

# Review of the *Railways (Access)* *Code 2000*

Issues Paper

February 2015

Economic Regulation Authority

WESTERN AUSTRALIA

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## Introduction

1. The Economic Regulation Authority (**Authority**) has prepared this issues paper to assist interested parties in making submissions on the Authority's proposed review of the *Railways (Access) Code 2000 (Code)*.
2. The review is being undertaken pursuant to the provisions of section 12 of the *Railways (Access) Act 1998 (Act)*.
3. The issues paper has listed a number of issues on which the Authority is seeking comment from interested parties. Each of these matters are discussed in this issues paper, under headings corresponding to each part of the Code.
4. In addition to the issues identified, interested parties may also provide comment on any matters within the scope of the Authority's review which may be considered relevant.

## Invitation to make submissions

Interested parties are invited to make submissions on the Authority's consultation paper by **4:00 pm (WST) Monday, 23 March 2015** via:

Email address: [publicsubmissions@erawa.com.au](mailto:publicsubmissions@erawa.com.au)

Postal address: PO Box 8469, PERTH BC WA 6849

Office address: Level 4, Albert Facey House, 469 Wellington Street, Perth WA 6000

Fax: 61 8 6557 7999

### CONFIDENTIALITY

In general, all submissions from interested parties will be treated as being in the public domain and placed on the Authority's website. Where an interested party wishes to make a submission in confidence, it should clearly indicate the parts of the submission for which confidentiality is claimed, and specify in reasonable detail the basis for the claim.

The publication of a submission on the Authority's website shall not be taken as indicating that the Authority has knowledge either actual or constructive of the contents of a particular submission and, in particular, whether the submission in whole or part contains information of a confidential nature and no duty of confidence will arise for the Authority.

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## ERA Code Review Process

5. Section 12 of the Act requires that a review be undertaken of the suitability of the Code provisions and that the review includes the opportunity for public comment.

6. It is anticipated that the public consultation process and timeframe for the Code review will be as follows.

| • Public Consultation Process             | • Anticipated Date |
|---|--------------------|
| Publish Issues Paper inviting submissions | February 2015      |
| Publish Draft Report inviting submissions | May 2015           |
| Final Report provided to the Treasurer    | July 2015          |

## Background

7. The main objective 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. The Authority is required to undertake a review of the Code on the third anniversary of its commencement and every five years thereafter.<sup>1</sup> The Code commenced on 1 September 2001.
11. In October 2004, the Authority commenced its first review of the Code. A final report of the review was provided to the Treasurer on 23 September 2005 and following the Treasurer's approval, the Authority published the Final Report on 5 December 2005.
12. 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.
13. 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.
14. As at the date of publication of this issues paper, no further consultation on the recommendations of the Final Report of December 2011 has been undertaken by the Government.

## Legislative Requirements

15. 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.<sup>2</sup>
16. As the Code commenced in 2001, the first review was required to be undertaken in 2004. The second review was required to be undertaken in 2009 and the third review is required to be undertaken in 2014, five years after the second review was commenced.

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<sup>1</sup> Section 12, Part 2 of the Act.

<sup>2</sup> Section 12(1) of the Act.

17. The Act stipulates that:

“The purpose of the review is to assess the suitability of the provisions of the Code to give effect to the Competition Principles Agreement in respect of railways to which the Code applies”.<sup>3</sup>
18. The Act sets out the requirements for the public consultation to be undertaken by the Authority as part of its review process, requiring a notice to be published in a daily newspaper circulating throughout the Commonwealth and also one circulating throughout the State.<sup>4</sup>
19. The Authority is then required to prepare a report on the review and give it to the administering Minister (the Treasurer) for consideration.<sup>5</sup>
20. Under the Act, a requirement of a review of the Code is to seek public comment on the effectiveness of the regime. This Issues Paper seeks to assist parties wishing to make comments on the effectiveness of the regime.
21. Copies of the Act and the Code are available on the Authority’s website ([www.era.wa.gov.au](http://www.era.wa.gov.au)).

## Scope of the Review

22. Part 2 of the Act sets out provisions relating to the establishment of a Code.
23. Section 4(1) of Part 2 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”.
24. 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 Competition Principles Agreement (CPA) in respect of railways to which the Code applies.<sup>6</sup>
25. 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”.
26. The CPA is part of the National Competition Policy (NCP) which was formulated and signed by all Australian Governments <sup>7</sup> The NCP is underpinned by three separate inter-governmental agreements;
  - (a) The CPA;
  - (b) The Conduct Code Agreement; and
  - (c) The Agreement to Implement the National Competition Policy and Related Reforms.

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<sup>3</sup> Section 12(2) of the Act.

<sup>4</sup> Sections 12(3) to 12(5) of the Act.

<sup>5</sup> Section 12(6) of the Act.

<sup>6</sup> Section 12(2) of the Act.

<sup>7</sup> 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>

27. The CPA provides a framework to allow third parties to access nationally significant infrastructure facilities which exhibit natural monopoly characteristics and cannot be duplicated economically.
28. The definition under the Act means that the relevant version of the Competition Principles Agreement of 11 April 1995, for the purpose of the Code review, is the most recent version of the Agreement. The Authority understands that the Competition Principles Agreement as amended to 13 April 2007, is the most recent version.<sup>8</sup>
29. 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 which 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").
30. The sections of Part 2 of the Act which 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 relates to consultation on amendment or replacement of the Code.
31. The Code refers to five regulatory instruments (Segregation Arrangements, Costing Principles, Train Path Policy, Train Management Guidelines, Over-payment Rules) which 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.
32. Consequently, these instruments will be reviewed and where necessary refined in a separate process with key stakeholders. Comments on issues relating to regulatory instruments are welcome at this stage, and may inform any subsequent review of those instruments.
33. 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

34. 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 (markets upstream and downstream of the infrastructure).
35. 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".<sup>9</sup> Clauses 6(c), 6(e) and 6(f) are of particular relevance to this review.
36. 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 which would not be economic to duplicate, which are necessary to permit effective competition in

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<sup>8</sup> The amended Competition Policy Agreement document is available at <https://www.coag.gov.au/node/52>

<sup>9</sup> See COAG Competition Principles Agreement, at: <https://www.coag.gov.au/node/52>



- upstream or downstream markets, and for which safe access may be economically provided.
37. Clause 6(e) of the CPA requires that an access regime should, among other things, provide for a negotiate/arbitrate approach to access, incorporating 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 elements of a business which are covered by the regime.
  38. Clause 6(f) requires that an access regime incorporates the following principles:
    - Promote the economically efficient use of, and operation and investment in significant infrastructure thereby promoting effective competition in upstream or downstream markets.
    - Access prices should meet the efficient costs of providing access, allow multi-part pricing and price discrimination, not allow a vertically integrated operator to discriminate in favour of its downstream operations, and provide incentives to reduce costs.

