Brookfield Rail

Brookfield Rail Pty Ltd
ABN 42 094 721 301
2-10 Adams Drive
Welshpool WA 6106 Australia
GPO Box S1411 Perth WA 6845 Australia

T +61 8 9212 2800
F +61 8 9212 2922
E info@brookfieldrail.com
www.brookfieldrail.com

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Mr Stephen King
Alternate Chairman
Economic Regulation Authority
Level 4, Albert Facey House
469 Wellington Street
Perth WA 6000

Via email Robert.Pullella@erawa.com.au
Jeremy.Threlfall@erawa.com.au

Dear Stephen,

I refer to the "Review of the Railways (Access) Code 2000 Issues Paper" (**Issues Paper**) released by the Economic Regulation Authority (**ERA** or **Regulator**) in February 2015. In the following, Brookfield Rail (**BR**) provides comment on the issues raised, and also provides comment on additional issues regarding the suitability of the Railways (Access) Code 2000 (**Code**) as it relates to giving effect to the Competition Principles Agreement of 11 April 1995, amended 13 April 2007 (**CPA**). In this submission the access regulation framework created by the Railways (Access) Act 1998 (**Act**) and the Code is referred to as the **Regime.**

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1. Key Conceptual Issues

1.1 Gross Replacement Value as Capital Cost Valuation Method

1.1.1 Discussed in paragraphs 144-147, the Issues Paper raises the question of whether 'there is a better means of estimating capital costs of a railway than the Gross Replacement Value (**GRV**) method'. The Issues Paper notes that this issue was raised in the Second Review of the Code. A number of parties made submissions on the issue, including BR, and the issue was rejected by the ERA and not put forward to the Minister.

1.1.2 In the Issues Paper, the ERA has not provided any new reasons in support of a move away from the GRV method, and only references the discussion in the Second Review of the Code. In the absence of any new information, BR reiterates its stance from the Second Review of the Code, the primary points of which were:

i. that the purpose of the Code review is to determine whether the Code is effective in meeting the objectives of the CPA, and that it must be comprehensively demonstrated that any change to the Code would enhance the effectiveness of the Code in this regard;

ii. that notwithstanding point (i), the ERA has not provided any evidence of the unsuitability of the GRV methodology as it relates to giving effect to the objectives of the CPA;

iii. that the philosophy of the Regime is that it be light-handed and should strongly encourage commercial negotiation between the parties within economically reasonable boundaries, and that this is in support of the CPA, and that other valuation methods potentially impose a far more onerous and costly regulatory burden;

iv. that the ERA has provided no commentary regarding how a valuation method other than GRV would function, even though such a change would have substantial and wide-ranging ramifications on the application of the provisions of the Code;

v. that a change to an alternative valuation methodology, such as DORC, could potentially have a serious and substantial adverse impact on the valuation of BR's railway infrastructure, and in turn, on BR's financial interests.

1.1.3 At paragraph 48 of the Issues Paper, the ERA notes that the National Competition Council (**NCC**) in its 13 December 2010 Final Recommendation on the "Western Australian Rail Access Regime Application for certification as an effective access regime" (**NCC 2010 Report**) raised this issue when assessing whether the Regime should be declared effective, because of the 'interface' of the Regime and the ARTC Interstate Access Undertaking.

1.1.4 The ERA references section 9.22 of the NCC 2010 Report in evidence of this concern. In so doing, the ERA misattributes the NCC's comments about GRV to its concern about

interface issues. The NCC comments about GRV are raised in the section that regards clause 6(5)(b) of the CPA, which describes that regulated access prices should be set to reflect efficient costs and a return on investment commensurate with the risks involved. BR notes that in fact, the section of the NCC 2010 report concerned with interface issues is section 6, and this section does not consider the issue of valuation methodology.

1.1.5 Utilisation of a different valuation methodology would have no impact on the interface issues of concern to the NCC by virtue of the fact that regardless of which method is chosen, the aim of that method is to facilitate the economically efficient allocation of the cost of infrastructure provision to the users of that infrastructure. How that economically efficient cost is calculated is not germane to the interaction of different access regimes and their respective access processes. Therefore, any change to valuation methodology on this basis would not improve the ability of the Code to give effect to the objectives of the CPA.

1.1.6 Furthermore, to the extent that inconsistency as it relates to the Code is of concern to the NCC, it is discussed by the NCC in relation to the application of access regulation *within* Western Australia. Utilisation of a different valuation methodology would not address this concern because regardless of the methodology, the ultimate outcome is to produce efficient costs. Harmonisation of valuation methodologies across different access regimes is not necessary to ensure that upstream and downstream markets are exposed to efficient costs. Therefore, any change to the valuation methodology for reasons of consistency would not improve the ability of the Code to give effect to the objectives of the CPA.

1.1.7 Paragraph 9.22 of the NCC 2010 Report notes that the alternative method of depreciated optimised replacement cost (**DORC**) is the widely accepted asset valuation methodology in Australia; this methodology is associated with the maintenance of a specific Regulatory Asset Base (**RAB**). Such a RAB based approach is administratively more onerous, as it requires regulatory review and endorsement of both the opening asset value and the reasonableness of capex that is subsequently undertaken on the asset. It is likely that the administrative simplicity of the GRV annuity approach would have been a key factor in the initial decision to use the GRV annuity in the Code.

1.1.8 For older assets, depending upon the approach taken to assessing depreciation, DORC may result in quite different ceiling prices than does the GRV annuity. If a DORC was assessed using straight line depreciation from asset construction date, this could substantially reduce the assessed ceiling prices on many of BR's routes. As BR has previously advised the ERA, such a change in valuation approach would substantially reduce the business value determinations made by shareholders and the WA Government at the time of the sale of the Westrail business in 2000. A regulatory change that undermined the business value in this way would be highly contrary to BR's legitimate business interests. Similarly, changes in the value of the asset base over time (due to depreciation) where an infrastructure owner is not recovering revenue at the ceiling can leave it worse off relative to a GRV approach.

1.1.9 While national consistency is an issue that has been raised by some stakeholders, including the ERA, as a reason to move towards a RAB based approach, BR questions

the validity of this argument. Any change in the Code that is based on achieving national consistency should only occur where the benefits of such consistency exceeded the costs. BR believes that there is little measurable benefit from aligning methodologies for assessing ceiling prices across regimes. Rather, any assessment of this issue needs to be considered based on the merits of alternate approaches in the context of the specific railways governed under the Code.

1.1.10 In light of the above, BR is of the view that it in order for any change to an alternative valuation method to be warranted, it must be conclusively demonstrated that the GRV valuation method fails to calculate efficient costs, and further to that, it must be demonstrated that the change from GRV to an alternative valuation method would result in benefits that exceed the cost of the change. Given that a change to the valuation methodology would require a considerable rewriting of the Code, the cost of change would be substantial. In the absence of evidence demonstrating clearly why an alternative costing method would calculate efficient costs more effectively than the GRV method, and in the absence of a detailed analysis of the net benefit of switching from GRV to an alternative method, BR does not support a change in the valuation method.

