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Submission to the Economic Regulation Authority

Review of *Railways (Access) Code 2000*

Issues Paper

2 April 2015

EXECUTIVE SUMMARY

CBH welcomes the opportunity to provide this submission to the Economic Regulation Authority (**ERA**) on its review of the *Railways (Access) Code 2000* (WA) (the **Code**).

As set out in these submissions, and the companion paper prepared by Frontier Economics, CBH's experience as an access-seeker is that the provisions of the Code do not give effect to the Competition Principles Agreement (the **CPA**). Significant reform is required in order to ensure that the Code promotes access to the railways covered by it, and the need for change is urgent.

This submission sets out in detail the problems that CBH has identified with the Code. Fundamentally, the Code does not effectively constrain the monopoly power of railway owners, and therefore does not deliver efficient access outcomes. This is for the following reasons.

(a) The process under the Code is slow, and provides a railway owner many opportunities to delay progress. There are many steps that must be completed before a railway owner's obligation to negotiate in good faith arises. This is in circumstances where the Code may be invoked because the parties have been unable to negotiate an agreement "outside" the Code, which means the access seeker is likely to already be under significant time pressure. This is compounded by the fact there are no "transitional" provisions that provide "default" access until the process (which may include multiple arbitrations, and potentially litigation) is completed.

(b) The access pricing outcomes under the Code are highly uncertain, which fundamentally undermines the utility of the process. The gulf between the floor price and ceiling price (which set the parameters for access pricing) is so large it essentially provides no real limit or guidance on pricing outcomes. In the case of CBH's access proposal, the "global" annual ceiling price is $526 million higher than the global annual floor price. A price range of $526 million does not meaningfully provide any guidance as to the appropriate access price. This is compounded by the "pricing guidelines" in the Code, which provide considerable scope for argument about where, and how, the price should be set.

(c) The Code does not address the information asymmetry between a railway owner and an access seeker. This information asymmetry is fundamental to a railway owner's ability to take advantage of its natural monopoly over below-rail services. The Code needs extensive and immediate reform to address this problem.

(d) CBH is concerned about the difficulties with enforcement of the Code, and submits that the ERA's, and an access seeker's, ability to effectively enforce the Code is significantly limited by the fact the provisions of the Code can only either be enforced by an injunction obtained by the ERA or an access seeker from the Supreme Court, or through arbitration. This stands apart from other regimes, which grant the ERA the power to impose infringement notices, and pecuniary penalties (among other remedies) for breaches. The Code currently provides a railway owner with numerous opportunities (should it wish to use them) to delay and hamper the process by committing repeated "small" breaches of the Code, which have a significant cumulative impact.

CBH believes that fundamental changes are urgently required to ensure the Code promotes competition in the market for rail operations, and the markets that rely on rail operations (including grain, and other export commodities). CBH encourages the ERA to report to the Minister that change is essential, and must be implemented immediately.

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1. INTRODUCTION

CBH welcomes the opportunity to provide this submission to the Economic Regulation Authority (**ERA**) on its review of the *Railways (Access) Code 2000* (WA) (the **Code**). The purpose of this review is to assess the suitability of the provisions of the Code to give effect to the Competition Principles Agreement (the **CPA**) in respect of railways to which the Code applies.

CBH's primary submission is that the provisions of the Code are not suitable to give effect to the CPA. Significant change is required to make them suitable. Currently, the provisions of the Code do little, if anything, to promote access to the railways to which the Code applies. Indeed, CBH considers that a number of important features of the Code mean that it is open to be used by railway owners to exercise their monopoly power to inappropriately raise prices and decrease capacity, service offerings and service quality. The Code is simply unattractive, unwieldy and inefficient as a pathway to access – a fact that is all too apparent to access seekers, and railway owners.

CBH believes that it is time for change, and that any change must be undertaken at the most fundamental level. CBH encourages the ERA to report to the Minister that change should happen and that it should happen now.