## NCC Reviews of the Effectiveness of the WA Railway Access Regime

39. Under the CPA, the National Competition Commission (NCC) can certify State access regimes as “effective”. Once a Regime is certified as effective, a third party cannot seek to have the infrastructure declared under the *Competition and Consumer Act 2010* (CCA).<sup>10</sup> A declaration under the CCA would enable the national access regime to apply to the declared infrastructure.
40. In February 1999, prior to the commencement of the Code, the WA Government made an application to the NCC to certify the WA Railway Access Regime. The NCC worked with the WA Government to refine the draft Code to resolve a variety of issues. The NCC’s main concern was to try to ensure efficient interface between the Regime and the Australian Rail Track Corporation (ARTC) Undertaking which was seen as likely to form the basis of a National Rail Access Regime.
41. The NCC viewed a single National Rail Access Regime as the best way to resolve interface issues, and suggested the WA Regime be amended to require the railway owner, in the event that a National Rail Access Regime was developed, to adopt any new national framework.
42. The WA Government was concerned about automatically committing to a National Rail Access Regime without knowing the details of such a regime and did not agree with the NCC recommendation to adopt any new national framework.
43. Consequently, the WA Government withdrew its application on 26 October 2000.<sup>11</sup> However, the NCC provided a letter of assurance which stated that, aside from the National Rail Access Regime adoption issue, the regime was broadly “effective”.
44. On 12 May 2010 the WA Government submitted a new application<sup>12</sup> to the NCC for certification of the WA Regime as an effective separate regime. The NCC published

<sup>10</sup> Formerly Trade Practices Act 1974

<sup>11</sup> <http://ncc.gov.au/images/uploads/CERaWaWL-001.pdf>

<sup>12</sup> Following the withdrawal of the 1999 application; see paragraph 43.

its draft recommendation on 17 August 2010, indicating that it proposed to recommend that the Regime be certified and invited interested parties to make submissions.

45. In its final report the NCC noted that submissions received in response to the draft recommendation raised a number of additional issues and concerns. These submissions focussed the NCC's attention on the increasing range of different approaches to third party access to railways in Western Australia (refer paragraph 47). Consequently, following further review, the NCC published its final recommendation on 13 December 2010,<sup>13</sup> which recommended that the WA Rail Access Regime not be declared effective.
46. The NCC stated its view that the WA Access Regime satisfactorily met the requirements of the CPA clause 6 principles and was consistent with the competition and efficiency limb of the objectives of Part IIIA of the (then) Trades Practices Act.<sup>14</sup>
47. However, the NCC found that WA railways were subject to a variety of regulation; some being for below-rail access and the proposed Roy Hill railway being for haulage (at that time); some being subject to Part IIIA and others to be regulated under the WA access regime. The NCC found that while the WA Rail Access Regime existed, there was no consistency in or certainty to its application.
48. In addition, the NCC noted that interface issues would continue to exist for national rail transportation due to inconsistency between the GRV approach, as adopted by Western Australia, and the asset valuation method used in other rail jurisdictions. In its Final Review, the NCC stated (at paragraph 9.22):

The WA Rail Access Regime is the only regulated industry to adopt GRV, as depreciated optimised replacement cost (DORC) is the widely accepted asset valuation methodology for regulation in Australia,

49. The NCC considered that, having regard to the consistency limb of the objects of Part IIIA, the WA rail access regime could not be certified as an effective access regime. Part IIIA requires that there be a consistency of approach to access regulation where it is applied through a State access regime.
50. The NCC concluded that, although the WA rail regime satisfied or reasonably conformed to the principles it must address in order to be certified as an effective access regime, it did not provide for a consistent approach to regulation of third party access to railways in Western Australia. On this basis, the NCC recommended that the Commonwealth Minister should not certify the WA Rail Access Regime as effective. Nevertheless, the Commonwealth Minister certified the WA Rail Access Regime as effective for a period of five years from 11 February 2011.<sup>15</sup> In his press release accompanying the decision, Mr. David Bradbury said:

<sup>13</sup> <http://ncc.gov.au/images/uploads/CERaWAFR-001.pdf>

<sup>14</sup> In particular, the NCC rejected the argument that the TPI railway was economic to duplicate, and agreed with the WA Government's supplementary submission that the 'uneconomic to duplicate' criterion should be based on an assessment of whether the facility exhibits natural monopoly characteristics. In other words, whether or not a new entrant to the market would face duplication costs which are higher than incremental expansion costs faced by the incumbent, with the capacity created by duplication potentially exceeding demand. The Authority is also aware of the 2012 Federal High Court decision in the Pilbara Rail Access Dispute, which used a different definition of the 'economic to duplicate' criterion.

<sup>15</sup>

<http://registers.acc.gov.au/content/item.phtml?itemId=977256&nodeId=784e535065fe33a66a138d8c383e>

Even though my decision is different to the NCC's final recommendation, I share some of their concerns about the way the WARAR is applied to new railways. I encourage the Western Australian Government to consider how greater certainty could be achieved, and the next review of the regime in 2014 is an appropriate opportunity for this to occur.

51. As noted above, the WA Rail Access Regime has been certified for a period of five years which will end in February 2016. The Commonwealth Minister noted in his decision that the ERA would be commencing a third review of the regime in late 2014 and considered it appropriate for the certification period to coincide with the finalisation of that review so that any recommended changes could be taken into account.
52. WA Railways Access Regime is a term that has been used to describe the Act and the Code. The Code is legislation subsidiary to the Act. The Code is subject to this review. The Act is not the subject of this review, except to an incidental extent.
53. The application of the WA Railways Access Regime (principally the Act) by the WA Government is a State policy matter. The Code applies only to the Railways to which the Act applies. This review does not relate to whether the legislation is being applied in a way which "gives effect to the competition principles", but only whether the provisions of the Code, where they are applied, are suitable to give effect to the CPA.

