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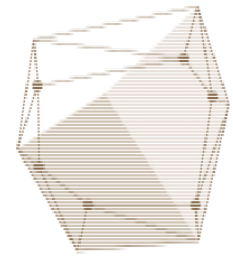

Submission to the Economic Regulation Authority – 2015 Code Review

6 April 2015

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1. INTRODUCTION

In late 2014, the Economic Regulation Authority (**Authority**) commenced the third review of the *Railways (Access) Code 2000* (WA) (**Code**) pursuant to section 12(1) of the *Railways (Access) Act 1998* (WA) (**Act**) (**2015 Code Review**). In February 2015, the Authority released an issues paper (**Issues Paper**) for the 2015 Code Review in which the Authority seeks submissions from interested parties in relation to the matters raised in the Issues Paper and the 2015 Code Review generally.

Brockman Iron Pty Ltd (**Brockman**) is the wholly owned subsidiary of Brockman Mining Australia Pty Ltd (**Brockman Mining**). Brockman Mining is authorised to make this submission on behalf of Brockman as well as on its own behalf. This submission is provided for consideration by the Authority in response to the Issues Paper and in relation to the 2015 Code Review more generally and is intended to be made public on the Authority's website.

As one of only three access seekers ever to have made an application for access under the Code (one of which was ultimately withdrawn), Brockman has a unique perspective on the Code, its operation and its deficiencies. Notably, both current access proposals under the Code (the other being Co-operative Bulk Handling Ltd's proposal in relation to the Brookfield Rail network) have been made since the last Code review was undertaken by the Authority in 2012. Brockman's experience, since seeking access under the Code, is summarised in the timeline below.

The Code timeline for Brockman

- On 15 May 2013, Brockman lodged with The Pilbara Infrastructure Pty Ltd (**TPI**) a proposal for access under section 8 of the Code (**Access Proposal**).
- On 14 August 2013, the Authority made a decision to approve negotiations on the Access Proposal under section 10 of the Code. On 9 September 2013, the Authority published a heavily redacted Floor and Ceiling Cost Determination for the Access Proposal route.
- On 4 October 2013 TPI commenced legal proceedings, by writ (challenging the validity of the Access Proposal), and a judicial review application (regarding the Authority's decision and conduct concerning the determinations relating to section 10 and Floor and Ceiling Cost Determination under the Code).
- On 26 September 2014, 16 months after the Access Proposal was lodged, the Supreme Court ruled in the challenge to the Access Proposal that Brockman's proposal was valid and dismissed the action commenced by writ. Both decisions regarding the writ and judicial review application have been appealed by TPI.
- On 24 December 2013 and 28 November 2014 respectively, Brockman made applications to the Supreme Court for mandatory injunctions under section 37(1) of the Act seeking orders to compel TPI to provide Brockman with information. Both of those injunction applications remain unresolved.
- On and from the lodgement of the Access Proposal and until July of 2014 Brockman was in regular contact with the Authority regarding the deficiencies in the TPI segregation arrangements and TPI sharing confidential information.
- Finally, upon direction from the Supreme Court, on 12 December 2014 the Authority published a remade redacted Floor and Ceiling Cost Determination which was necessary for Brockman to advance the section 14 and section 15 submission process.

Brockman's experience has brought to light genuine deficiencies in the current form of the Code to achieve the original intent of the legislature. In Brockman's view, there exists real questions about whether the Code is capable of operating as intended,

including whether it facilitates third party access, and whether it is an 'effective regime' for the purposes of the National Competition Principles Agreement. As such, the Code is not effective in enabling access to railway infrastructure in Western Australia. Brockman's proposal for access under the Code to TPI's Pilbara to Port Hedland rail infrastructure has been extremely costly and has progressed very slowly. Brockman's costs and delay burden includes defending the two TPI Supreme Court challenges (both under appeal by TPI) and commencing Brockman's two Supreme Court enforcement proceedings to obtain information necessary to progress the Access Proposal in an informed manner.