1.2 Prescriptiveness of the Regime

1.2.1 Paragraph 59 of the Issues Paper invites the views of stakeholders 'as they relate to the wider issue of the prescriptiveness of the regime, and whether a more prescriptive regime [requiring a benchmark tariff for a benchmark service] would be better in giving effect to the CPA than the current approach based on the floor and ceiling price tests'.

1.2.2 This paragraph is in a section describing the operation of the Regime, noting views of stakeholders since recent access proposals, and noting the NCC's view that the Regime should not be declared effective, citing inconsistency between the Regime and ARTC Interstate Access Undertaking. The ERA notes that the ARTC Interstate Access Undertaking is more prescriptive and establishes a benchmark access tariff for a standard service, in comparison to the cost boundaries for negotiation present in the Regime.

1.2.3 With regard to consideration of price prescriptiveness in the Regime, BR quotes the following principles of the CPA that are to be incorporated into a State or Territory access regime:

> *6(4)(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.*
>
> *6(4)(b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.*
>
> *6(4)(e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.*
>
> *6(4)(f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.*

1.2.4 BR notes that there is a strong emphasis on negotiation and the flexibility afforded to the parties by virtue of these principles. A more prescriptive access regime would diminish the railway owner's ability to take into account the 'requirements of the persons seeking access', and the presence of benchmark tariffs and services is not conducive to providing access 'on the basis of terms and conditions agreed between the owner of the facility and the person seeking access'.

1.2.5 In its current form, the Regime provides a flexible mechanism by which access seekers can negotiate a market price which is not inflated by the extraction of monopoly rents (prevented by the ceiling price test), and where the prices paid by their competitors using the same infrastructure are not subsidised by preferential pricing (prevented by the floor price test). The parties are otherwise free to negotiate a price which is appropriate and consistent for the access provided and which encourages use of and investment in the railway infrastructure, as guided by clause 13 of schedule 4 of the Code. As such, BR believes that the existing Regime efficiently meets the principles of section 6(5)(b) of the CPA:

> *6(5)(b) Regulated access prices should be set so as to:*

(i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;

(ii) allow multi-part pricing and price discrimination when it aids efficiency;

(iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

(iv) provide incentives to reduce costs or otherwise improve productivity.

1.2.6 Paragraph 74 of the Issues Paper notes that In 2006, all Australian Governments and Territories signed the Competition and Infrastructure Reform Agreement (**CIRA**). This included a commitment to (amongst other things) implement a consistent national system of rail access regulation. BR understands that preliminary investigations were undertaken by the ACCC on this matter. However, this proposal ultimately did not progress as it became apparent that a 'one size fits all' template is not appropriate given the diversity of rail networks across Australia (including matters that vary according to rail industry structure, location and commodities/goods carried). For example, the content of a rail access regime for a vertically integrated access provider will be very different to that which is suitable for a stand-alone below rail access provider. Similarly, a network servicing heavy haul cyclic traffics will have different regulatory requirements to one providing freight haulage in competition with road. A degree of flexibility is therefore required in order for rail access regulation to be fit for purpose for specific railway networks.

1.2.7 In contrast, the Regime includes obligations on the railway owner to develop segregation arrangements and a range of other instruments to specifically address the circumstances of that rail business. In this way, it allows for the regulatory regime to be tailored to the rail business in question, while ensuring compliance with the Regime.

1.2.8 Certification of all rail access regimes was also a requirement of the 2006 CIRA, with all state-based access regimes (including the Regime) now certified by the NCC as effective. This means that there is a largely consistent approach to rail access regulation across Australia in terms of underlying principles and approaches. However, specific access regimes have differences which reflect the circumstances of individual rail networks.

1.2.9 BR is of the view that the certification process is sufficient for ensuring an appropriate level of consistency across access regimes. A 'one size fits all' rail regulation template based on the ARTC Interstate Access Undertaking would not be appropriate given the different circumstances of different railways.

1.2.10 BR also notes that no other jurisdictions are actively considering moving to a single nationally consistent regime. There is little that WA can do on its own to progress a nationally consistent framework. In this context, BR considers that there is little merit in considering amendments to the Code simply to further an ideal of national consistency. Rather, amendments to the Code should be assessed on their own merit, in terms of

whether they are required in order to effectively implement the relevant provisions of the CPA in the context of the railways to which the Code applies.

1.2.11 BR also notes that a number of the features contained in the ARTC and Aurizon Access Undertakings, which are prescriptive, are contained in the Code's Part 5 Instruments. The Part 5 requirements, Costing Principles, Over-payment Rules, Train Path Policy and Train Management Guidelines are required to be approved by the Regulator following a public consultation process. Further, the requirement of the Act for rail owners to prepare segregation arrangements are much more prescriptive than the ringfencing arrangements outlined in the Aurizon Undertaking. Therefore, when taking the Code provisions, together with the content of the Part 5 requirements, into consideration, BR contends that the level of prescription is sufficient to meet the objectives of the CPA as outlined above.

1.2.12 In regards to benchmark tariffs, BR notes that prices for using infrastructure are typically regulated to make sure that the infrastructure owner does not charge excessively - there is a standard set of principles that is applied across infrastructure sectors to ensure prices reasonably reflect the full cost of providing the services (including replacing assets as required) together with a regulated rate of return that the infrastructure owner earns on its investment in the infrastructure.

1.2.13 In most infrastructure sectors, once the regulator has assessed this maximum reasonable charge (that is, the ceiling price), this is the price that users pay. In access regimes where a benchmark tariff is set (including rail access regimes), this benchmark tariff is typically set at the ceiling price. The purpose of the benchmark tariff is to inform current and potential users of the price that will achieve (but not exceed) full cost recovery.

1.2.14 Reflecting this, the use of benchmark tariffs most typically occurs in circumstances where access charges are being set at or near the revenue ceiling, and the benchmark tariff is closely scrutinised by the regulator to ensure that it does not allow the access provider to extract any monopoly returns. In setting this benchmark tariff, it is implicitly accepted that the users of this service are able to pay an access charge at (or even above) the ceiling price, and the key issues that would potentially arise are to avoid monopoly pricing and avoid inappropriate price differentiation within a market.

1.2.15 Where the tariff is below the ceiling price, the assessment of the appropriate charge is a far more complex process, requiring a detailed awareness of the specific circumstances of and an understanding of the requirements and priorities of both the access seeker and access provider, so as to establish an access charge that sets an appropriate balance. This is most effectively achieved through commercial negotiations, with recourse to dispute resolution in the event that agreement cannot be reached.

1.2.16 On BR's rail network, there are a range of different products carried over a wide geographic area. There are only limited cases where there is more than one customer for a particular commodity in a given geographic area, meaning that in most cases, a benchmark tariff will only be applicable to a single user. There seems to be little efficiency advantage of a detailed examination of benchmark tariff, where this is only applicable to a single user. In these cases, negotiation with recourse to dispute resolution will be a substantially more efficient process.

1.2.17 Given these issues, and particularly in light of the 'substantial revision of the Code' (para.74 of the Issues Paper) that would be necessary to make the Regime more prescriptive, and the commensurate increased regulatory burden (para.57 of the Issues Paper), BR is not of the view that a change to a more prescriptive regime would improve the ability of the Code to give effect to the objectives of the CPA.