## The operation of the WA Rail Regime

54. The WA regime requires the Regulator to establish costs relevant to the floor and ceiling price tests described in clauses 7 and 8 of Schedule 4 of the Code, and railway owners and proponents are then able to negotiate prices between upper and lower limits based on those costs. In other words the Code sets the maximum and minimum revenue that the railway owner should be able to recover through access charges paid by users of the railway. If negotiations on this basis, between the access seeker and the railway owner, break down, then the parties have recourse to arbitration as described in Part 3 of the Code.
55. In the course of discharging its obligations in respect of two access proposals that have been lodged since the second review of the Code, the Authority has been made aware of the views of some stakeholders that the Code is not effective in enabling access to railway infrastructure in WA. Further, the NCC previously recommended that the WA regime not be declared effective, partly due to inconsistency between the WA regime and the ARTC undertaking which determines access conditions on the interstate route into Kalgoorlie from the east.
56. The inconsistency cited by the NCC is referred to in paragraph 48 above and relates to the basis on which the capital value component of total costs is established. Further, the ARTC regime is more prescriptive than the WA regime in that it establishes a benchmark access tariff for a standard service, whereas the WA regime establishes only cost boundaries within which negotiation must take place.
57. The Authority notes that the use of an alternative capital cost 'building block' does not necessarily go hand in hand with a more prescriptive benchmark tariff approach, i.e. an alternative to GRV asset valuation method is not necessarily inconsistent with a floor and ceiling price approach. However, the adoption of an alternative asset

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[2ac9&fn=WA%20Rail%20Access%20Regime%20-%20Certification%20decision%20&%20statement%20of%20reasons.pdf](#)

valuation approach may require more frequent ‘regulatory resets’ in order to preserve continuity of historic capital and operating cost schedules.

58. The issue of the form of asset valuation scheme required by Schedule 4 of the Code was raised in the second review of the Code and a substantial portion of the final report for that review was devoted to a discussion of the issues and stakeholder views on that matter. This issue remains relevant, and comments are invited (at paragraphs 144 to 146 of this issues paper) on the appropriateness of the valuation method currently prescribed in the Code.
59. The Authority is also interested to learn the views of stakeholders as they relate to the wider issue of the prescriptiveness of the regime, and whether a more prescriptive regime - that is, a regime which requires a benchmark tariff for access to a benchmark service to be established rather than cost boundaries as a basis for negotiation on price – would be better in giving effect to the CPA than the current approach based on the floor and ceiling price tests as prescribed in the Code.
60. These issues are also raised in the Appendix to the Final Report of the second review of the Access Code<sup>16</sup>.

## Development of the Western Australian Rail Access Regime

### Legislative Reforms in WA

61. The first State-owned railway was built in 1879, linking Geraldton and Northampton to support copper and lead mines in the area. Western Australian Government Railways (WAGR) was formally established as a Government-owned entity in the same year.
62. With all railways effectively under control of a monopoly utility, Western Australian railways were not subject to any form of access regulation until the making of the NCP Agreement in 1995. Under the NCP agreement, Australian Governments committed to implement reforms which included provision for third party access to significant infrastructure.<sup>17</sup>
63. The Australian governments also agreed to Part IIIA of the *Trade Practices Act 1974*, now the *Competition and Consumer Act 2010* (CCA). This established a national regime for accessing infrastructure which cannot be economically duplicated. The

<sup>16</sup>

[http://www.erawa.com.au/cproot/10237/2/20120207%20Review%20of%20the%20Railways%20\(Access\)%20Code%202000%20-%20Final%20Report.pdf](http://www.erawa.com.au/cproot/10237/2/20120207%20Review%20of%20the%20Railways%20(Access)%20Code%202000%20-%20Final%20Report.pdf)

<sup>17</sup> The development of the NCP was preceded by the Hilmer Report (1993). The Hilmer Report provided an analysis of the micro-economic reforms which had been underway since the 1980s, and focused in great detail on electricity, gas and water supply. Economic analysis of these industries was undertaken and reform processes designed to improve their productivity and efficiency subsequently implemented in the NCP. Railways were not one of the industries analysed in the Hilmer Report. Railway reform was based on reforms designed for electricity, gas and water industries. The quantum of competition policy tranche payments made to compensate State Governments in respect of railway reform were determined by a separate cost-benefit analysis undertaken in 1995.

national regime gives access seekers legal rights to reasonable terms and conditions, and a fair price for the use of the services of the infrastructure.

64. Following the signing of the CPA, the first phase of reform by the WA Government was the enactment of the *Government Railways Amendment Act 1996*, which allowed Westrail to enter into access agreements with third party above rail operators. National Rail Corporation, Toll Rail, Specialised Container Transport (SCT) and Great Southern Railways were able to use the interstate network (using their own crews), effectively enabling access by interstate operators who were not in competition with Westrail.
65. The *Government Railways Amendment Act 1996* effected access on the interstate network but did not provide a framework where operators could negotiate access on transparently equal terms across the whole WA network, and SCT sought to have other parts of the Westrail network declared.
66. SCT was initially denied further access by Westrail and subsequently referred the matter to the NCC. The NCC considered Westrail's arguments as to why it should not provide access, and determined that those arguments were not substantial. The Council made a recommendation to the WA Premier that third party access be granted in line with the National Competition Principles.
67. By that time, SCT had also appealed to the Australian Competition and Consumer Commission. However, before that appeal was heard, Westrail came to an agreement with SCT to allow access, and the Government made an undertaking that it would develop an Access Bill.
68. The *Government Railways (Access) Bill 1998* was introduced to apply to the freight network in the south-west of WA. In his second reading speech of the Bill, the then Minister for Transport referred to the national access regime contained in Part IIIA of the Trade Practices Act, and the imperative to provide access to infrastructure that cannot be economically duplicated.
69. In December 2000, the WA Government announced that the freight business of WAGR, trading as Westrail, had been sold to the Australian Railroad Group Pty Ltd (ARG). ARG was a 50:50 joint venture between Wesfarmers Ltd and international rail operator Genesee & Wyoming Inc.
70. The *Rail Freight System Bill 1999*, which enabled the disposal of the Westrail business, had also served to modify the *Government Railways (Access) Act 1998* by removing the word "Government" from the title of the Act, and replacing the word "commission" with "railway owner" throughout, thereby providing for a non-government railway owner.
71. The *Rail Freight System Bill 1999* also amended the *Government Railways (Access) Act 1998* by inserting section 34A, which prohibits the hindering or preventing of access, and prescribing penalties for breaches of that section.
72. The Act was further amended by the *Government Railways (Access) Amendment Act 2000* which provided for the establishment of the Office of the Rail Access Regulator (ORAR) to oversee, monitor and enforce compliance by the railway owners with the provisions of the Regime.<sup>18</sup> These functions were subsumed into the