The cost and delay experienced by Brockman should also be considered in the context of clause 6(4) of the Competition Principles Agreement which provides that an "owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access" and further that the process of obtaining access is intended to be dealt expeditiously. Similarly, having regard to terms of the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* (WA) (**State Agreement**), TPI is required to "use all reasonable endeavours to promote access to, and attract customers for, the Railway" (clause 16(7)). It is Brockman's view that in maximising use, TPI must "use all reasonable endeavours to" accommodate Brockman's proposed use. Brockman's experience with TPI is that the Code has not facilitated the intended outcomes contemplated by the Competition Principles Agreement or the State Agreement to promote access and provide for a mechanical and transparent process whereby both access seekers and railway owners have a clear understanding of the process and steps. This lack of appropriate prescription creates ambiguity and enables delay and hindrance of the means by which access to third party declared infrastructure should be facilitated.

Based on its experience, Brockman provides this submission to the effect that the Code requires review and improvement:

- **universally**, so as to address key issues in relation to the Code's lack of clarity and deficiency in operation (part 2 of this submission); and
- **specifically**, in relation to existing sections of the Code on which Brockman provides direct comment (many of which comments seek to, but should not be viewed to comprehensively, address the universal issues noted above) (part 3 of this submission).

Part 4 of this submission is Brockman's response to the specific questions raised by the Authority in the Issues Paper in relation to the appropriate valuation method for determining floor and ceiling prices and whether a reference tariff approach to pricing should be adopted.

The 2015 Code Review presents an opportunity for the Authority, through its report to the Minister, and the Minister, through adoption of the recommendations set out in that report, to improve the efficiency and effectiveness of the Code and achieve the intended objects of the legislation generally. That is, to put into operation a regime that gives effect to clause 6(f) of the Competition Principles Agreement which relevantly provides that an access regime should incorporate 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."*

Brockman looks forward to a meaningful engagement with the Authority in relation to the points set out in this submission.

2. UNIVERSAL ISSUES

In Brockman's experience, the Code is not effective in enabling access to railway infrastructure in Western Australia. An effective access regime is fundamental to ensuring that key infrastructure is used most efficiently. To this end, an access regime should:

- be designed and administered so as to promote effective competition (and minimise monopolistic and unfair conduct) in the development and operation of the infrastructure to which it applies;
- be formulaic and mechanical (i.e. provide a precise process for gaining access, and clarity as to what is objectively required to move along the steps in that process); and
- leave access seekers and railway owners with no doubt as to what is required to be done to achieve an access arrangement.

The evidence to date is that the Code is not achieving these objectives.

To date, access to regulated infrastructure in Western Australia has been achieved through commercially negotiated agreements. Only three access proposals have been made under the Code in its 15-year existence (none of which have led to access being gained under the Code). As one of the three access seekers, Brockman has experienced, first hand, the inadequacies, and inability, of the Code to provide an effective and efficient means to gain access to regulated rail infrastructure when commercial negotiations with the railway owner external to the Code have been extensive but have ultimately proved to be unsuccessful. In Brockman's view, the Code does not, in its current form, achieve its purpose on the basis that it:

- lacks clarity – there are too many sections of the Code which are unclear and make compliance difficult for both railway owners and access seekers;
- is not prescriptive - it leaves too much to be negotiated by the railway owner and access seeker; and
- does not mandate appropriate industry standard ring-fencing and non-discrimination protections.

In addition, it is Brockman's view that the Code has, to date, not been subject to effective monitoring and enforcement by the Authority.

1. Lack of clarity

On the whole, the Code lacks clarity. The Code does not adequately provide railway owners (such as Brookfield Rail and TPI) or access seekers with clarity as to their obligations or what the requirements of the Code are. It also does not provide the Authority with clarity as to the administration of its functions. As a result, the Code does not effectively enable access seekers (such as Brockman) to gain access to regulated rail infrastructure in a timely fashion.