1.3 Appointment of Arbitrator by Parties

1.3.1 Section 6(4)(g) of the CPA stipulates that a State or Territory access regime should incorporate the principle that owners and access seekers should be able to appoint and fund an independent body to resolve a dispute.

1.3.2 In the NCC 2010 Report, at section 8.43, the NCC makes the observation that:

> *One of the advantages of arbitration is that it allows the appointment of an arbitrator who has specialist technical expertise and experience in the subject matter of the dispute. Thus an arbitration process can provide a specialist forum thereby facilitating more efficient and effective dispute resolution.*

1.3.3 However, BR notes that the Code makes no provision for the selection of an arbitrator with specialist (or otherwise relevant) technical expertise. Additionally, the ERA is not at liberty to select any appropriate arbitrator – as per section 26(2) of the Code, the ERA is limited to select from a panel that the ERA compiles based on recommendation of the Chairman of the Western Australian Chapter of the Institute of Arbitrators and Mediators Australia (**IAMA**).

1.3.4 Furthermore, the Code makes no provision for the parties subject to the dispute to have input into the selection of the arbitrator. In commercial disputes, it is common for both parties to agree on the identity of an independent arbitrator. In fact, the ability of the parties to appoint an arbitrator is often stated as an essential ingredient of the parties' willingness to go to arbitration, as opposed to the courts.

1.3.5 In light of the above, and because of the direction of 6(4)(g) of the CPA, BR believes that a new section (for example, 26A) should be added to the Code which provides for:

- the parties in dispute to agree upon an arbitrator(s), and that this agreement occur within 10 business days of the Regulator being notified that the disputing parties seek to refer the dispute to arbitration;
- that the proponent must notify the Regulator of the appointment of such an arbitrator(s) within 5 business days of the agreement of such an appointment;
- that if no agreement is reached within 10 business days of the regulator being notified that the disputing parties seek to refer the dispute to arbitration, both parties to the dispute may nominate one arbitrator each, with a third and presiding arbitrator to be appointed by the Regulator.

1.3.6 The inclusion of such a section in the Code would improve the ability of the Code to give effect to section 6(4)(g), which directs that the parties should be able to appoint an independent body, and also improve the ability of the Code to give effect to section 6(4)(i) of the CPA, which details the items the dispute resolution body should take into account, a number of which would likely be more comprehensively considered by persons with specific technical and economic expertise. It is also much more reflective of the selection process for arbitrators found in commercial agreements.

1.3.7 Section 26(2) of the Code should be removed and replaced to give effect to the suggested section 26A, above.

1.3.8 Additionally, section 27 of the Code ('Appointment where issues are also relevant to arbitration under another access regime') should be amended to allow for the appointment of an arbitrator as per the suggested section 26A above, for the same reasons.

1.3.9 Section 26(1) of the Code should be amended to require the entity that is in dispute with the railway owner to also provide notice to the railway owner, in addition to the Regulator.

1.4 Days in the Code

1.4.1 The Code contains multiple timeframes stipulated in 'days'. The concept of 'days' is not a defined term within the Code. As such, all timeframes include the counting of public holidays and weekends. The result is that some timeframes in the Code are potentially as short as three business days – a seven day timeframe reduced by two days of weekend, and potentially (as was the case in December) by two consecutive public holidays.

1.4.2 BR submits that for clarity and so that timeframes are not in practice artificially shorted by weekends, and in particular if there are public holidays during the relevant period, any reference to 'days' in the Code should be changed to 'business days' (as is the case in other Australian access regimes). 'Business days' should be a defined term with the definition of:

> *a day on which banks are open for general banking business in Perth, Western Australia excluding a Saturday, Sunday or public holiday*

1.4.3 Such a change would enhance the operation of the Code by making its interpretation and application more straightforward as the term would be defined in the Code, in addition to contributing to improving the timeframes themselves (a separate issue, discussed below).

1.5 Timeframes in the Code

1.5.1 Discussed in paragraph 148, the Issues Paper raises the question of whether the prescribed 30 day time limit for the making of the Regulator's determination in section 10 of the Code is sufficient, noting that the ERA found it to be an insufficient period for all administrative functions to be met.

1.5.2 In recent experience with the Code process, in order to meet the deadlines imposed upon the railway owner, BR had to commit substantial internal and external resources. Although BR was successful in meeting all timeframes, the cost and business disruption from doing so was onerous. In light of this, BR supports an increase in and standardisation of this and other timeframes in the Code, and such an incorporates the changes resultant from the use of 'business days', as suggested above.

1.5.3 BR has considered the timeframes found in the ARTC Interstate Access Undertaking and the Aurizon Network Access Undertaking, in order to assess the reasonableness of suggested timeframes. In light of that review, BR submits that the following changes should be made:

- s.7(2) – 14 days should be changed to 15 business days;
- s.9(1) – 7 days should be changed to 30 business days (given the information that must be compiled by the railway owner regarding the specifics of the access seeker's proposal and the costs of the network, a short timeframe is not workable for this item, particularly in the event that it is a completely new task on the network);
- s.9(2)(b) – 30 days should be changed to 40 business days (this requires an assessment of the operations and the infrastructure required and planning and estimates of cost, and associated technical considerations on a potentially completely new capital installation, and this is a substantial task)
- s.9(3a)(i)(I) – 30 days should be changed to 20 business days after the determination made by the Regulator under sch.4 cl.9 is published, or 50 business days after the railway owner received the access proposal, whichever is later;
- s.9(3a)(i)(II) – 44 days should be changed to 20 business days after the determination made by the Regulator under sch.4 cl.9 is published, or 60 business days after the railway owner received the access proposal, whichever is later;
- s.9(3a)(ii) – 23 days should be changed to 25 business days after the approval of the Regulator under s.10 is published, or 50 business days after the railway owner received the access proposal, whichever is later;
- s.9(3a)(b) – 7 days should be changed to 20 business days;
- s.10(3) – 30 days changed to 30 business days;
- s.11(1) – 7 days changed to 10 business days;

- s.18(1) – 7 days should be changed to 10 business days;
- s.18(2) - 7 days should be changed to 10 business days;
- s.19(1)(b) – 30 days should be changed to 30 business days;
- s.19(3) – 7 days should be changed to 10 business days;
- s.20(3) – 90 days should be changed to 90 business days;
- s.28(3) – 10 days should be changed to 10 business days;
- s.34(2)/(4) – 14 days should be changed to 15 business days;
- s.42(2) – 30 days should be changed to 30 business days;
- s.45(2) – 30 days should be changed to 30 business days;
- Sch.4 cl.(3)(4) – 30 days should be changed to 30 business days;
- Sch.4 cl.(9)(4) – 30 days should be changed to 30 business days;
- Sch.4 cl.(10)(3) – 30 days should be changed to 60 business days (reflective of time required by ERA in recent determinations; improves the ability of the ERA to properly afford procedural fairness to the two key parties).

1.5.4 BR submits that the timelines suggested are far more reasonable and realistic, particularly in light of the detail required and the significance of the issues in question. In this way, the Code is able to give better effect to the CPA, which prioritises accuracy of information considered by parties and its use in promoting the efficient use of infrastructure.

1.6 Merits Review of Regulator's Decisions

1.6.1 Section 6(5)(c) of the CPA contemplates that a process for merits review of decisions may be provided, and if it is, stipulates a set of limitations on what the review body will consider.