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<sup>18</sup> Hansard. Hon MJ Criddle. Government Railways (Access) Amendment Bill 2000 – second reading  
21 June 2000.

Economic Regulation Authority in 2004. The final reform required for establishment of the Regime was the development of the *Railways (Access) Code 2000* in September 2000. The Code is subsidiary legislation required by the Act, meaning that it was not tabled in Parliament, and can be amended or disallowed by the Government without reference to the Parliament. Hansard records in the WA Parliament:<sup>19</sup>

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

The NSW Access Code, which was used as a model for the WA Code, requires only government gazettal. In Victoria, the Act provides the Governor in Council, on the minister's recommendation, with the power to declare rail transport services and specify pricing and other principles to be applied in an access regime outside the parliamentary process. Likewise, the South Australian Railways (Operations and Access) Act requires only the Government to proclaim any changes to the application of the access regime and the assignment of the regulator to a nominated authority.

Finally, any changes to the code that are required to comply with the National Competition Council requirements to ensure certification of the regime should be able to be implemented without the risk of subsequent amendments through the parliamentary process.

73. The WA Railways Access Regime is comprised of the Code and the Act, both became fully effective on the 1st September 2001 when the Regime commenced.
74. The Code has been amended since 2001, as detailed from paragraph 85, but remains as subsidiary legislation to the Act. In 2006, as part of the Competition and Infrastructure Reform Agreement (CIRA), WA agreed that a consistent system of rail access regulation, based on the ARTC model, would be implemented for all significant rail corridors, where the benefits of the change could be shown to exceed the costs<sup>20</sup>. The ARTC model is more prescriptive than the WA regime, and adoption of that model would require a substantial revision of the Code.

## Railway Owners in WA

75. There are three railway owners with railways listed in Schedule 1 of the Code ("Routes to which this Code applies"). These railway owners are: the Public Transport Authority, which operates the passenger transport network in the Perth metropolitan area; The Pilbara Infrastructure which operates a railway into Port Hedland, and Brookfield Rail, which operates the former Westrail freight network in the south of WA.
76. As part of the sale of the Westrail business in 2000, WestNet Rail (WNR), a subsidiary of ARG, was granted a 49 year lease of the network infrastructure, or the "below rail"

<sup>19</sup> Hansard. Mr P Omodei. Government Railways (Access) Bill. Second reading 18 November 1998 page 3688/1.

<sup>20</sup> [http://archive.coag.gov.au/coag\\_meeting\\_outcomes/2006-02-10/docs/attachment\\_b\\_ncp\\_review.pdf](http://archive.coag.gov.au/coag_meeting_outcomes/2006-02-10/docs/attachment_b_ncp_review.pdf) see Appendix E clause 3.1.

- business. Ownership of the “above-rail” component of Westrail, (comprising the rolling stock and customer contracts) was transferred freehold to ARG as part of the sale.
77. In 2006 ARG was sold to a consortium comprised of Babcock and Brown and Queensland Rail. ARG was subsequently split, with the below rail component of ARG (trading as WestNet Rail) transferred to Babcock and Brown, and the above rail operation transferred to Queensland Rail.
  78. In 2009, Babcock and Brown became known as Prime Infrastructure. Prime Infrastructure was delisted as a public company in 2011 and is now owned by Brookfield Infrastructure Partners. To reflect these ownership changes, WestNet Rail was renamed Brookfield Rail in August 2011.
  79. While the WA Government remains the legal owner of the railway infrastructure, Brookfield Rail is the current lessee of the network under the sale agreement. Accordingly, for the purposes of access agreements under the Regime, Brookfield Rail is the network owner of the freight railway infrastructure.

## Economics and Industry Standing Committee Inquiry: The Management of Western Australia’s Freight Rail Network

80. In 2014, the Economics and Industry Standing Committee of the Legislative Assembly (Parliament of Western Australia) conducted an inquiry into the management of the lease arrangements applying to the freight network leased currently by Brookfield Rail.<sup>21</sup> Part of the inquiry terms of reference was to examine the regulatory arrangements currently in place in WA. These matters are dealt with in Chapter 5 of the Report (pages 85-96 of the report).
81. The Report at paragraph 5.29 states that “the Code has been dormant for the majority of its 14 year existence”, and (at paragraph 5.31) “In light of the dormancy of the Code, the role of the ERA in regulating the market for access to WA’s freight rail network in the time since it was privatised can best be described as minimal”.
82. The Authority notes that the Code commenced in 2001. Since its commencement, the ERA has made 25 separate decisions relating specifically to the SW Freight network.<sup>22</sup> All of these decisions served to clarify the terms and conditions under which the railway owner will provide access under the Code, thereby defining the ‘safety net’ provided by the Code.
83. Recommendation 4 of the Report of the Inquiry is that the Economic Regulation Authority’s 2014 review of *the Railways (Access) Code 2000 (WA)* include a critical evaluation of why so few access seekers have sought to use the Code. This question is relevant to the extent that it informs whether the CPA objectives are being advanced. In particular the Authority notes that clause 6(e) of the CPA requires that the railway owners promote access and do not hinder access, but does not require

<sup>21</sup>[http://www.parliament.wa.gov.au/Parliament/commit.nsf/\(EvidenceOnly\)/F96D1AFA1D945C3348257C9A0009FF2B?opendocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(EvidenceOnly)/F96D1AFA1D945C3348257C9A0009FF2B?opendocument)

<sup>22</sup> Segregation Arrangements - 2002, 2007, 2010; Train Management Guidelines - 2003, 2006, 2009, 2013; Costing Principles - 2002, 2006, 2007, 2009, 2011; Train Path Policy - 2002, 2006, 2009, 2103; Over-payment rules 2003, 2006, 2010, 2011; Costs determinations- 2003, 2004, 2007, 2014 and section 10 - 2002

discrimination of commercial agreements in favour of agreements under the Code. The regime is intended to encourage commercial negotiation where appropriate and not force regulated agreements, but provides for the access seeker to pursue such a course if it considers it necessary. This characteristic of the Code was highlighted by the ERA in the inquiry hearings [para 5.34] and is common to the gas and electricity regimes administered by the ERA.