It is generally accepted that the Code (and the broader Western Australia rail access regime) is intended to facilitate negotiations between railway owners and access seekers (irrespective of whether those access seekers will undertake above rail operations personally) and a contestable market for access to regulated rail infrastructure. It follows that in circumstances where railway owners and access seekers

are unable to commercially agree to terms of access (independent of the Code), the Code should enable both parties to embark upon a certain, definitive and fair process whereby access to that infrastructure may be agreed or determined. In Brockman's view, the Code does not provide certainty, definitiveness or fairness, and is deficient in the following key respects.

- The Code uses broad aspirational phrasing and establishes vague guidelines for how negotiations for access are to be conducted. It does not identify or prescribe, in sufficient detail, terms and conditions that might be included in an access agreement.
- The dispute procedures under the Code do not facilitate timely progression of the access process. The 2015 Code Review should include a wholesale review of the dispute procedures under the Code with a view to implementing definitive timeframes for each stage of dispute procedure and to otherwise prevent unnecessary delay in the access process. For example, while Brockman acknowledges the importance of parties' right of recourse to the courts (for judicial review), that right should be clearly limited to where that party has a genuine basis for such recourse. Any scope for frivolous litigation is unnecessary, time-consuming and costly. For example, Justice Edelman indicated a view during the TPI Supreme Court proceedings about the effect of TPI's case on timing when he said to TPI's counsel, "the whole purpose of this proceeding is to stop it (sic) from entering into negotiations"[1]. Railway owners' obligations under the Code are not clearly defined. Notably, there is considerable uncertainty as to what the Code requires railway owners to do when access is sought by a person under the Code, what information it is required to provide and the level of detail of that information. This uncertainty around information supply has forced Brockman to commence two legal actions in the Supreme Court to compel TPI to provide information. This issue is compounded by the lack of enforcement of the Code by the Authority against railway owners (see 2(4) of this submission).
- The current timeframes under the Code do not effectively encourage efficient progression of access proposals made under it.

Brockman has proposed specific amendments to address these issues in part 3 of this submission.

2. Lack of prescription

In its current form, the Code is open to being exploited by railway owners seeking to avoid proper and agreed constraints on their monopoly power, operate their infrastructure as if it were unregulated and unnecessarily delay legitimate attempts to gain access. The legal proceeding in the Supreme Court of Western Australia in which TPI sought a declaration that the Access Proposal, made pursuant to section 8 of the Code, was invalid is a contemporary example but also provides significant guidance as to how the Code could be improved.[2]

TPI claimed that the Access Proposal was invalid on various grounds, a number of which were based on arguments that the Code incorporated implied requirements and needed to be 'gap filled'. While the judgment of Justice Edelman sets out his Honour's findings in relation to each of TPI's arguments in this regard, in short:

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[1] CIV 2512 of 2013, Supreme Court transcript Page 359, Day 3, Wednesday 20 August 2014.
[2] See *The Pilbara Infrastructure Pty Ltd v Brockman Iron Pty Ltd [No 2]* [2014] WASC 345 (**TPI v Brockman [No 2]**).

- TPI's argument that the Code included additional requirements (by implication and 'gap filling') was rejected on the basis that such a finding would be inconsistent with Australian principles of statutory interpretation and would render the Code practically unworkable;
- TPI's argument proposed a near "rewrite" of the statute; and
- the Access Proposal was held to be valid.

Notwithstanding those findings, the lack of clarity and definitive process in the Code presented TPI with an opportunity to challenge the Access Proposal which had the effect of unnecessarily delaying Brockman's access and, if it had of been successful, would have required the Access Proposal to be remade and the access process restarted.

While Brockman acknowledges, and is cognisant of, the importance of the right of recourse to the courts, such a right should not be unfettered and should be properly constrained with amendments to the Code. Amendments to the Code that improve its clarity, degree of prescription and introduce structured timeframes would have the positive effect of limiting the scope of unnecessary recourse to the courts and the potential for opportunistic railway owners to unnecessarily delay access.