1.6.2 BR believes that a merits review process of regulatory decisions should exist in the Code. The ability of affected parties to seek a merits review of a regulatory decision is an important element of a balanced and fair regulatory regime. It allows recourse where an affected party believes the regulator has made an error in its decision, which may (in the case of a railway owner) adversely affect the continued operation of the infrastructure and any future expansion of the infrastructure owner's assets, or may hinder access (in the case of an access seeker). Merits review provides a measure of accountability on the part of the regulator.

1.6.3 Section 8.86 of the NCC 2010 Report notes that the NCC's view is that 'providing for appropriate review of the decisions of regulators is good regulatory practice', and in section 8.87 notes that 'an appropriate level of merits review does not require a general reconsideration of the initial decision or de novo re-determination' and that 'this limited merits review appropriately balances the need for oversight of the regulatory decision making and reduces the scope for unacceptable delay'.

1.6.4 BR notes that in the 2010 Final Report of the Second Review of the Code, the ERA took the view that it would be highly unusual for a merits review process to apply because the instruments subject to ERA determinations provide only a framework within which the terms of access must be negotiated. While this may be the case, the framework provided by the ERA must still be correctly and fairly determined – by design, the cost boundaries specified in the Code are an important and potentially central reference point for the efficient recovery of costs by a railway owner, and as efficient access tariffs for the access seeker.

1.6.5 In addition, as the Part 5 instruments submitted by the railway owner can be determined by the Regulator, and because they constitute primary reference points for facets of the railway owner's day to day operations, particularly as it provides access to access seekers (among other restrictions), it is reasonable that the affected parties have recourse to merits review of the Regulator's decisions if the parties believe that the exercise of the regulator's discretion was incorrect or unreasonable.

1.6.6 The merits review body should be specified as the Australia Competition Tribunal.

1.6.7 BR submits that the Code should be changed to include a merits review process for the decisions of the Regulator. Merits review is contemplated by the CPA - including a merits review mechanism in the Code would be consistent with the objectives of the CPA.

2. Third Code Review Issues

2.1 Timing of Proposal for Extension/Expansion in Section 8(4) and 8(5)

2.1.1 Discussed in paragraphs 104-105, the Issues Paper raises the question of whether sections 8(4) and 8(5) of the Code should be clarified to allow the proponent to propose an extension or expansion at any time after making an access proposal, in particular to facilitate proposals where the requirements of sections 14 and 15 relate to the extension or expansion.

2.1.2 BR notes that section 8(5) of the Code stipulates that the fact that an extension or expansion is not specified in an access proposal does not prevent the proposal of an extension or expansion later being made in the course of negotiations.

2.1.3 To the extent that the intention of section 8(5) is ambiguous, BR supports a clarification that makes the effect of that section clearer.

2.1.4 As a separate issue, BR note that sections 14 and 15 of the Code exist to assess the financial, managerial and operational capability of the proponent, and that these sections function as a threshold for negotiations. However, section 8(5) allows an extension/expansion to be proposed in the course of negotiations, after this assessment has been conducted.

2.1.5 It is the case that the introduction of an extension/expansion (and the associated costs and operational changes it may introduce) during negotiation could substantially alter the assessment of a proponent's financial, managerial and operational capability. It is appropriate that these factors be retested upon the introduction of extension/expansion plans during negotiation.

2.1.6 In light of this, BR submits that section 8(5) of the Code be clarified to allow the railway owner to re-enliven sections 14 and 15 (and in turn, section 18 and 19) of the Code in the event that an extension/expansion is proposed during negotiations, so that the railway owner can again require the proponent to demonstrate capability under sections 14 and 15.

2.1.7 The effect of this re-enlivening should be to pause any negotiations underway. Negotiation can resume (with original timeframes) in the event that the railway owner is satisfied and notifies the proponent as such under section 19; however if the railway owner is not satisfied, then the parties should follow the dispute outcome as outlined in section 18, and the original negotiation timeframe is terminated.

2.1.8 BR submits that such a change enhances the existing function of the Code by ensuring that the material change of the proposal of an extension/expansion causes the ability of the proponent to safely utilise the network and pay the efficient costs of providing access to be reassessed.

2.2 Timing and Circumstances of Section 10 Relevance

2.2.1 Discussed in paragraphs 106-111, the Issues Paper raises the question of whether section 10 of the Code (allowing access may preclude access by other proponents) should be clarified to give effect to the intent of section 10 as addressed by the ERA in a decision it made regarding this section in 2013.

2.2.2 Paragraph 108 of the Issues Paper states that 'Section 10 is relevant if there is currently adequate capacity to accommodate the proposed access, but no more'. The ERA states that as long as expansion were possible, section 10 is not relevant.

2.2.3 BR suggests that section 10 of the Code appears to be a mechanism to ensure that scarce capacity is not contracted to a particular access seeker without other potential access seekers being aware of this and having an opportunity to gain access. In this way, it may be intended to facilitate the allocation of scarce capacity to its most valuable contemporaneous use.

2.2.4 BR notes that other rail access regimes do not have any form of regulatory process to address this issue. Rather, they assume that there is a commercial objective of the infrastructure provider to allocate scarce capacity to its highest value use, and that the infrastructure provider will be loathe to lock capacity into a low value use if there is potential for a higher value use to seek access.

2.2.5 BR also notes that section 10 was written into law before the 2009 amendments (dealing with extension/expansion proposals) occurred. Additionally, it is not clear what action does or does not flow from the Regulator's approval or disapproval under section 10, and as the ERA suggests, this approval or disapproval is apparently appropriate to provide only in rare, limited circumstances.

2.2.6 BR submits that given the above issues, section 10 should be removed from the Code, as the objectives that it seems to embody can be efficiently achieved without the involvement of the Regulator.

2.3 Clarification of Section 14 and 15 Information as Threshold Issues

2.3.1 Discussed in paragraphs 121-122, the Issues Paper raises the question of whether a railway owner can challenge the validity of an access proposal prior to receiving from the proponent the information required by sections 14 and 15, particularly in the context of proposals that require extension/expansions, and whether the status of sections 14 and 15 as threshold issues for Part 3 of the Code should be clarified.

2.3.2 Section 8(2) of the Code stipulates that a proposal can only be made in respect of a route to which the Code applies, and only for the purpose of carrying on rail operations. Section 8(3) of the Code specifies that a proposal must specify the route to which access is sought, indicate when access is sought, the nature of the rail operations, and be accompanied with a letter of intent to enter negotiations under the Code.

2.3.3 BR believes that at a minimum, the railway owner should be able to challenge the validity of an access proposal at any time according to whether or not the information provided by the proponent satisfies the requirements stipulated in sections 8(2) and 8(3) of the Code. Any change to the Code limiting this ability hinders the effectiveness of the Regime by forcing the railway owner to potentially consider access proposals not related to providing access to the railway infrastructure. This is not the intent of section 6(4)(b) of the CPA, so any change in this regard reduces the effectiveness of the Code to give effect to the objectives of the CPA.

2.3.4 In regards to section 14 or 15 functioning as a threshold issue which determines the validity of an access proposal, BR acknowledges that these sections are intended to function as threshold issues determining commencement of negotiations, and not as determinants of the validity of an access proposal.