84. The Authority welcomes any comments from stakeholders which relate to specific provisions of the Code if these are considered to discourage access agreements (that is, agreements under the Code).

## Amendments to the Code since its commencement

85. The Code has been amended a number of times since its commencement. These amendments were aimed at improving the efficiency and effectiveness of the Code. Consideration of these amended provisions should be made with reference to these aims and to the internal consistency of the Code.
86. The Code was amended by the WA Government in 2003, after the Regime had been operating for two years. The most significant changes were the provisions to expand the scope of negotiable access to include extensions and expansions to a railway.
87. There were 15 areas of the Code which were amended as part of this review process, and the most significant amendments<sup>23</sup> are summarised below:
- **Proposals requiring extensions and expansions allowed.** Negotiable access was broadened to include operations that are outside the existing capacity of the railway infrastructure. This amendment requires railway owners to negotiate expansions and extensions of a given route or associated railway infrastructure with an access seeker, as long as it is economic for the owner to do so. This amendment resulted in changes to a number of sections of the Code including: Part 1 section 3, 5 & 8; Part 2 section 9; Part 3 sections 14, 15 & 33; Part 4 sections 36; and Schedule 4.
  - **Costs of arbitration.** Section 34 of the Code was amended to ensure that the costs of arbitration are binding on both the railway owner and the access seeker.
  - **Definition of railway infrastructure.** The definition of 'railway infrastructure' in s.3 was amended to ensure consistency with the definition of 'railway infrastructure' outlined in the Act.
  - **Reimbursement of over-payments by railway owners.** An amendment was made to s.47 of the Code, requiring railway owners to reimburse operators where over-payment has occurred, as determined by the Regulator.
  - **Definition of operating costs.** The definition of 'operating costs' in Schedule 4 of the Code was amended to require assets to be, if appropriate, modern equivalent assets.

<sup>23</sup> See Government of Western Australia [Amendments to the Railways \(Access\) Code 2000](#) Public Consultation Paper, November 2003.



- **Application of one ceiling to each route segment.** An amendment was made to Schedule 4 clause 8 to clarify that only one price ceiling applies to each route segment.
  - **Time limit for the approval of the determination of ceiling costs by the regulator.** The previous time period was not considered sufficient to effectively assess the owner's application. Schedule 4 clause 10(2) and (3) were repealed and replaced.
  - **Calculation of capital costs where a cutting or embankment is required:** This amendment to Schedule 4 clause 2 means that the cost of cuttings and embankments incurred after the commencement of the Code are to be included as railway infrastructure in the calculation of capital costs.
  - Schedule 1 ("Routes to which the Code applies") was amended to include parts of the railway network that were not previously included in the Schedule. Corresponding amendments were also made to Schedule 4 clause 3.
88. In 2008 Schedule 1 of the Code was also amended to include The Pilbara Infrastructure (TPI) railway, as a route to which the Code applies.<sup>24</sup>
89. Following the ERA's first review of the Code, which was published in 2005, further amendments were made to the Code. The following amendments were subsequently gazetted<sup>25</sup>:
- **Definition of Route Section.** The definition of Route Section in section 3 was clarified as "the sections of the railways network into which the network is divided for management and costing purposes".
  - **Negotiations outside the Code allowed.** Section 4A was inserted clarifying that parties may choose to negotiate outside the Code, and that if they do, nothing in the Code – in particular the Part 5 instruments – applies to the negotiations or any resulting agreement.
  - **Required Information broadened.** Section 6 was deleted, and replaced with Part 2A (sections 6 and 7A-E) which outlined the railway owner's duty to prepare network information and keep it up to date. Section 6 refers to Schedule 2, which lists required information and which was also amended to broaden the scope of that information, Sections 7A-E also requires that information be kept up to date and allows for the regulator to grant exemption from the obligation to publish tonnages on specific routes if requested.
  - **Notification of intention to negotiate required.** Section 8 was amended to require the proponent to notify the railway owner in writing as part of a proposal that the proponent intends to enter into negotiations under the Code, and that the proponent must provide the regulator with a copy of the proposal.

<sup>24</sup> The Code was subsequently also amended by the WA government in 2011 [WA Government Gazette number 177, 20 September 2011] to enable consideration of land-related costs. There are material land-related capital and operating costs which were seen to be relevant to the establishment of The Pilbara Infrastructure railway. The amendment applies only to railways included in schedule 1 after the commencement of the Code, and therefore does not apply to the leased SW freight or the urban passenger network.

<sup>25</sup> These amendments are detailed in the WA Government Gazette number 114, 23 June 2009.

- **Withdrawal or remaking of a proposal.** Section 9A was inserted to provide regulations around the withdrawal of a proposal, and the re-making of the same or further proposals.
- **Extension or expansion costs to be apportioned.** Section 9 was amended to refer to the requirements for apportionment of the costs of extension and expansion (in Schedule 4 clause 7A).
- Schedule 1 (“Routes to which the Code applies”) was amended to incorporate routes between Perth and Clarkson, Fremantle, Armadale, Midland and Mandurah.
- Schedule 2 (“Information to be made available”) was expanded to include information on the running times of existing trains, gross tonnages on existing trains, available capacity and planned capital works.
- Schedule 4 (“Provisions relating to prices to be paid for access”) was amended to incorporate clause 7A which refers to the apportionment of costs of proposed extensions and expansions.