The Code should expand on the prohibition on hindering or preventing access set out in section 34A of the Act in order to address this issue. In giving effect to both the section 34A regime and the intention of the Code, the Code should clarify conduct that will constitute 'hindering or preventing access' for the purposes of section 34A of the Act. In Brockman's view, such conduct should include:

- any repeated failure by a railway owner to comply with its obligations to deliver or provide access to information to which an access seeker is entitled pursuant to sections 6 or 7 of the Code; and
- any conduct of the railway owner that has the effect of repeatedly and unnecessarily delaying an access proposal.

3. Deficient ring-fencing and non-discrimination protections

The Code does not provide effective and enforced ring-fencing non-discrimination protections to ensure a robust access regime in circumstances where railway owners (or their related entities) provide above rail haulage services.

Given the involvement of some railway owners (such as TPI) in above rail and below rail operations the Code should provide adequate protections to ensure:

- the regulated business units of railway owners are separate to unregulated business units and that information (and human resources) between each is separated (e.g. physically and through information systems);
- that there is no ability for railway owners to have regard to the interests of their above rail customers or discriminate against access seekers in relation to an access proposal (e.g. the obligation must be placed on the railway owner to justify any discrimination); and
- conflicts of interests are minimised.

Brockman proposes that the Code be amended by building on the broad protections set out in Part 4 Division 3 of the Act to include a more comprehensive coverage of protections against conflicts and discrimination. Strict compliance with such ring-fencing and non-discrimination protections must be subject to effective Authority enforcement and third party audit.

4. Inadequate enforcement

The enforcement of the Code against railway owners is lacking, which further renders an already deficient Code ineffective. Enforcement of railway owners' obligations under the Code by the Authority is fundamental to the effectiveness of the Code and needs to be improved. The Authority should use its existing powers of audit and enforcement to ensure compliance by railway owners with all obligations contained in the Code.

While enforcement does not, on its face, necessitate an amendment to the Code (or the Act), Brockman's view is that clarification is required to ensure that the Authority's existing responsibilities to 'monitor and enforce' the Code and Act generally are broad and actioned. Brockman is opposed to the Authority's current view that its functions are narrow and it should adopt a 'light-handed' approach. The practical effect of this approach is that the Authority only applies the power to monitor and enforce in respect of the Authority's discreet and specific statutory functions (e.g. the setting of Floor and Ceiling prices). The broad positive obligation upon the Authority to monitor and enforce the Code, which is set out in section 20 of the Act, should extend to both its own statutory functions, as well as general compliance and enforcement upon any railway owner or access seeker under the Code. Such enforcement should, at a minimum, extend to ensuring that railway owners deliver (or provide access to) information when required by the Code to do so, and to positively investigate compliance and activities of hindering and preventing access to rail infrastructure. The threshold for action by the Authority should be set below where railway owner's behaviour is deliberate, discriminatory and aimed at obfuscating, but require that the Authority proactively investigate general compliance as well as non-compliance or alleged breaches.

The Economics and Industry Standing Committee of the Legislative Assembly in its 2014 report on *Management of Western Australia's Freight Rail Network* (**Committee Report**) noted that:

- 'the [Authority] describes its role in regulating the market for access to the WA freight rail network as 'a "light handed" approach to infrastructure regulation'…';[3] and
- 'the role of the [Authority] 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'.[4]

Enforcement of the Code is crucial to its effectiveness. In Brockman's view, a 'light handed' approach is a misconstruction of the power conferred by, and required for effective enforcement of, the Code. Such an approach to ensuring (though audit and enforcement) railway owners' compliance with all applicable parts of the Code renders the enforcement elements of the Code wholly ineffective.

Where compliance is not required, the Code fails to encourage the efficient use of, and investment in, railways by facilitating a contestable market for access, and reduces the ability for access seekers (such as Brockman) to gain access. Brockman has, and continues to endure, the consequences (in terms of significant financial outlay as well as repeated delay to access) of the Authority's unwillingness to monitor and enforce the Code. Brockman's concerns in this regard have been made known to the Authority and its executive prior to this submission.

[3] See paragraph 5.3 of the Committee Report.
[4] See paragraph 5.31 of the Committee Report.