2.3.5 However, BR reiterates its submission at section 2.1 above – sections 14 and 15 should be re-enlivened in the event that an expansion/extension is proposed during the course of negotiations.

2.3.6 BR submits that section 14 and 15 should be clarified to make it clear that they function as threshold issues to negotiation only, and not to the validity of an access proposal, and these sections should also be changed as necessary to facilitate their re-enlivening, as above.

2.4 Section 16 Definition of 'Unfairly Discriminate'

2.4.1 Discussed in paragraph 123, the Issues Paper raises the question of whether section 16 of the Code should be expanded to clarify the term 'unfairly discriminate', and invites comments in relation to section 16(1).

2.4.2 Additionally, the Issues Paper reiterates Recommendation 7 of the Second Review of the Code that Treasury should '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 that section 16 should be amended to provide a non-exclusive list of those considerations.

2.4.3 BR agrees that section 16 of the Code could be expanded to clarify the term 'unfairly discriminate'. However, BR disagrees with Recommendation 7 of the Second Review of the Code, which suggests that, in effect, a non-exclusive list of examples of 'fair discrimination' (which it is permissible for the railway owner to engage in) be added to section 16 of the Code.

2.4.4 Rather, BR submits that section 16 should be amended (as the Issues Paper suggests) to provide a non-exclusive list of examples of 'unfair discrimination' that the railway owner should not engage in. As suggested in the Second Review of the Code, Treasury could undertake consultation in order to determine what might be included on such a list.

2.4.5 BR submits that it is not possible for the ERA or Treasury to specify in advance all relevant and permissible forms of discrimination that the railway owner might legitimately engage in, and any such list, despite a nominally non-exclusive nature, might be seen to form the only means by which a railway owner is allowed to discriminate.

2.4.6 BR draws support for its suggested approach from section 6(4)(e) of the CPA, which states that the railway owner 'should use all reasonable endeavours to accommodate the requirements of persons seeking access'. By providing a list of discriminatory actions that the railway owner must definitely avoid (as opposed to a list of actions that are permissible to engage in), the Code remains flexible enough to contemplate circumstances where 'reasonable endeavours to accommodate the requirements of persons seeking access' potentially includes novel forms of discrimination not considered at this point in time.

2.4.7 BR submits that changing section 16 of the Code to include a non-exclusive list of examples of unfair discrimination improves the ability of the Code to give effect to sections 6(4)(e) and 6(4)(f) of the CPA. However, the inclusion of a non-exclusive list of examples of fair discrimination would reduce the flexibility of the Code and its ability to give effect to section 6(4)(e) of the CPA.

2.5 Arbitration Time Limits

2.5.1 Discussed in paragraphs 128-130, the Issues Paper raises the question of whether Part 3 of the Code should prescribe a time limit for the conclusion of arbitration, the ERA noting that arbitration is effectively an 'open-ended process' and that the indeterminate timeframe for the resolution of disputes provides an opportunity for unreasonable delays in the progress of negotiations. The ERA cites time limits in access regimes in other industries.

2.5.2 Arbitration is a formal dispute resolution process, conducted by an independent third party, and should be conducted according to the principles of natural justice; the size and complexity of arbitration may vary according to the size and complexity of the dispute. The arbitrator must hear the claims and defences of the parties, and review all the relevant evidence, before coming to a conclusion and providing the result of the arbitration, which is enforceable in the same manner as a Court judgement.

2.5.3 BR submits that it is not appropriate for arbitrary time limits to apply to the arbitration process. The arbitrator must be free to hear and consider all relevant arguments and evidence, otherwise his ability to perform a fair arbitration is compromised. Timeframes should be dictated by the significance and quantity of evidence to be assessed, and this information is not known in advance.

2.5.4 BR submits that any change to the Code which serves to limit the freedom of the arbitrator to conduct an arbitration (and which makes no reference to the contemporary context of the dispute to be arbitrated) can only diminish the ability of the arbitrator to discharge his responsibilities under section 6(4)(i) of the CPA. Such a change would thus reduce the ability of the Code to give effect to the objectives of the CPA.

2.6 Section 50 Confidential Information

2.6.1 Discussed in paragraphs 138-140, the Issues Paper raises the question of whether the railway owner should be allowed to declare any information confidential, or only information not otherwise required by the Code to be provided by the railway owner.

2.6.2 Section 50(1) of the Code states that it is a function of the ERA to 'disseminate information that relates to the carrying out of the Act, this Code or of matters provided for by them'. Section 50(2) of the Code adds the proviso that this function 'applies to information that the Regulator considers would guide or assist persons who are involved in negotiations under Part 3 [of the Code] or may become so involved'.

2.6.3 At paragraph 138 of the Issues Paper, the ERA asserts that information referred to in section 50(3) of the Code does not include information which is required to be provided by another section of the Code. BR asserts that this is not correct; section 50(3) is in Part 6 ('General') of the Code, and the direction to prevent disclosure in that section applies to any information that is confidential.

2.6.4 The Act stipulates, at section 20, the functions of the Regulator. At section 20(4), the Act stipulates what the Regulator is to take into account when performing its functions; none of the items in this section have reference to the dissemination of information, however several of them provide for the Regulator to take into account the interests of the railway owner or the parties holding contracts for use of the railway infrastructure, or the parties seeking access to the railway infrastructure.

2.6.5 Section 31 of the Act provides that there must be an effective regime designed for the protection from disclosure of confidential information relating to the affairs of persons seeking access.

2.6.6 The CPA contains no sections which describe that the regulating body should disseminate information, nor that any weight should be given to the interests of third parties not directly involved with providing or seeking access, except the benefits accruing to the public in having competitive markets.

2.6.7 Where confidential information provided by the railway owner contains confidential information regarding the access seeker, any change to the Code which diminished the application of confidentiality would put at risk the objective of section 23 of the Act.

2.6.8 Additionally, without assurance that information deemed confidential will be treated as such, parties providing that information (the railway owner and others, including access seekers) may be more circumspect in providing that information to the ERA.

2.6.9 BR submits that changing the Code in such a way as to give the ERA discretionary power regarding the classification of information provided by the railway owner as confidential or not (regardless of whether the railway owner is required to provide this information by another section of the Code) does not improve the ability of the Code to give effect to the objectives of the CPA, most notably because the CPA contains no such objective.

2.7 Gross Replacement Value as Capital Cost Valuation Method

2.7.1 Discussed in paragraphs 144-147, the Issues Paper raises the question of whether 'there is a better means of estimating capital costs of a railway than the Gross Replacement Value method'.

2.7.2 BR addressed this item at Part 1.1 of this submission.

2.8 Time Limit on Regulator's Determination

2.8.1 Discussed in paragraph 148, the Issues Paper raises the question of whether the prescribed 30 day time limit for the making of the Regulator's determination in section 10 of the Code is sufficient, noting that the ERA found it to be an insufficient period for all administrative functions to be met.

2.8.2 BR addressed this item in Part 1.5 of this submission.

3. Second Code Review Issues

3.1 Required Information to be Supplied on Railway Owner's Website

3.1.1 The Issues Paper reiterates Recommendation 1 of the Second Review of the Code that the required information to be provided by the railway owner as described in section 6 of the Code should be made available on the website of the railway owner or associated company.

