any person interested in making an access proposal. This is known as 'preliminary information'.

346. The Authority received a number of submissions in response to the Issues Paper that commented on required and preliminary information, including one from a railway owner. All submissions commented that required information should be available free of charge from the railway owner's website.

347. A number of submissions made suggestions for improvements to the definition of specific items for required information such as train movements and the specification of capacity. The railway owner supported a consultative review to improve the usefulness of information routinely available to access seekers.

348. The Authority made recommendations in relation to this issue in the Draft Report. Those recommendations were Recommendation 5 and 6, which were:

Recommendation 5:

The prescribed time limit set out in section 7C(2)(b) for the amendment or replacement of Required Information (information described in section 7A) be reduced from two years to six months

Recommendation 6:

That Schedule 2 Preliminary Information be amended to clarify the meaning of "available capacity" and specify the information which must be provided under item 4(o) of that schedule.

349. The Authority acknowledges a mistaken reference to "Preliminary Information" in paragraph 140 and recommendation 6 of the Draft Report, and both of these should refer to "required information".

Comments in Submissions

350. BR provided some practical advice relating to the difficulty in defining "available capacity" and submitted that the provision of "scheduling diagrams" to persons seeking access would provide them with all the information required to make a functional assessment of the capacity of the route to accommodate a proposed operation (submission page 10).

351. BR commented that "scheduling diagrams" do not need to refer to confidential information and are not subject to frequent change (submission page 10).

352. BR agreed with submissions to the Issues Paper that 'gross tonnages' and 'tonnages of freight' should be removed from Schedule 2 and replaced with "Gross Tonne Kilometres" which is a more functional measure (submission page 11).

353. BR made other specific suggestions for improvements to the items listed in Schedule 2 (submission page 11). BR acknowledges that the ERA agreed with its suggestion in an earlier submission that a consultative process be undertaken to re-examine the appropriateness of all items in Schedule 2 (submission page 10).

354. BR submitted that the general purpose of the required information is to provide the potential access seeker with sufficient information to make an assessment of whether their proposed freight task can (or could) be accommodated on the relevant railway infrastructure, prior to the access seeker going to the trouble of submitting an access proposal (submission page 11).

355. Brockman submitted that it agrees with Recommendation 5 and 6 of the Draft Report (submission page 5).

356. CBH submitted that it agrees with Recommendation 5 of the Draft Report (submission page 6). CBH submitted that the Authority should properly scrutinise required information to ensure it complies with the Code, and that it is unreasonable to expect a person seeking access to take Supreme Court proceedings to simply require the railway owner to comply with the Code so that it can decide whether or not it is worth submitting a proposal (submission page 7).

357. CBH submitted that it is important that there is a permanent record of the required information for evidential purposes – for example, in the event of an arbitration under the Code where required information published at the time the proposal was made is relevant, as contemplated by section 15(1) of the Code (submission page 7).

358. CBH submitted that it supports Recommendation 6 of the Draft Report. CBH submitted that "capacity" should be clarified to refer to the infrastructure capacity of the route (the capacity consistent with the MEA on which the costing is based) and not its current state of repair,[32] and that "available capacity" should be clarified to mean the capacity as defined that is not committed to another operator (submission page 7).

359. CBH indicated that it would be keen to participate in a consultative process of the sort mentioned in paragraph 508 of the Draft Report, as required information provides access seekers with information necessary to make decisions about whether or not to make a proposal (submission page 8).

[32] CBH stated that this view is consistent with the Authority's view in its determination of costs dated 30 June 2014 at paragraph 71.

360. TPI submitted that it does not agree with Recommendation 5 of the Draft Report, as section 7C(2)(a) provides that a review and any necessary amendment and replacement of Schedule 2 (Information to be made available) must be carried out "as often as is necessary to ensure that the information remains reasonably up-to-date at all times". On this basis, TPI submitted that Recommendation 5 of the Draft Report is unnecessary, and that there is no justification for requiring the information to be updated more than once per year (submission page 4).

361. TPI submitted that it does not agree with Recommendation 6 of the Draft Report. TPI provided some practical advice relating to the difficulty in defining "available capacity", and commented that Capacity is defined in the Code as "the number of rail operations that can be accommodated on the route during a particular time" (submission page 4).