3. SECTION-SPECIFIC ISSUES

Supplementing the universal issues identified in part 2 of this submission, part 3 sets out section-specific recommendations designed to rectify deficiencies in the Code that have come to light in the course of Brockman having lodged an access proposal under the Code.

1. Required information (Part 2A of the Code)

The concept of 'required information' in Part 2A of the Code lacks clarity. The following amendments to the Code should be made in relation to required information.

- Required information (as defined in the Code) should be available on a public website which can be accessed free of charge. Brockman notes that some railway owners, such as Brookfield Rail, currently provide such information on their website.[5]
- Section 7C of the Code sets out the railway owners' obligation to keep required information up-to-date. The prescribed time period, in section 7C(2)(b) of the Code, requiring such information be reviewed (and amended or replaced) at 'not less than 2 yearly intervals' should be reduced to 6 monthly intervals.
- Item 4(m) in Schedule 2 (Information to be made available) to the Code should be clarified so it is clear that it relates to individual train movements, not an aggregate figure for the 3 year period referred to in section 7D of the Code.
- Item 4(o) in Schedule 2 (Information to be made available) to the Code should be clarified by defining 'available capacity' or clarifying what information must be included in relation to available capacity. The submission below in relation to section 7 of the Code is relevant to this issue.
- Item 6 in Schedule 2 (Information to be made available) to the Code should be clarified so it is clear what level of detail is required to be provided.

2. Preliminary information (section 7 of the Code)

Section 7 of the Code sets out information that is required to be provided by a railway owner to an access seeker interested in making a proposal for access. In Brockman's experience, the following amendments are required to provide access seekers, railways owners and the Authority with clarity and certainty as to preliminary information prior to an access proposal being lodged.

- There should be a mandatory obligation on railway owners to publish information regarding available capacity.[6] That information should be provided in the form of publically available capacity registers (i.e. published on a website) which are required to be kept up-to-date. Railway owners' compliance with this obligation should be supervised and enforced by the Authority.
- Railway owners should be required to include, in the capacity registers (referred to in the paragraph above), reasonably forecast future demand where that information is known to a railway owner (i.e. capacity subject to an access proposal, an expression of interest or contractual arrangements) and, where there is no excess capacity, an enforceable public queuing mechanism.

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[5] See paragraph 5.12 of the Committee Report.
[6] Brockman acknowledges that this overlaps with Item 4(o) of Schedule 2 (Information required to be made available) to the Code.

- Railway owners should be required, following a request for information from an access seeker, to provide all information upon which the railway owner's assessment of available capacity (or reasonably forecast future demand) published in the capacity register is based.
- An Authority approved standard access agreement (with fair and reasonable access terms and conditions) should be developed and publically available at all times.

Brockman's experience with TPI in relation to section 7 of the Code demonstrates that, in its current form, section 7 is not effective. Brockman intends to provide the historical correspondence and the supporting gap analysis which details TPI's record of providing information to Brockman pursuant to sections 6 and 7 of the Code. Given elements of that information may be of a confidential nature, those materials will be provided to the Authority in a supplementary confidential submission.

3. Proposals for access (section 8 of the Code)

Further to part 2(3) of this submission, the lack of clarity in relation to section 8 of the Code was a key issue in TPI v Brockman [No 2]. In Brockman's view, section 8 of the Code should be amended to provide clarification as follows.