3.1.2 BR supports this change to the Code.

3.2 Capacity Information Supplied on Reasonable Basis

3.2.1 The Issues Paper reiterates Recommendation 2 of the Second Review of the Code that section 7 should be amended to stipulate 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 operations of the railway owner.

3.2.2 BR supports this change to the Code.

3.3 Definition of Disputes to Include All Information/Negotiation Obligations

3.3.1 The Issues Paper reiterates Recommendation 3 of the Second Review of the Code that the definition of disputes (which can trigger arbitration) be expanded to include all information provision and negotiation obligations on railway owners (which are relevant to access seekers), in Parts 2 and 3 of the Code.

3.3.2 In response to this issue in the Second Review of the Code, BR extended its support and suggested that section 25 of the Code should be expanded to clearly define the specific circumstances under which disputes can be triggered. Further consideration of the practicalities of Recommendation 3 of the Second Review of the Code leads BR to consider that broad support for that recommendation overlooks difficulties in application.

3.3.3 Specifically, if disputes (which lead to arbitration under the Code, as opposed to court action) are triggered by issues which are more legal in nature, as opposed to technical, it is not clear why arbitration would provide a better outcome for either party. It is BR's recent experience under the Code that arbitration is not less costly than court action, and indeed that the parties are likely to incur greater cost where disputes are referred to arbitration than under any court process.

3.3.4 The issues raised in sections 7, 8 and 9 of Part 2 of the Code are more legal than technical, and it is BR's strong view that there is benefit to such issues being resolved by way of court injunction rather than arbitration.

3.3.5 Accordingly, BR submits that Recommendation 3 of the Second Review of the Code should be abandoned, and that no change to the Code should be made on this issue. At the very least, the ERA should review the implementation of their recommendation and detail specifically which sections are proposed to be included in the definition of disputes and how arbitration would function to resolve those disputes, and that the ERA should detail this in the draft report for public comment.

3.4 Review and Consultation of Part 5 Instruments

3.4.1 The Issues Paper reiterates Recommendation 4 of the Second Review of the Code that the Code should be amended to:

- only require public consultation on changes to the Segregation Arrangements when the changes are material;
- include the costing principles and over-payment rules in section 45 (which describes standard public consultation criteria and reflects existing practice); and
- a new provision should be added to provide for review of all Part 5 instruments every 5 years or as determined by the ERA.

3.4.2 BR supports these changes to the Code.

3.5 Removal of Transitional Provisions

3.5.1 The Issues Paper reiterates Recommendation 5 of the Second Review of the Code that several sections of the Code - 52(1), 52(2), 52(3), 52(4) and 53 are transitional provisions and are no longer relevant and thus should be deleted.

3.5.2 BR supports these changes to the Code.

3.6 Schedule 1 and 4 Amendments to Update References

3.6.1 The Issues Paper reiterates Recommendation 6 of the Second Review of the Code that schedule 1 and schedule 4 should be variously amended to correctly include the TPI and PTA networks in various clauses; it also recommends that the public consultation provisions in relation to the determination of the WACC also apply to the initial determination for a new railway.

3.6.2 BR supports these changes to the Code.

3.7 Treasury Review of Differential Treatment Considerations

3.7.1 The Issues Paper reiterates Recommendation 7 of the Second Review of the Code that Treasury should 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.

3.7.2 BR commented on this item in Part 2.4 of this submission.

3.8 Treasury Investigation of Desirability of Standing Set of Part 5 Instruments

3.8.1 The Issues Paper reiterates Recommendation 8 of the Second Review of the Code that Treasury should 'undertake further consultation in relation to the desirability of requiring a standing set of model Part 5 instruments to be maintained by the ERA' which would apply to all new railways.

3.8.2 In light of the important function of the Part 5 instruments as they affect the operations of the railway owner, and in light of the fact that new railways regulated by the Regime may not have the same form of operations as the railways already regulated by the Regime, BR does not believe that it would be appropriate to have a standing set of Part 5 instruments that would apply to new railways.

3.8.3 Furthermore, it seems unlikely that the cost of the ERA maintaining such a set at all times could be justified, given that new railways are infrequently added to the Code, and given that the ERA would be required to review and approve any changes made by the railway owner, which would be likely to occur. If appropriate, a new railway could adopt the form of instruments that have been approved for existing railways, and this should provide the same measure of certainty and clarity contemplated as a benefit of a standing set of instruments.

3.8.4 In the event that a standing set of instruments were to be adopted, in order for the railway owner to tailor their Part 5 instruments as necessary to reflect their specific operations, it must be clear that model Part 5 Instruments are not determinative and that existing Part 5 instruments are not required to confirm with model Part 5 Instruments.

3.8.5 BR submits that Recommendation 8 of the Second Review of the Code should be abandoned and BR does not support the notion of a standing set of Part 5 instruments.

4. Further Comments

4.1 Arbitration Binding on Both Parties

4.1.1 Section 34 of the Code provides that the railway owner must give effect to the determination of an arbitration, but that the other party (the access seeker) is not required to give effect to the determination except to the extent that a determination directs as to, or an award of, costs under section 34(1) or (4) of the Commercial Arbitration Act 1985.

4.1.2 Section 6(4)(h) of the CPA stipulates that 'the decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.'

4.1.3 The NCC 2010 Report states at section 8.35 that the provision for the access seeker to elect to not be bound by the outcome of the arbitration 'is designed to ensure that third parties are not required to give effect to determinations where it is uneconomic for them do so'. The NCC does not elaborate on why this is sufficient reasoning to deem that section 34 of the Code satisfied section 6(4)(h) of the CPA.

4.1.4 Section 6(4)(a) of the CPA states that 'wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access', and section 6(4)(b) states that 'where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility'.

4.1.5 BR submits that the outcome of arbitration should be binding on both parties. By making such a provision, referral to arbitration (which is in the power of the access seeker) would be a 'last resort process' by which both the access seeker and the railway owner can reach a conclusive outcome. If both parties are intractably committed to their positions in regards to the dispute between them, then it follows that they should be committed to a determined outcome when those positions are evaluated in a dispute resolution process. Rights of appeal remain, as noted in sections 8.37-8.41 of the NCC 2010 Report.

4.1.6 Section 9A of the Code allows the access seeker to withdraw an access proposal at any time before a referral of a dispute to arbitration and may resubmit a new or the same proposal, thereby retaining flexibility in the access process prior to arbitration. There are no limitations on the ability of the access seeker to do this.

4.1.7 Without binding arbitration, there is no incentive for the access seeker to negotiate access other than on terms most favourable to them as they can elect not to be bound by an arbitration, and then repeat the process of arbitration to seek a better outcome. Unnecessarily repeated and frivolous arbitration is an inefficient process that is contrary to the objectives of the CPA.

4.1.8 BR submits that making arbitration binding on both parties supports the objectives of both section 6(4)(a) (because arbitration does not become a substitute for a commercial

negotiation process), 6(4)(b) (because binding arbitration establishes a conclusive outcome from utilising the 'facility') and particularly the explicit directive of 6(4)(h) of the CPA and is therefore an improvement of the Code's ability to give effect to the CPA.