362. TPI submitted that the Code contemplates that there may be differing assessments of available capacity made by the railway owner and the proponent, which is why the Code includes an obligation on the railway owner to provide required information and an obligation on the proponent to demonstrate that there is "available capacity" (submission page 4).

363. TPI also submitted that it would be difficult to draft a single workable definition of "available capacity" suitable for all rail networks in WA, given the fundamental differences between them in characteristics and operation (submission page 4).

364. TPI submitted that any definition of "available capacity" should incorporate consideration of the railway owners Train Path Policy and Train Management Guidelines, the "actual and reasonably projected demand" for train paths, and limitations caused by "end effects" or other elements of the supply chain (submission page 5).

Authority Assessment

365. The Authority acknowledges that "capacity" is defined in the Code in terms of train paths, and considers that this is consistent with railway owners' submissions that a clarification of the term "available capacity" should incorporate considerations of a railway owner's ability to schedule trains in conjunction with the "characteristics of the route"[33] and the nature of the proposed operations.

366. Clarification of this definition of "available capacity" in Schedule 2 would focus attention of both the proponent and the railway owner on the ability of the railway owner to schedule additional train paths, and would not enable higher-order concepts of capacity (such as tonnes per annum) to become the subject of debate as they have been in the past.

367. The Authority does not agree with TPI that there is no justification for requiring the information to be updated more than once per year. Nonetheless, the Authority has given consideration to TPI's submission that the Code already provides a requirement for Schedule 2 information to be kept up to date, and the opinion of BR that the sort of information included in "scheduling diagrams" does not change frequently.

368. The Authority agrees that Schedule 2 information for TPI's railway may not require review as often as for a general freight railway. In any event, the Authority notes that

[33] As referred to in the definition of "capacity" in section 3 of the Code.

section 7C(2) requires only a review, and an amendment or replacement if necessary.

369. The Authority considers that, in view of the capacity of modern data acquisition and management information systems, a requirement for review of Schedule 2 information on an annual basis would not constitute an unreasonable burden of compliance on the railway owner.

370. The Authority considers that 'evidential' requirements for a permanent record of Required Information which has been published by the railway owner may be easily met by any party retaining hard copy of information, and may be provided by the railway owner for legal reasons if required.

371. The Authority re-iterates its recommendation from the second review that this information should be freely available on the railway owner's website.

372. The Authority agrees with BR's suggestion that a consultative process be undertaken to re-examine the appropriateness of inclusions in Schedule 2, and including clarification of the definition of "available capacity". The Authority has noted that CBH has also agreed with this suggestion.

373. The Authority considers that "available capacity" should be defined in terms consistent with the definition of capacity in the Code, that is, in terms of train paths. The definition of capacity in section 3 of the Code is:

> *In relation to a route, means the number of rail operations that can be accommodated on the route during a particular time having regard to –*
>
> *(a) The characteristics of the route;*
>
> *(b) The length of the rolling stock comprising a train that can be operated on the route, and the speed at which it can be operated*
>
> *(c) The requirements of the railway owners' safety Standards or any written law*
>
> *(d) The technical requirements of the relevant rolling stock*

Authority Recommendations

Recommendation 8

The prescribed time limit set out in section 7C(2)(b) for the amendment or replacement of required information (information described in section 7A) be reduced from two years to one year.

Recommendation 9

That Schedule 2 of the Code be amended to clarify the meaning of "available capacity" and the information which must be provided under item 4(o) of that schedule, such that it is consistent with the meaning of "capacity" as defined in Section 3 of the Code.

Part 2 [section 8] – Proposals for Access

Key Issues

374. In response to the Issues Paper, the Authority received two submissions, both from railway owners, addressing the information obligations of an access seeker when lodging an access proposal.

375. Section 8(3) of the Code requires a proposal to:

Section 8(3)(a)	*specify the route, including the railway infrastructure, to which access is sought*
Section 8(3)(b)	*indicate the times when the access is required*
Section (3)(c)	*set out the nature of the proposed rail operations*

376. It was submitted that the information which must be included by a proponent in an access proposal should be expanded to assist railway owners in assessing costs, expansion requirements and negotiable terms. A list of suggested additional information was submitted.[34] This suggested list is shown below.