- The Code should be amended to clarify that the matters referred to in sections 8(2) and 8(3) of the Code are matters required to be described in writing in an access proposal made under section 8(1).
- The phrase 'times when access is required' in section 8(3)(b) of the Code should be clarified so it is clear what level of detail is required to be provided (notably, having regard to possible train paths, rather than specific future times of the day when a service is sought).
- The intent of sections 8(4) and 8(5) of the Code should be clarified such that there is certainty that an access seeker (referred to as a 'proponent' under the Code) can propose an extension or expansion at any time after making an access proposal. In its current form, these sections of the Code may be narrowly construed to limit an access seeker from proposing an extension or expansion until after the requirements of sections 14 and 15 of the Code have been satisfied. This narrow construction is inconsistent with the intent of the Code, the rail access regime generally and the Competition Principles Agreement.
- The Code should include provisions allowing an access seeker to propose an extension or expansion following a statement from the railway owner pursuant to section 18 of the Code or during arbitration under section 15 of the Code. This would enable an access seeker to respond to a possible technical deficiency in the access proposal where the railway owner has proposed that there is insufficient capacity to meet the access sought.
- The Code should be clarified to remove any ambiguity in relation to an access seeker's ability to amend an access proposal to include extensions or expansions (including in circumstances where an arbitrator determines that there is no capacity on the current configuration). To give effect to this, amendments may need to be made to Part 1 (sections 3 and 5), Part 2 (sections 8 and 9) Part 3 (sections 14, 15 and 33) Part 4 (section 36) and Schedule 4 (Provisions relating to prices to be paid for access) of the Code.
- The Code should include a general provision allowing amendments to be made to any aspect of an access proposal after it has been made. Such a provision is required to ensure that railway owners are not able to prevent an access proposal from advancing due to a change in circumstances, error, deficiency or other technical shortcoming.

4. Floor and ceiling prices and costs

In its current form, the Code adopts ambiguous terminology in relation to floor and ceiling prices, and floor and ceiling costs (which terms are used interchangeably). If the current cost boundaries regime is retained, the confusing terminology used for floor and ceiling costs should be clarified and standardised. Brockman's submission in relation to whether the current cost boundaries regime should be replaced by a more prescriptive benchmark tariff is set out in part 4(2) of this submission.

5. Determination of the floor and ceiling prices (section 10 of the Code)

The intent and meaning of section 10 of the Code is not clear. The Code should be clarified to remove any doubt as to the intention and meaning of that section so as to minimise uncertainty, unnecessary cost and delay.

The decision of the Supreme Court of Western Australia in *The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346, in which TPI successfully challenged the Authority's determination of floor and ceiling prices for access negotiations between TPI and Brockman, is a relevant and useful example. The comments of Justice Edelman in that case, as well as those of the Authority, are helpful to form the basis of clarifying amendments. Section 10 should be clear so as to limit the scope and possibility of any challenge to determinations made by the Authority under section 10 of the Code.

6. Railway owners' rights under sections 14 and 15 of the Code

The intent of sections 14 and 15 and the rights that may be exercised by a railway owner pursuant to those sections need to be constrained to achieve the underlying purposes of the Code and to accord with the Competition Principles Agreement. Brockman, as one of the few access seekers to have firsthand experience of the practical operation of sections 14 and 15 of the Code, proposes the following amendments to rectify deficiencies, and give effect to the purpose of, the Code.

- Section 14(1)(b) of the Code should be clarified to set out what is required to be shown by an access seeker in order to show that:

  '*(b) it has the necessary financial resources —*

  (i) to carry on the proposed rail operations; and

  (ii) if section 8(4) applies, to pay the share of costs referred to in section 9(2)(b).'

  The Code should include formulaic and objective tests which clarify the extent of 'necessary financial resources'. Brockman submits that the threshold to satisfy such objective tests should be low on the basis that satisfaction of this requirement merely enables negotiations between an access seeker and a railway owner to occur. The financial resources of an access seeker should not be a precondition to commencing negotiations for access, especially considering that an access seeker will not be liable to commit financially until (and only if) arbitration occurs. A high threshold would unnecessarily curb the effectiveness of the Code and unfairly discriminate against access seekers that are in the process of establishing and assessing project viability.

- The definition of 'capacity' in section 3 of the Code should be amended to remove reference to 'section 9 of the *Rail Safety Act 1998*' and replaced with the relevant reference to the *Rail Safety Act 2010* (WA).

- The capacity test in section 15 of the Code should be clarified. How capacity is to be assessed, pursuant to section 15 of the Code (based on information provided by a railway owner under sections 6 and 7 of the Code), should be clearly and prescriptively defined, and subject to third party audit. That said, the capacity test could be removed altogether if a public capacity register is established (see parts 3(1) and 3(2) of this submission).