## Issues

### Recommendations from the second Review (2010)

90. The Authority provided a report on its second review of the Code to the Minister in December 2011. The report was published on the Authority’s website in February 2012. The report has not been acted upon. The recommendations of that report are:

#### Second Review Recommendation 1

Part 2A of the Code should be amended by adding a further requirement that the information required to be provided by a railway owner as described under sections 6(a) and 6(b) of the Code should be published on the railway owner’s website. If a railway owner does not have a website, but information relating to the railway is maintained on the website of an associated company, then the required information as described under sections 6(a) and 6(b) should be published on that company’s website.

#### Second Review Recommendation 2

Section 7 of the Code should be amended by adding a new sub-section noting that any capacity information provided by the railway owner must be compiled on a reasonable basis consistent with the railway owner’s obligation under section 16(2) not to unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner.

#### Second Review Recommendation 3

Section 25 of the Code should be amended such that the definition of disputes includes all information provision and negotiation obligations on railway owners, which are relevant to access seekers, under Parts 2 and 3 of the Code.

#### Second Review Recommendation 4

Part 5 of the Code should be amended as follows:

- Section 42 should be revised to only require public consultation for variations to segregation arrangements considered by the Authority to constitute a material change.
- Section 45 should include the costing principles and over-payment rules in order to ensure consistency in the public consultation process across all Part 5 instruments.
- A new provision should be added to provide for the review of all Part 5 instruments every 5 years or as otherwise determined by the Authority.

#### Second Review Recommendation 5

Sections 52(1), 52(2), 52(3), 52(4) and 53 of the Code should be deleted as these transitional provisions are no longer relevant.

#### Second Review Recommendation 6

Schedule 1 should be amended as follows:

- Item 52 should be amended by replacing the words "... the railway constructed pursuant to the TPI Railway and Port Agreement" with "... the railway constructed pursuant to the TPI Railway and Port Agreement and defined as 'Railway' in that Agreement".

Schedule 4 should be amended as follows:

- Item 50A of Schedule 1 should be added to clause 3(1)(a)(i) of Schedule 4.
- Clause 3(1)(a)(ii) should be amended by replacing the words "in the other items in that schedule" with "in items 1 to 48 in that Schedule".
- Clause 3(2) should be amended to ensure that the public consultation arrangements set out in sections 3(3) to 3(5) of Schedule 4 apply to the initial WACC determination for any new railway which comes under the Code.

#### Second Review Recommendation 7

The Department of Treasury undertake further consultation in relation to the specific considerations a railway owner should be allowed to take into account when providing differential treatment to prospective operators, and Section 16 of the Code should be amended to provide a non-exclusive list of those considerations.

#### Second Review Recommendation 8

The Department of Treasury undertake further consultation in relation to the desirability of requiring a standing set of model Part 5 instruments to be maintained by the Authority, and if desirable, that these model Part 5 instruments should apply to all new railways from a date six months prior to the commencement of the operations of the railway.

91. The Authority will re-state the above recommendations in the final report of this review for the attention of the Minister. Any relevant comments will be noted by the Authority if stakeholders wish to provide further input on these matters.

## Issues for Consideration: Third Review

92. The Code is comprised of the following parts:
- Parts 1 and 2A – Preliminary and Publication of Information
  - Part 2 – Proposals for Access
  - Part 3 – Negotiations (Divisions 1 and 2)
  - Part 3 – Negotiations (Division 3)
  - Part 4 – Access Agreements
  - Part 5 – Certain approval functions of the Regulator
  - Part 6 – General
  - Schedules

Each of these parts are described below with issues for preliminary consideration identified under each heading.

### *Parts 1 and 2A – Preliminary and Publication of Information*

93. Parts 1 and 2A of the Code contain sections 1 – 7E. Part 1 of the Code deals principally with the definitions of terms used in the Code. Most of these definitions are derived from the Act which does not form part of this review.
94. Part 2A of the Code deals with the publication of information by the railway owner. The purpose of this section is to provide entities interested in seeking access to the railway with preliminary information on the railway network. In particular, Schedule 2 specifies the level of information required to be provided to access seekers by the railway owner for each route section. The railway owner must make this required information available to access seekers, in a publication, at a reasonable price.

### *Preliminary Issues – Parts 1 and 2A*

95. No issues relevant to Parts 1 and 2A of the Code, further to those shown in the second review, have been identified by the Authority ahead of public consultation.
96. The Authority invites any further comments relating to the provisions of Parts 1 and 2A of the Code.

### *Part 2 – Proposals for Access*

97. Part 2 of the Code contains sections 7-12. Part 2 of the Code deals with proposals made to the railway owner for access to the railway owner's network.
98. Section 7 sets out details of the preliminary information which an entity seeking access can request from the railway owner.
99. Sections 8 and 9A set out the requirements which an entity making a proposal for access (proponent) must meet in terms of the proposal and any subsequent withdrawal of the proposal.

100. The railway owner's obligations on receipt of a proposal from a proponent are set out in section 9.
101. Sections 10 and 11 deal with the railway owner's obligation to seek the Authority's approval should a proposal, under section 10(1)(b), be likely to preclude other entities from access to that infrastructure.
102. Section 12 deals with the requirement for the railway owner to maintain a register of all proposals.

## Preliminary Issues – Part 2

103. Two access proposals have been lodged since the Authority's second review of the Code. Some of the issues which have arisen in the course of making determinations relevant to those proposals are identified below.

### **Section 8(4) and 8(5) – when can an extension or expansion be proposed?**

104. The Authority is aware that the validity of an access proposal has been challenged on the basis that an expansion was not proposed and also could not be proposed until the railway owner's requirements under sections 14 and 15 have been satisfied. This issue is closely related to the function of sections 14 and 15 as "threshold clauses" (that is, clauses which must be satisfied prior to proceeding) to Part 3 of the Code. The status of sections 14 and 15 are raised at paragraph 121 in this document.
105. The Authority invites comment on whether the meaning of section 8(4) and 8(5) should be clarified such that there is certainty that a proponent can propose an extension or expansion at any time after making a proposal.