Section 8(3)(a) should additionally require information indicating:

- *The entry and exit points on the route; and*
- *Points on the route that might be used for servicing/stabling*

Section 8(3)(b) should additionally require information indicating:

- *The frequency of recurrence of access and any cycles or seasonality that may be relevant*

Section (3)(c) should specify that the proposal must supply information describing:

- *The dimensions and operating characteristics of the rolling stock to be used, including weights, load levels, locomotive power, axle load and the like;*
- *The configuration of that rolling stock on each train and the length of each train used in each train path*
- *The intended travel speed of the trains*
- *Loading and unloading times at relevant ports or terminals; and*
- *The number of fleets available*

377. The Authority sought further comment on this suggestion.

Comments in Submissions

378. BR reaffirmed its suggestion that the Code should be amended to require a proponent to provide operation-specific information to the railway owner with a proposal (submission page 12).

379. Brockman submitted that the information which must be included by an access seeker in an access proposal should not be expanded. Brockman submitted that it is more appropriate for an access seeker to provide additional information to a railway owner in the course of negotiation, or in arbitration (submission page 5).

[34] BR Submission dated 2 April 2015 page 33.

380. Brockman submitted that requiring a proponent to provide additional information at the proposal stage would discriminate against junior resource developers who may not be in a position to provide such additional information. Brockman submitted that there is a difference in the level of information able to be provided by a development company such as Brockman and an established operator who may already operate on the relevant infrastructure (submission page 5).

381. Brockman also submitted that section 8 of the Code does not currently limit a proponent from providing information in addition to the minimum required, and railway owners have broad discretion to request additional information pursuant to sections 14 and 15 of the Code (submission page 5).

382. CBH submitted that there is little to be gained by increasing the formal requirements for a valid proposal, and therefore providing scope for delays to the commencement of negotiations. CBH submitted that the information required in a proposal is sufficient for a railway owner to provide a complete draft access agreement for negotiation, and for parties to have meaningful negotiations (submission page 20).

383. Roy Hill submitted that it agrees with BR's suggested additional information, referred to in paragraph 376 above (submission page 3).

Authority Assessment

384. The Authority notes that the list of information suggested is not additional in scope to that already required by section 8, but is in more detail. For instance, the requirement of section 8(3)(a) "specify the route, including the railway infrastructure sought" would reasonably require that entry and exit points and servicing locations would be specified. The "times when the access is required" (section 8(3)(b)) can reasonably be taken to mean the frequency of recurrence of access and any cycles or seasonality that may be relevant.

385. The Authority acknowledges that there is a difference between a proponent who is a development company with a feasibility study subject to an infrastructure solution and a proponent with an infrastructure solution subject to an access proposal. The Authority considers that a bona fide access seeker with a well-developed proposal would be able to indicate particulars of the service required – in terms of entry/exit points and frequency of service (i.e. the information required in 8(3)(a) and 8(3)(b)).

386. The Authority agrees that the suggested additional information may assist the railway owner in providing a more accurate indicative price to an access seeker. The usefulness of the indicative price provided by the railway owner would be determined by the level of detail provided by the access seeker with its proposal. The access seeker may provide any level of detail it considers appropriate in the context of the minimum requirements laid out in the Code.

387. The Authority agrees with Brockman that proponents are able to provide information with their proposal to any level of detail consistent with the requirements of section 8(3). The Authority agrees with the comments in BR's initial submission that because the information at the suggested level of detail must be known prior to an access agreement being put in place, and - because of the importance of the information in section 8(3) to the negotiation of terms of an agreement - that the provision of the information to the suggested level of detail would reduce delays in the regime process.

388. The Authority therefore considers that the level of detail provided by the proponent to the railway owner in its proposal will determine the 'usefulness' of the initial response by the railway owner, and that the level of detail provided in a proposal is at the proponent's discretion. The Authority therefore has not made a recommendation in relation to this matter.

Part 3 [Division 3] – Arbitration of disputes – other matters

Key Issues

389. The Code makes provisions for the arbitration of disputes. The regulator is required to establish a panel of arbitrators on the recommendation of the WA Institute of Arbitrators and Mediators Australia. The *Commercial Arbitration Act 2012* applies to an arbitration under the Code.

390. The Code describes the circumstances in which an entity is taken to be in dispute with a railway owner. An entity may refer a dispute to arbitration by notifying the regulator. The entity is not required by the Code to advise the railway owner that it has done so. The regulator must appoint an arbitrator, or arbitrators, from the panel of arbitrators. A railway owner may not declare itself to be in dispute with an entity.