4.2 Inclusion of Mediation Process Prior to Arbitration

4.2.1 BR believes that the Code should be amended to introduce a mediation step before the parties go to arbitration for dispute. Section 23 of the Code stipulates that nothing in Part 3 of the Code prevents the parties from engaging in mediation, however the Code does not specify the point at which this should occur, and how such a step would be integrated into the existing process.

4.2.2 BR submits that the Code be changed to refer the parties to mediation before arbitration occurs, when the entity is taken to be in dispute with the railway owner as per section 25 of the Code. The following process should be included:

- upon being notified of a dispute, the Regulator should appoint an independent, external mediator;
- the parties must meet with the mediator within 10 business days;
- if the parties cannot resolve their dispute after 30 business days from the date of that meeting, then the parties must notify the Regulator and the arbitration should commence.

4.2.3 All information provided by the parties in mediation should be confidential and without prejudice, and the information provided should not be referred to in any subsequent arbitration.

4.2.4 By further encouraging and facilitating the negotiation of access on terms and conditions agreed between the parties, such a change to the Code embodies the objective of section 6(4)(a) of the CPA.

4.3 Completion of Arbitration Required Before Other Time Limits Apply

4.3.1 BR believes that the Code should be changed to stipulate that any ongoing arbitration process must be completed before any other timeframes in the Code that are part of the access process are considered to have begun or elapsed.

4.3.2 Section 25(2) of the Code stipulates that the parties may be in dispute due to three different situations:

- where the railway owner has refused to negotiate;
- where the proponent has notified the railway owner that there is a dispute between them; or
- where the time for negotiation has expired or where the parties agree that negotiations have broken down.

For at least the first two of these situations, the Code stipulates further timelines that could occur as part of the normal access process.

4.3.3 BR submits that for the Code to effectively allow the dispute resolution body to take into account all the items of 6(4)(i) of the CPA (and the associated evidence presented by the parties), the Code should recognise that an ongoing arbitration effectively pauses the access process, which should resume only after the conclusion of arbitration.

4.4 Estimation of Floor Price

4.4.1 Clause 7 of Schedule 4 of the Code details the floor price test, which stipulates that an operator provided access must not pay less than the incremental cost of providing that access. Incremental costs are defined in clause 1 of Schedule 4 of the Code, and the relevant requirements are:

- operating costs will include, among other things, maintenance costs, calculated on the basis that cyclical maintenance costs will be evenly spread over the maintenance cycle; and
- if modern equivalent assets are being used for the calculation of the capital costs, the maintenance costs are to be the costs that would be incurred were that infrastructure to be replaced using those modern equivalent assets (**MEA**);
- major periodic maintenance costs are not included in the assessment of maintenance costs as they are assumed to extend the life of the asset; and
- capital costs are only included in the assessment of incremental cost if they are expected to increase the MEA standard of the infrastructure.

4.4.2 Unusually (at least in the sense that regulatory approaches normally assess floor costs on a basis that would leave an infrastructure owner no worse off from providing a service), the Code requires that incremental costs will only include costs that could be avoided over the following 12 months. The Code does, however, address variability in maintenance costs by providing that these will be assessed as an annualised amount. In doing so, maintenance costs are assessed based on a profile that only includes routine maintenance for the initial years of the assets' life, with cyclical maintenance activities then commencing and applying for the remaining economic life of the asset. This is converted into an equivalent annual maintenance charge.

4.4.3 These approaches were developed primarily on the basis that the ceiling price was assessed on the GRV annuity method and, specifically in this context, are not unreasonable. However, when these approaches are then applied in the assessment of the floor price, they result in a floor price that may have very little resemblance to the true incremental cost of continuing to provide access on a route. At best, the approach to assessing the floor price is unhelpful and misinforms access seekers as to the true floor cost of providing a service.

4.4.4 This is particularly relevant for older infrastructure, where the actual maintenance costs may be significantly higher than the annualised profile or where major maintenance activities are required in order to maintain the capability of the infrastructure. In these cases, the floor price assessed under the Code falls well short of the true incremental cost of providing the route.

4.4.5 BR considers that it is essential that the definition of incremental cost, and the floor price tests, be reviewed to ensure that the floor price assessed under the Code is consistent with the true incremental cost of providing access, including the costs associated with major maintenance if this is required in order to provide access to the access seeker over the proposed term.

4.5 Information Provision Requirements from an Entity in Section 7

4.5.1 Section 7 of the Code allows for an entity interested in making a proposal for access to ask the railway owner for a set of preliminary information, which includes an indication of available capacity, price for access, and terms and conditions of access, as well as details about proposed path origin and destination.

4.5.2 BR submits that when an entity requests preliminary information under section 7 that the entity should also be required to provide preliminary information about the operations the entity is contemplating having accommodated on the railway infrastructure. This information would constitute a basic outline of the operations, intended to tailor the railway owner's response in a way that adds significantly more value to the information by virtue of its enhanced relevance to the circumstances of that particular entity.

4.5.3 Specifically, the preliminary information provided by the entity should include indicative descriptions of:

- the operational timeframe of the activity supported by the rail operations;
- the nature of the product to be conveyed by rail;
- the volume to be moved per day, month and year;
- the frequency of rail operations;
- the rolling stock configuration;
- relevant port/terminal interactions; and
- any other relevant details the entity is reasonably able to provide.

4.5.4 Section 6(5)(a) of the CPA stipulates that access regimes should have 'objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure'. BR submits that if a railway owner is provided with some preliminary details about the potential access regarding which the railway owner must provide preliminary information itself, that this improves the ability of both parties to maximise the use of the railway infrastructure by facilitating relevant and tailored information exchange.

4.5.5 BR submits that section 7 of the Code should amended to include the requirement of the entity to provide preliminary information (described above) about the operations being contemplated for access to railway infrastructure, and that this would improve the ability of the Code to give effect to section 6(5)(a) of the CPA.

4.6 Operational Detail Provided with Access Proposal

4.6.1 BR submits that the requirements of what an access proposal must include, as listed in section 8(3) of the Code, should be elaborated upon, so that it is clearer what the minimum required information from the access seeker should contain. Given that the railway owner must make an assessment of costs, prices, extension/expansion details, and the specifics of access agreement terms and conditions, there is significant value in all the relevant details being clearly stipulated by the access seeker at the time the proposal is made. In support of this, BR submits that the following changes should be made to the Code.

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

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

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

- the frequency of recurrence of access and any cycles or seasonality that may be relevant.

4.6.4 Section 8(3)(c) should specify that the proposal must supply information describing:

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

4.6.5 Because all of this information must be known prior to an access agreement being put in place, and because the railway owner must make so many decisions on the basis of the information supplied under section 8 of the Code, BR submits that the suggested changes improve the efficiency of the Regime process, and therefore embody the objectives of section 6(5)(a) of the CPA.

4.7 Charge for Extension/Expansion Capacity Analysis

4.7.1 Section 9(2)(b) of the Code requires the railway owner to provide a reasonable estimate of the costs relating to a proposed extension/expansion, and section 15 of the Code entitles the railway owner to require the proponent to show that its operations can be accommodated on the route and that any proposed extension/expansion is feasible and can be conducted safely.