7. Unfair discrimination (sections 7(1) and 16(2) of the Code)

The Code does not provide sufficient clarity in relation to what is meant by 'unfair discrimination'.

Section 7(1) of the Code provides for the basis for making a request for information regarding available capacity. That section should be read together with section 16(2) of the Code which provides that during the: 'negotiation of access agreements the railway owner must not unfairly discriminate between the proposed rail operations of an [access seeker]'.

Brockman's strong preference is that the election on the part of the railway owner to discriminate against an access seeker should be removed altogether, but the concessional position is that clear guidance be provided in the Code as to what the objective meaning of 'unfairly discriminate' is. Amendments to this section of the Code should be considered in light of Brockman's submissions in relation to the capacity test under section 15 of the Code and submissions in relation to queuing and transparency generally.

8. Referral of matters to arbitration (section 25(2) of the Code)

Section 25(2) of the Code, which refers to situations where an access seeker is in dispute with a railway owner, is ambiguous and unclear. Section 25(2) should clearly provide that it is an exhaustive list of the circumstances in which a matter may be referred to arbitration under the Code.

9. Un-redacted determinations

The Code should provide that all determinations that affect the interests of an access seeker (whether made by the Authority or a railway owner) must be made available in un-redacted form to that access seeker. While Brockman, acknowledges that it may be appropriate for some aspects of a railway owner's costing model to remain confidential, access seekers should be entitled to all other matters the subject of determination.

10. Segregation arrangements (section 42 of the Code and Part 4 Division 3 of the Act)

The Code should further expand upon the duty on railway owners, under section 28 of the Act, to segregate access-related functions and should set minimum requirements for segregation arrangements. In Brockman's view, the Code should prescribe the following minimum requirements for railway owners' segregation arrangements:

- a prohibition on conducting business with related parties (or itself when acting as above rail operator) other than on an arm's length basis;
- an obligation to not unfairly discriminate between access seekers or users; and
- an obligation to schedule trains in an equitable and non-discriminatory manner.

Upon TPI's assertion, the Authority approved segregation arrangements (which predated the Access Proposal) were ineffective in preventing TPI from sharing Brockman's confidential information relating to preliminary information and the Access Proposal. The following is extracted from the Authority's 30 July 2014 notice inviting submissions:

> "*BMA submitted that the Authority should not approve the revised TPI segregation arrangements. However, BMA did not object to the proposed amendments and noted in its submission that the proposed revised segregation arrangements are an improvement on the existing segregation arrangements.*
>
> *BMA's comments relate specifically to:*
>
> - *The adequacy of the definition of access-related functions;*
> - *Potential for conflict of interest issues to arise;*
> - *The adequacy of the definition of Confidential Information; and*
> - *The adequacy of provisions for fairness.*
>
> *The Authority has noted BMA's reservations about the effectiveness of the segregation arrangements.*
>
> *The Authority is aware that TPI and Brockman Iron Pty Ltd (Brockman) are currently commencing negotiations, and that the amendments to TPI's segregation arrangements address concerns expressed by Brockman in relation to the protection of its confidential information. These concerns were expressed in consultation on amendments to TPI's segregation arrangements in 2013, and following acceptance of those amendments in 2013.*
>
> *If the current amendments proposed by TPI are not accepted by the Authority, then Brockman may not have protection of confidentiality over information it has already provided to TPI in the course of the current negotiations.*"

Brockman notes that a period of just over a year elapsed between when the Access Proposal was lodged and the identified deficiencies were remedied.