391. Prior to the publication of the Draft Report, the Authority received submissions that addressed issues related to arbitration.

392. One submission suggested that the Code should include a list of circumstances under which an access seeker could declare itself in dispute with a railway owner. In the Draft Report, the Authority concluded that Part 3 provides an adequate list of circumstances that must exist for the proponent to be considered in dispute with the railway owner and does not need to be expanded.

393. Other submissions expressed the view that only technical matters should be brought before an arbitrator, and not statutory (legal) matters. In the Draft Report, the Authority concluded that matters which can be referred to arbitration should be technical matters only and not statutory (legal) matters.

394. Submissions were received from both railway owners and access seekers suggesting that parties in dispute should be involved in the appointment of an arbitrator. The Authority concluded that the Code does not prevent the regulator from consulting with parties in the selection of an arbitrator from the panel, and the Code should not be amended in this respect.

395. A railway owner submitted that the entity in dispute with the railway owner should be required to advise the railway owner (and not just the regulator) that it considers itself in dispute; that the arbitration process should involve a preliminary mediation step; and that the pool of arbitrators available for selection should not be confined to WA arbitrators but extend to arbitrators with expertise nationally.

396. In the Draft Report, the Authority concluded that the Code should not be amended to require the entity in dispute with the railway owner to also provide notice to the railway owner, or that additional mediation should be stipulated in the Code.

397. It was submitted that the arbitrator's determination should be binding on both parties (not just the railway owner). In the Draft Report, the Authority concluded that this was not appropriate.

398. In the Draft Report, the Authority agreed that information and outcomes of arbitration should remain confidential, as confidential information belonging to both the railway owner and the access seeker might otherwise be disclosed.

399. The Authority did not make any recommendations in relation to this issue in the Draft Report.

Comments in Submissions

400. BR submitted that it agrees that the current list in the Code of circumstances that must exist for the proponent to be considered to be in dispute with the railway owner is adequate. BR agreed with the Authority that the matters which can be referred to arbitration should be technical matters only and not statutory matters (submission page 12).

401. BR submitted that, in the absence of a clear policy confirming that the Authority will notify a railway owner when the Authority becomes aware of a dispute, the Code should be amended to require notification by the proponent to the railway owner within one business day (submission page 13).

402. BR submitted that it agrees with the Authority that information and outcomes of an arbitration should remain confidential. BR commented that, in the event of an arbitration resulting in an access agreement, that certain information disclosed in the arbitration may still require the protection of confidentiality (submission page 13).

403. BR re-iterated its earlier submissions that section 26(2) of the Code should be amended to allow parties subject to an arbitration to agree on the selection of an arbitrator, and that this would enable the arbitration process to proceed more effectively (submission page 13).

404. CBH submitted that there is no guidance in the Code of the sort provided by the ACCC[35] which provides specific detail on how the ACCC would arbitrate disputes on price (attachment to submission page 5).

405. CBH submitted that it agrees with the Authority that an entity in dispute with a railway owner should not be required to provide notice of that dispute to the railway owner, in addition to the regulator (submission page 20).

406. CBH submitted that it agrees that there is not a requirement for additional mediation mechanisms to be stipulated in the Code, and that the matters which can be referred to arbitration should be technical matters only and not statutory matters. CBH commented that some elements of an arbitration may involve considerations of statutory matters – for example, establishing a definition of 'capacity' – and that to this extent some outcomes of arbitration should not be confidential (submission page 20).

407. CBH submitted that it agrees with the Authority that the outcome of arbitration should not be binding on both parties (submission page 20).

[35] ACCC, Access Pricing Principles – A Guide, 1997, available at www.accc.gov.au

408. CBH submitted that parties to an arbitration should be able to recommend a person be appointed to the panel of arbitrators required to be maintained by the regulator, and then be appointed to an arbitration. CBH submitted that the panel of arbitrators should not be a "closed" panel (submission page 21).

409. CBH also commented that the person who recommends appointment to the panel is not IAMA, but the Chairman of IAMA, and that the Chairman is not required to consult with the branch (submission page 21).

410. CBH submitted that it does not agree that arbitration outcomes should be kept confidential, as arbitration necessarily includes statements about the law (statutory matters) and so provide useful guidance for other access seekers (submission page 21).