### **Section 10 – when is section 10 relevant (allowing access may preclude access by other proponents)?**

106. Section 10 provides for 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.
107. The Authority invites comment on whether the intent and meaning of Section 10 should be clarified. The intent of section 10 has been addressed by the Authority in its decision in respect of a section 10 request<sup>26</sup> made by The Pilbara Infrastructure in 2013. The Authority decided in that instance that section 10 was not relevant where it is possible to economically expand the network.
108. Section 10 is relevant if there is currently adequate 'capacity' to accommodate the proposed access, but no more. Reference to section 10 would not be appropriate in circumstances where the railway owner considers that there is inadequate 'capacity' to accommodate the proposal itself.
109. The Authority's decision was consistent with the Code allowing for access to be contemplated where that access requires expansion. In 2001, the Office of the Rail Access Regulator received a request from WNR for a section 10 decision in relation to an access proposal by Portland Cement. In that instance, the ORAR decided<sup>27</sup> that section 10 was not relevant, as an expansion was possible, even though the

<sup>26</sup> <http://www.erawa.com.au/cproot/11565/2/20130830%20110918%20-%20TPI%20-%20Corrigenda%20Decision.pdf>

<sup>27</sup> [http://www.erawa.com.au/cproot/3321/2/kalesp\\_det.pdf](http://www.erawa.com.au/cproot/3321/2/kalesp_det.pdf)

Code at that time did not contemplate access proposals requiring expansion. Section 10 was not amended in 2003 to allow for extensions and expansions when other provisions enabling proposals involving extensions and expansions were added to the Code.

110. The current wording of section 10 may also have been taken to suggest that a proposal cannot be made if there is no current available access (a future proposal may be 'precluded' if the 'last of the current capacity' is committed). This would not be consistent with access being contemplated for proposals requiring expansions.
111. Further, section 10 applies where the railway owner seeks approval from the Regulator to enter into negotiations. This means that the railway owner wishes to enter into negotiations and will proceed if that approval is given. The two section 10 requests received by the Authority were received from railway owners not seeking approval to commence negotiations.
112. The Authority invites any further comments relating to the provisions of Part 2 of the Code.

### ***Part 3 – Negotiations (Divisions 1 and 2)***

113. Part 3 (Divisions 1 and 2) of the Code contains sections 13 to 21. Part 3 of the Code deals with the negotiation process for an access agreement between the proponent and the railway owner. Divisions 1 and 2 relate to the negotiation process and the obligations on the railway owner and the proponent under this process.
114. Section 13 sets out the duty on the railway owner to negotiate with a proponent in good faith.
115. Sections 14 and 15 outline the obligations on proponents seeking to negotiate an access agreement with the railway owner. Under section 14, the railway owner is entitled to require a proponent to show that it has sufficient managerial and financial ability to undertake the rail operations set out in its proposal. Section 15 provides the railway owner with an entitlement to require a proponent to show that its proposed operations can be accommodated within the capacity of the relevant route or, if an upgrade of the rail infrastructure on that route is necessary to accommodate the proposed operations, such that the required upgrade can be undertaken in a technically and economically feasible manner.
116. Section 16 sets out the general obligations of the railway owner in the negotiation of an access agreement including the requirement that the railway owner must not unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner.
117. Section 17 deals with the matters which must be taken into account by the railway owner and the proponent when negotiating an access agreement.
118. Section 18 outlines the process for dealing with the information provided by a proponent under section 14 and 15 in the event that the railway owner is not satisfied that the information provided meets the requirements of these sections.
119. Sections 19 and 20 deal with the commencement of negotiations. Section 19 provides for the railway owner to notify the proponent of its readiness to commence negotiations and for the proponent to respond in a similar manner. Under section 20 the railway owner and the proponent are required to set a time for the negotiations to

terminate if, by that time, either an access agreement is not in place or if the parties have not agreed to an extension to the negotiation time.

120. Section 21 allows a proponent to apply to the Authority for an opinion on the price sought by the railway owner for access, in relation to whether this price meets the requirements of clause 13(a) of Schedule 4.

### Preliminary Issues – Part 3 (Divisions 1 and 2)

#### **Sections 14 and 15 - can a railway owner challenge the validity of a proposal prior to receiving the information required by those sections from the proponent?**

121. The Authority is aware that the validity of an access proposal has been challenged on the basis that an expansion was not proposed and also could not be proposed until the railway owner's requirements under sections 14 and 15 have been satisfied. This issue is referred to in the context of proposals requiring expansions at paragraph 104.
122. The Authority invites comment on whether the status of sections 14 and 15 as threshold issues for Part 3 should be clarified. Sections 14 and 15 are in Division 1 ("When duty to negotiate arises") of Part 3. The remedies available to a railway owner who is not satisfied with the information provided by the proponent are shown in section 18 (Division 2 – "Negotiations").

#### **Section 16 – what does the term “unfairly discriminate” mean?**

123. The Authority invites comment on whether there is a need to expand section 16 to clarify the meaning of the term “unfairly discriminate”. In addition, the Authority invites any comments in relation to subsection 16(1), which requires that the railway owner avoids unnecessary delays and meets the requirements of a compliant proponent. This issue was raised in the Authority's second review of the Code (Final Report recommendation 7)
124. The Authority invites any further comments relating to the provisions of Part 3 (Division 1 and 2) of the Code.

### Part 3 – Negotiations (Division 3)

125. Part 3 (Division 3) of the Code contains sections 22 to 35. This part deals with the arbitration process for disputes between the railway owner and a proponent in the negotiation of access agreements.
126. Under the arbitration process set out in Part 3, Division 3, the Authority is required to appoint an arbitrator (section 26(2)) to hear the dispute. The arbitrator is required to carry out the arbitration process under the *Commercial Arbitration Act 1985* subject to the provisions set out under sections 28 to 35 of the Code.
127. Section 25 sets out the circumstances which constitute “disputes” under the Code in relation to the negotiation of access agreements. Proponents are able to refer these disputes to arbitration through notification to the Authority under section 26(1).