4.7.2 Where the estimates produced by the railway owner as part of section 9(2)(b) of the Code form part of the final plan for an expansion/extension, or where the access seeker does not have the technical expertise to conduct an expansion/extension or capacity analysis and requires the railway owner to provide that expertise in order to satisfy the requirements of section 15 of the Code, that the railway owner should be entitled to recover costs and/or charge a reasonable fee for the expertise provided.

4.7.3 Any such requirement should be agreed between the parties prior to the assessments being undertaken.

4.7.4 BR submits that the Code should be changed to incorporate cost recovery by the railway owner from the access seeker for costs incurred in assessing extension/expansion proposals, and to incorporate cost recovery by the railway owner from the access seeker for costs incurred by the railway owner if the access seeker opts to utilise the expertise of the access seeker to satisfy section 15 of the Code.

4.7.5 Such a change would assist the railway owner in preventing the allocation of resources to vexatious proposals, and would also allow the access seeker certainty over the cost of extension/expansion analysis and certainty in the cost of any expertise sought from the railway owner. Certainty in this regard enhances the ability of the Code to give effect to section 6(5)(a) of the CPA, which stipulates that the regime should 'promote the economically efficient use of, operation and investment in, significant infrastructure'.

4.8 Update of Legislation References

4.8.1 BR notes that in several instances, legislation referenced in the Code has been superseded. BR submits that these references should be updated.

4.8.2 The legislation references in question, and BR's understanding of the modern equivalent laws and sections therein, are as follows:

- s.3, under the definition of 'capacity', refers to section 9 of the Rail Safety Act 1998' – the modern legislation is the Rail Safety Act 2010, and the relevant sections are sections 28(4) and (5);
- s.3, under the definition of 'related body corporate', refers to Corporations Law – the modern legislation is the Corporations Act 2001;
- s.27(1)(b) refers to the Trade Practices Act 1974 – the modern legislation is the Competition and Consumer Act 2010;
- s.31(2), refers to the Rail Safety Act 1998 – the modern legislation is the Rail Safety Act 2010;
- s.46(5) refers to the Corporations Law – the modern legislation is the Corporations Act 2001;
- Sch.3, item 9(b) refers to section 9 of the Rail Safety Act 1998' – the modern legislation is the Rail Safety Act 2010, and the relevant sections are 28(4) and (5).

4.8.3 BR notes that the West Australian Parliament is in the process of passing the Rail Safety National Law (WA) Act 2014, which will repeal the Rail Safety Act 2010. The Code should be changed to accommodate or reflect this impending change.

4.9 Approval of Railway Owner Required in Sch.4 cl.11(2)

4.9.1 BR notes that clause 11(2) of Schedule 4 of the Code allows the Regulator to seek unilateral approval from the proponent to breach the time limit on the determination of costs in clause 10(3). It is not clear in the Code why unilateral approval is sufficient, given the importance of the outcome to both the access seeker and the railway owner.

4.9.2 BR submits that clause 11(2) of Schedule 4 of the Code should be amended to also require the approval of the railway owner. The railway owner plans for and deploys resources in order to meet the prescribed timeframes of the Code; in order to efficiently do so, advance awareness of changes to those timeframes is important. This supports the objective of 6(5)(a) of the CPA, which stipulates that the Regime should include 'clauses that promote the economically efficient use of, operation and investment in, significant infrastructure' and would therefore improve the ability of the Code to give effect to the objectives of the CPA.

4.10 Ability of Regime to Apply to New/Other Railways

4.10.1 Paragraph 50-53 of the Issues Paper raises concerns about how the Regime does not provide for a consistent approach to the regulation of third party access to railways in Western Australia, particularly new railways.

4.10.2 BR agrees with the statement by the ERA in para.53 of the Issues Paper, where the ERA notes that 'the application of the [Regime] is a State policy matter'. BR notes that section 5(3) of the Act stipulates a clear set of questions to be answered in the affirmative if the route is to be included in the Code. Section 5(3)(e) of the Act includes the question of whether or not there is already effective access to the route; by this question, the Regime could be applied to railways already exposed to an alternative regime that is deemed by the Minister to be working ineffectively, and therefore the Regime is able to function as a final mechanism for regulated access, should the need arise.

4.10.3 In light of this functionality, BR does not support any change to the Code on the basis that it should be modified to solve the policy matter of which railways should be exposed to which regime.

4.11 Limitations on Section 48 Information Provision

4.11.1 Section 48 of the Code requires that if the railway owner has provided cost and price information to an access seeker under section 9(1)(c), then the railway owner must supply that information to another entity that requests the information.

4.11.2 BR submits that without any evaluation of whether the entity is a genuine access seeker or potential access seeker, that this enables vexatious and malicious use of what would otherwise be confidential information. In its current format, an entity can manipulate the outcome of Code-mandated process of negotiation by employing outside levers of influence (both on the arbitrator and the railway owner), such as public opinion and political pressure.

4.11.3 Section 48 fails to recognise that both the railway owner and the access seeker are two commercial organisations negotiating at arms' length, who are both incentivised to see that access to the railway is achieved. Confidentiality is important until the pricing of any access proposal is finalised, otherwise:

- it could be just as damaging for the access seeker as for the railway owner – competitors could get an insight into the access seeker's business that the access seeker may not want them to have; and
- it could easily send incorrect signals to other entities about what pricing they may expect to achieve, because every task is different, and thus how pricing is ascertained is different. It would be difficult for everyone involved if incorrect expectations about pricing were set before a genuine request for access was negotiated.

4.11.4 BR submits that section 48 of the Code should be changed to included criteria that limits the entities who can request this information to entities that can reasonably demonstrate that they do conduct or have a genuine intention to conduct business that requires access to the portion of the network which the information in section 9(1)(c) relates to, and that the entity must demonstrate a current or expected future need for that access.

4.12 Selection of Panel of Arbitrators

4.12.1 Section 24 of the Code stipulates that the ERA may add or remove persons from 'a panel under this section only on the recommendation of the Chairman for the time being of the Western Australian Chapter of the Institute of Arbitrators and Mediators Australia.' This panel of arbitrators is the pool from which the ERA later selects when an arbitrator is required to arbitrate a dispute.

4.12.2 BR notes that on 1 January 2015, IAMA joined with LEADR to become LEADR & IAMA.

4.12.3 BR suggests that section 24(2) should be changed such that the ERA 'may' seek a recommendation; the power of choice should not rest with the IAMA.

4.12.4 BR considers that it may be preferable for the national, rather than the West Australian chair of IAMA to make such recommendations where the parties to the dispute or the ERA consider that it is necessary to source an arbitrator with more appropriate skills and expertise. Section 24(2) should be changed to reflect this possibility.

Conclusion

BR thanks the ERA for the opportunity to comment on the Third Review of the Railways (Access) Code 2000. BR has drawn from recent experience as well as long-term interaction with the Code in order to produce the above comprehensive submission, and hopes that its contribution serves to improve the ability of the Code to give effect to the goals of the Competition Principles Agreement, and generally improve the operation of the Code.

Yours sincerely

Paul Larsen
Chief Executive Officer
Brookfield Rail Pty Ltd

Please CC any response to Commercial@brookfieldrail.com