Authority Assessment

411. The Authority has noted CBH's assertion that the Code should include pricing guidelines for arbitrators similar to that provided by the ACCC, in administering the (now repealed) GRV-based telecommunications access regulations. A significant difference between the National Access Regime (as administered by the ACCC) and the WA rail access regime, is that the ACCC establishes its own tribunal to arbitrate disputes, and the WA regime 'outsources' this to independent arbitrators operating under the *Commercial Arbitration Act 2012.*

412. The Authority considers it is wholly appropriate for the ACCC to provide guidelines for how it would arbitrate a price dispute, but it would not be appropriate for the ERA to issue guidelines for the Arbitration of pricing disputes by independent arbitrators.

413. The Authority has noted CBH's submission that a more prescriptive approach should apply more broadly across the WA rail access regime.

414. The Authority has noted the submissions of BR and CBH that parties to a dispute should be able to be involved in the selection of an arbitrator, and the earlier submission of BR[36] that section 6(4)(g) of the CPA stipulates that parties should be able to appoint an independent body to resolve a dispute.

415. The Authority has recently expanded the panel of arbitrators to include interstate arbitrators and arbitrators with a wider range of experience. The Authority has provided assurance to BR and CBH that it will involve them in the selection of arbitrators from the panel in the event of a dispute between. The Authority has decided that this assurance should be provided to all parties who might come into dispute, by amendment to the Code, and has provided a recommendation to that effect.

416. The Authority does not consider it practical to allow all stakeholders who might potentially come into dispute to be involved in appointments to the panel from which arbitrators are selected, as those potential stakeholders are not known to the Authority. The Authority considers that the panel must be a 'closed' panel.

417. CBH referred to the Authority's statement that "it would not be appropriate to publish arbitration outcomes if that outcome is not subsequently reflected in an agreement"[37] and commented that arbitration outcomes are binding and that there is no need for a

[36] July 2015 page 10.

[37] Draft Report paragraph 164.

separate subsequent agreement. The Authority's reference to "agreement" was to an access agreement which is the meaning given to the term agreement in the Code.

418. The Authority does not agree with BR's suggestion that the Code should be amended to require notification by the proponent to the railway owner within one business day. The Authority considers that parties to a dispute - and the regulator - should act in good faith and ensure that all parties are informed of any dispute proceedings in a timely manner.

419. The Authority has noted CBH's submission that confidentiality may be addressed by the arbitrator, in the same way that confidentiality may be addressed in court judgements. The Authority has noted that the *Commercial Arbitration Act 2012* includes confidentiality provisions, and considers that these are appropriate to an arbitration under the Code. The Authority agrees that it may not be appropriate to keep an arbitrator's decision on statutory matters confidential, but that this is a matter to be agreed by the arbitrator and the parties in arbitration.

Authority Recommendation

Recommendation 10

The Code be amended to include provisions, in place of section 26(2), enabling the following:

- The parties in dispute to agree upon an arbitrator(s), and this agreement is to occur within 10 business days of the Regulator being notified that the proponent is in dispute with the railway owner.
- The proponent must notify the Regulator of the agreement of such an arbitrator(s).
- If the regulator is not notified within 10 working days that an agreement has been reached, the regulator is to appoint one or more persons whose names are on a panel established under section 24 to act as arbitrators to hear and determine the dispute.
- The regulator must consult with the parties in dispute prior to the appointment of an arbitrator from the panel.

Part 5 – Certain approval functions of Regulator

Key Issues

420. Part 5 of the Code describes certain regulatory instruments that the regulator must approve and the processes for approving them. These are the Train Path Policy, Train Management Guidelines, Costing Principles and Over-payment rules (sometimes referred to as "Part 5 Instruments"). A number of submissions commented on these instruments and the required processes for their approval.

421. Public consultation is required in relation to Train Path Policy and Train Management Guidelines but not in relation to Costing Principles or Over-payment rules.

422. In the Draft Report, the Authority did not make any recommendations for amendments in relation to this Part of the Code.

Comments in Submissions

423. BR submitted that it agreed with the Authority's assessments in relation to this matter, and noted that the provisions in the Act and the Code relating to the regulator's powers provide for the exercise of discretion in relation to consultation and approval of Part 5 instruments (submission page 13).