4. RESPONSE TO THE ISSUES PAPER

In addition to seeking comments in relation to the effectiveness of the provisions of the Code, the Authority, in the Issues Paper, has sought specific comments in relation to:

- the inconsistency identified by the National Competition Council (**NCC**) between the Western Australia rail access regime (which adopts a 'gross replacement value' (**GRV**) valuation method) and other regulated infrastructure in Australia (which widely adopts a 'depreciated optimised replacement cost' (**DORC**) valuation method);[7] and
- whether the Western Australia rail access regime should move from cost boundaries as a basis for negotiation on price (i.e. by determination of floor and ceiling prices) to a more prescriptive benchmark tariff for access to a benchmark service base.

Brockman's view in relation to these areas is set out in this part 4.

[7] See paragraphs 48 and 56 of the Issues Paper.

1. DORC versus GRV as a method of valuation for floor and ceiling prices

Determining the appropriate asset valuation method is a complex issue and depends on the specific form the valuation method takes (including assumptions and calculation of depreciation). Noting that any such method would need to be carefully considered prior to adoption, Brockman's broad view is that the DORC method of valuation for the determination of floor and ceiling prices should be adopted.

The adoption of DORC valuation would better align the Code with the Competition Principles Agreement, and would benefit railway owners, assess seekers and users of the Western Australia rail access regime in the following ways.

- Adoption of DORC valuation would align the Western Australia rail access regime with other rail access regimes in Australia. The established and well-considered DORC valuation methods for regulated rail infrastructure in both Queensland and New South Wales would be useful reference in developing a similar regime for Western Australia. Such alignment would also minimise inconsistency with national rail transportation (which would likely adopt a DORC valuation method based on the prevalence of that method in other jurisdictions).
- DORC valuation provides for more certainty and clarity in floor and ceiling prices over time. In contrast, GRV can change substantially over time resulting in significant movements in the access charges.
- Conventional DORC valuation recognises improvements in efficiency and technology (i.e. it values the infrastructure based on the replacement cost of an optimised system), and allows for potential cost savings that may result from such improvements. In addition, unused or unutilised assets are generally excluded. GRV (as defined in the Code[8]) does not include the same level of recognition. GRV may operate, in some circumstances, to embed inefficiency (where that inefficiency is inherent to the rail assets and the modern equivalent assets comparison is not triggered).
- GRV effectively combines revenue for return on capital and return of capital. In contrast, DORC typically separates return on capital from return of capital and, in so doing, makes allowance for the previous utilisation of the asset. As such, DORC minimises the risk that users will be required to pay super profits to the railway owner (including after the asset has been fully repaid).
- Adoption of DORC valuation would not necessarily be inconsistent with the existing floor and ceiling price approach. As such, if it is recommended that floor and ceiling price approach is retained instead of adopting a reference tariff approach (see part 4(2) of this submission for Brockman's view on this point), that would not preclude the adoption of DORC valuation as a method for floor and ceiling price determination.

While Brockman is generally in favour of exploring the adoption of DORC valuation, the appropriateness of a new valuation method will depend on the extent to which existing rail infrastructure assets are depreciated and the method and assumptions used.

2. Floor and ceiling prices versus reference tariff

Brockman cannot, at this stage, form a definitive view on whether a benchmark tariff should be adopted in place of the current floor and ceiling price regime. However, Brockman is open to considering the reference tariff approach in more detail (and may

[8] See section 2(4)(c) of Schedule 4 (Provisions relating to prices to be paid for access) to the Code.

be in a position to provide a definitive view) if the form of the approach is developed and disclosed for comment.

Broadly speaking, the reference tariff approach (which Brockman notes is widely used in other rail access regimes in Australia) involves determination of a reference price which forms the price for access to a standardised service, and a benchmark for determining the price for access to a non-standardised service (i.e. a service which is similar to the standardised service, but differs in some way).

A reference tariff is more prescriptive than a floor and ceiling price approach, particularly where floor and ceiling prices are determined with a significant range in which access seekers and railway owners can negotiate price. In Brockman's view, this provides a number of potential advantages of adopting a reference tariff, including:

- decreased in time and cost of negotiating a price for services;
- increased pricing transparency and certainty for access seekers; and
- noting that one of the key objectives for reference tariffs is to replicate the outcomes of competitive markets, better aligning the Code with the Competition Principles Agreement.