## Preliminary Issues – Part 3 (Division 3)

### Should Part 3 prescribe a time limit for the conclusion of arbitration?

128. There are no time limits prescribed for the conclusion of arbitration in Part 3, and the Authority notes that it is effectively an ‘open-ended process’. The Authority invites comment as to whether time limits for conclusion of arbitration should be stipulated in Part 3 Division 3 of the Code.
129. An indeterminate timeframe for resolution of disputes provides an opportunity for unreasonable delays in the progress of negotiations. Access regimes in other industries overseen by the Authority contain time limits for conclusion of arbitration. For example, certain types of arbitrated disputes in the Electricity Networks Access Code are subject to time limits.<sup>28</sup>
130. The Authority invites any further comments relating to the provisions of Part 3 (Division 3) of the Code.

## Part 4 – Access Agreements

131. Part 4 of the Code contains sections 36 to 39. Part 4 deals with general matters relating to access agreements including the registration of such agreements.

## Preliminary Issues – Part 4

132. No issues relevant to Part 4 of the Code have been identified by the Authority ahead of public consultation. The Authority invites any further comments relating to the provisions of this part.

## Part 5 – Certain approval functions of the Regulator

133. Part 5 of the Code contains sections 40 to 47. Part 5 of the Code sets out the approval functions of the Authority in relation to the Part 5 Instruments. These instruments are the train management guidelines, the train path policy, the costing principles and the over-payment rules.<sup>29</sup> The provisions under Part 5 require a railway owner to submit these instruments to the Authority for approval.
134. Part 5 also contains provisions relating to the public comment process which must be undertaken by the Authority on the railway owner’s train management guidelines, train path policy (section 45) and segregation arrangements (section 42) before the Authority can approve these documents.
135. The requirements for Segregation Arrangements are detailed in sections 28 to 34 of the Act, and are not subject to this review. The requirements for consultation associated with Segregation Arrangements are described in Part 5 of the Code and are subject to this review.

<sup>28</sup> Queuing disputes referred to in chapter 10 *Electricity Networks Access Code 2004*

<sup>29</sup> Train Management Guidelines and Train Path Policy are policy documents which describe the railway owner’s processes for allocating capacity and scheduling train movements between different operators. Costing Principles and Overpayment rules describe the way that a railway owner will establish costs for use of the railway and how any over-recoveries of cost will be reimbursed to operators.



## Preliminary Issues – Part 5

136. No issues relevant to Part 5 of the Code have been identified by the Authority ahead of public consultation. The Authority invites any further comments relating to the provisions of Part 5 of the Code.

## Part 6 – General

137. Part 6 contains sections 48 to 53. This part of the Code deals with general matters including the issue of inquiries and reports by the Authority, obligations on the Authority with respect to confidential information and transitional provisions.

## Preliminary Issues – Part 6

### **Section 50 – should a railway owner be able to declare any information confidential, or only information which is not otherwise required by the Code to be provided by the railway owner?**

138. The Authority invites comment on whether the provisions of section 50(3) should be clarified. Section 50(3) relates to the confidentiality of railway owner's information. The railway owner's information referred to in section 50 does not include information which is required to be provided by another section of the Code.
139. Section 50(3) does not allow the railway owner to claim confidentiality over any information required to be provided by provisions of the Code other than section 50.
140. The Authority invites any comments relating to the provisions of Part 6 of the Code.

## Schedules

141. The Code contains five schedules, as follows:
- Schedule 1 – Routes to which the Code applies
  - Schedule 2 – Information to be made available
  - Schedule 3 – Matters for which provision is to be made in an access agreement
  - Schedule 4 – Provisions relating to prices to be paid for access
  - Schedule 5 – Relevant provisions of Competition Principles Agreement
142. No issues relevant to Schedules 1 to 3 of the Code have been identified by the Authority, further to those identified in the second review, ahead of public consultation. Schedule 5 is a copy of the Competition Principles Agreement and is not subject to amendment.
143. A number of issues have been identified by the Authority in reference to Schedule 4. These are outlined following.

## Preliminary Issues – Schedule 4

### **Clause 2 – is there a better means of estimating capital costs of a railway than the GRV (Gross Replacement Value) method prescribed in clause 2?**

144. This issue was raised in the Authority's second review of the Code and was addressed in a number of submissions received in response to the draft report for that review. The adoption of a DORC valuation method as an alternative to GRV was supported by Roy Hill, Co-operative Bulk Handling, and Oakajee Port and Rail. WestNet Rail submitted that a change in valuation method from GRV would be prejudicial to its business interests. WestNet Rail and Northwest Infrastructure submitted that the Code Review mechanism should not be used to change the provisions of the Code without sufficient evidence that existing arrangements are not effective.
145. This issue has been raised again by the Authority for consideration as it is an issue identified by the NCC, and was factored into the NCC's recommendation that the WA regime not be declared effective. The matter of concern to the NCC is discussed at paragraph 48 of this issues paper, and relates to the 'interface' of the WA rail regime and the ARTC undertaking on the interstate route at Kalgoorlie.
146. A summary of submissions received on this matter for the second review and other considerations related to the valuation method stipulated in Schedule 4 of the Code are contained in the Appendix (paragraphs 140-234) to the Final Report of the Second Review.<sup>30</sup>
147. The Authority notes the comments made by the NCC in its final report in relation to consistency of the WA regime with regulations in other states, and in particular the basis for costs assessment in the Code being light-handed. The Regulator is required to set a negotiating range using the GRV to establish the costs that can be recovered by the railway owner. The Authority invites comment on the appropriateness of this approach as the basis for facilitating access as outlined in clause 2 of Schedule 4.

### **Clause 10 – is the prescribed 30 day time limit for the making of the regulator's determination sufficient?**

148. The Authority invites comment on the time limit prescribed in clause 10(3) of Schedule 4 for the Regulator to either approve a railway owner's determination of costs, or make its own. This time limit is 30 days. The time limit may be extended with the proponent's agreement beyond 30 days as outlined in clause 11. In the absence of an extension, the Authority has found that 30 days is insufficient time for all administrative (including appointment of a consultant) drafting and approval functions to be met.
149. The Authority invites any further comments relating to the provisions of Schedules 1 to 4 of the Code.

<sup>30</sup>

[http://www.erawa.com.au/cproot/10237/2/20120207%20Review%20of%20the%20Railways%20\(Access\)%20Code%202000%20-%20Final%20Report.pdf](http://www.erawa.com.au/cproot/10237/2/20120207%20Review%20of%20the%20Railways%20(Access)%20Code%202000%20-%20Final%20Report.pdf)