424. CBH submitted that the views of stakeholders are relevant to Costing Principles ad Overpayment Rules as they directly impact on the way that costs are determined (Costing Principles) and are mandatorily included in access agreements (Over-payment Rules) (submission page 22).

425. CBH submitted that the Authority should consider whether the railway owner and access seeker should be able to negotiate variations from the standard instruments where appropriate (submission page 22).

Authority Assessment

426. The Authority considers that it is not appropriate for the Code to be amended to provide for variations from standard Part 5 instruments to be negotiated in access agreements.

427. As CBH has commented, some of the Part 5 instruments are mandatorily included in access agreements – these are the Over-payment rules and the Train Management Guidelines. These two instruments guide the conduct of the railway owner in managing the contractual aspects of a negotiated access agreement – that is, how overpayments will be refunded, and how capacity will be managed on the network in real time.

428. The other two Part 5 instruments, the Costing Principles and the Train Path Policy have no function beyond the making of an agreement, and guide the negotiation of the access agreement, not the railway owner's conduct in accordance with it. The Train Path Policy establishes how train paths will be negotiated for an access agreement. A railway owner's Costing Principles simply establishes costs relevant to boundary prices for negotiation, and has no direct bearing on the price negotiated in an access agreement.

429. Proponents and railway owners effectively negotiate variations around the provisions of the railway owner's Costing Principles and Train Path Policy, in the course of negotiating an access agreement. Once an access agreement has been negotiated and made, the purposes of the Costing Principles and Train Path Policy have been achieved.

430. The Authority considers that there is no requirement to extend consultation provisions. The Authority agrees with BR that the provisions in the Act and the Code relating to the regulator's powers provide for the exercise of discretion in relation to consultation and approval of Part 5 instruments. The Authority has consistently consulted on amendments to railway owners' Part 5 instruments, where proposed amendments have been significant.

431. Accordingly, the Authority has not made a recommendation in relation to these matters.

Section 48 – Railway owner must supply certain information if requested

Key Issues

432. The Code requires a railway owner to provide the costing information that is provided to a proponent to any other person who requests it.

433. Prior to the Draft Report, the Authority received a submission which commented that railway owners should not be required to provide costing information on request to persons who cannot demonstrate that they have a genuine intention to conduct business that requires access to the part of the railway network to which the information relates.

434. The Authority considers that the existing confidentiality provisions provide adequate protection to a railway owner in respect of confidential information provided to the proponent. Railway owners have demonstrated an understanding of this protection by limiting the level of detail provided to proponents, such that confidential information is not able to be made public as a result of the provisions in section 48.

435. The Authority did not make a recommendations in relation to this issue in the Draft Report.

Comments in Submissions

436. BR submitted that criteria should be added to section 48 of the Code which ensures that only entities with a practical need for the information are entitled to receive it (submission page 13).

437. CBH submitted that section 48 of the Code reinforces CBH's submission that there is a "presumption of disclosure" in the Code, which is appropriate for a regulatory instrument of this kind (submission page 23).

Authority Assessment

438. The Authority considers that section 9(1)(c) of the Code requires a railway owner only to provide total prices for the access and the costs on which those prices have been calculated. For both recent access proposals, railway owners have confined the level of detail of costing information provided to proponents in accordance with 9(1)(c) such that information subsequently required to be provided in accordance with section 48 has not included detailed costing information.

439. The Authority does not consider that railway owners can reasonably require that this information be made confidential.

440. The Authority has not made a recommendation in relation to these matters.

Clause 7A Schedule 4 – Apportionment of costs of extension or expansion

Key Issues

441. The Code requires that the costs of extensions and expansions are shared between all entities that will use the expanded route, based on their usage and the economic benefit that they are expected to derive from this use.

442. The Authority received a submission prior to the Draft Report that commented that the Code was not clear on how costs of extensions or expansions should be shared, and does not indicate (a) how the allocation of economic benefits should translate into a specific tariff apportionment; or (b) whether costs referred to total, incremental, operating or capital costs.

443. The Authority concluded that the form of words used in that clause anticipates the application of standard commercial principles and that further prescription in clause 7A of Schedule 4 is not warranted. The Authority did not make a recommendation in relation to this issue.

Comments in Submissions

444. BR agreed with the Authority's assessment on this issue (submission page 14).

445. Aurizon submitted that one of the reasons for negotiations occurring outside of the Code is a direct consequence of uncertainty of outcomes for extensions/expansions. Aurizon submitted that, in the event of an access seeker and the access provider being unable to agree on terms for an expansion, the Code should not compel the access provider to fund an expansion if it does not consider the price determined by an arbitrator is reasonable (submission page 8).

Authority Assessment

446. The Authority considers that the costs of extensions and expansions which may impact on the prices quoted for extensions and expansions are not subject to Code provisions until such time as they are constructed. At that point, the regulated costs of the extended/expanded route section must be reviewed if the railway owner wishes the total cost to be determined for the purpose of administering over-payment rules in respect of that expanded route.

447. The initial 'determination' of costs and 'quote' for an extension and expansion, as referred to in clauses 6 and 7A of Schedule 4 to the Code, is in this respect quite separate from the cost determination process outlined in the Code, and is not subject to Code requirements except to the extent of the broad considerations outlined in clause 7A(2).

448. The Authority has not made a recommendation in relation to this issue.

Other Matters Raised in Submissions

Key Issues

449. This section canvasses matters raised in submissions which are not referred to in the Draft Report, or which were raised in earlier submissions to this review and re-submitted.

Comments in Submissions

Efficiency gains made by an Operator

450. Aurizon commented that the efforts of a rail operator to improve its efficiency provides opportunities for the access provider to expropriate those efficiency gains by seeking to vary the price substantially more than necessary to reflect any changes in cost or to offset any loss of revenue associated with the operator's efficiency gains (submission page 11).

451. Aurizon submitted that the Code should include a requirement that where a rail operator seeks to vary the terms of an access agreement then the access provider must make all reasonable efforts to satisfy those requirements, and that this could be included within the guidelines shown at clause 13 of Schedule 4 to the Code, as this would permit the proponent to include appropriate review provisions in an access agreement which the railway owner would be forced to accept (submission page 12).

Transition Provisions

452. CBH submitted that the Code should be amended to require the status quo to be preserved under an existing agreement between a railway owner where an access proposal process is underway (submission page 24).

Regular clause 9 determinations

453. Aurizon submitted that the Authority should re-establish published floor and ceiling costs under clause 9 based on the foreseeable demand for those routes (submission page 10).

454. CBH submitted that the time required to complete floor and ceiling determinations would have been reduced if previous clause 9 determinations were made, because there would already have been established costings for inputs (submission page 13).

Authority Assessment

455. In relation to 'efficiency gains made by an operator' the Authority notes that clause 13(e) of Schedule 4 to the Code requires that, in the negotiation of an access agreement, prices should be structured in a way that will encourage the optimum use of facilities. Section 13 of the Code requires the railway owner to negotiate in good faith with a view to making an access agreement, and section 16(1)(a)(ii) requires the railway owner to meet the requirements of a proponent who has complied with the Code.

456. The Authority notes that Part 4 Division 1 of the Code "Access Agreements" does not limit the matters which may be negotiated in an access agreement. The Code does not constrain the terms of price or the escalation or review of prices in an access agreement. The Authority considers that the railway owner and the proponent should be free to negotiate these terms to their mutual benefit.

457. In relation to 'transition provisions', the Authority does not consider that the Code may be amended to ensure the continuance of contract terms associated with a contract made outside the Code, subject to the negotiation of a Code agreement. This is because section 4A of the Code requires that nothing in the Code applies to contracts made outside the Code, and so the provisions of any agreements made prior to a Code agreement being made cannot be prescribed in the Code.

458. In relation to 'regular clause 9 determinations' the Authority notes that the criterion enabling a clause 9 determination to be made for a route is that the regulator must consider that it is likely that a proposal will be made in respect of the route. The Code does not permit a clause 9 determination to be made on the basis of foreseeable demand.

459. The Authority also notes that input costs may vary significantly over a short period depending on the demand for railway materials elsewhere in the economy, the value of the Australian dollar and the geographic location of the route in question. The Authority considers that both clause 9 and 10 of Schedule 4 of the Code contemplate cost determinations being made in respect of specific proposals (either likely or actual) for particular routes, and that the Code does not anticipate cost determinations to be generally related between different proposals.

460. The Authority has not made any recommendations in relation to these issues.