CBH makes this submission as one of only three proponents to have sought access under the Code. CBH is also the only proponent to have had input from the ERA on the determination of costs relevant to the grain freight rail network operated by Brookfield Rail Pty Ltd (**BR**), which is covered by the Code. This has given CBH unique insight into the many failures of the Code in giving effect to the CPA.

CBH submitted a proposal for access to the grain rail network over 15 months ago, in December 2013. However, CBH only recently commenced the process of negotiating with BR under the Code, and is still yet to see a copy of a draft access agreement that includes pricing. Since lodging its proposal, CBH has been forced to seek injunctive relief in the Supreme Court to enforce its rights under the Code (which was ultimately settled with BR before trial), and commenced arbitration proceedings which took over nine months to resolve a preliminary issue

CBH is dissatisfied to find itself in this position. The process of obtaining access under the Code has had a significant negative effect on the efficiency of its operations, and has resulted in uncertainty and increased costs for CBH, its members and growers. Not being able to secure long-term access on reasonable terms to a vital part of the grain supply chain increases costs, and therefore the competitiveness of WA grain growers, and their ability to transport their grain to highly competitive international markets efficiently and effectively. This directly affects the competitiveness of the WA grain industry, and its significant contribution to Australia's national economy.

CBH's experience under the Code demonstrates a complete failure to achieve efficient outcomes, and to meet the object of the *Railways (Access) Act 1998* (WA) (**RAA**) of encouraging the efficient use of, and investment in, railway facilities. The key issues which CBH has encountered under the Code include:

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[1] Excluding the five "catch-all" routes covering tracks and spur lines servicing CBH facilities connected to the twenty routes.

(a) the failure to facilitate a streamlined path to negotiated outcomes - in particular, the Code allows inappropriate threshold issues to effectively "hold up" substantive negotiation processes;

(b) the flawed pricing methodology, and unhelpfulness of the floor and ceiling prices in assisting an access seeker to negotiate prices under the Code;

(c) the lack of a direct correlation between access prices and below rail performance and the absence of suitable minimum performance requirements;

(d) a lack of transparency and information disclosure by the railway owner, particularly in relation to pricing information and performance standards;

(e) ineffective enforcement mechanisms to enforce the performance of the obligations of the railway owner under the Code; and

(f) the fact that the railway owner has been able to make significant confidentiality claims over information, the disclosure of which is vital to facilitate a transparent and consultative process and to redress the information asymmetry that exists between it and users of the rail network.

About these submissions

CBH's detailed submissions are set out in this document in the following way:

(a) Part 1 provides an introduction and summary to these submissions;

(b) Part 2 provides a background to CBH, its supply chain and its access proposal under the Code;

(c) Part 3 discusses the need for the Code to facilitate a more streamlined path to negotiation – which CBH submits is an underlying issue with the processes under the Code;

(d) Part 4 discusses pricing issues and performance standards;

(e) Part 5 discusses issues relating to capacity and extensions/expansions;

(f) Part 6 discusses dispute resolution and arbitration under the Code;

(g) Part 7 discusses the insufficient information disclosure requirements under the Code, including the required information, preliminary information and Part 5 instruments;

(h) Part 8 discusses regulatory issues, such as the enforcement of obligations under the Code and confidentiality; and

(i) Part 9 discusses other issues relating to the object of the Code, the need to preserve the status quo under existing access agreements, and the need to revise the treatment of negotiations outside the Code.

In Schedule 1 to this submission, CBH has set out a discussion of the application of the CPA, and an analysis of the interpretation and meaning of each of the relevant principles under clause 6 of the CPA. This analysis provides the context against which the Code must be assessed and supports CBH's submission that the Code provisions are not suitable to give effect to the CPA.

Submission by Frontier Economics

CBH has also engaged Frontier Economics to analyse and critically review the operation of the Code, particularly in respect of the setting of floor and ceiling prices, and how to improve the effectiveness of the negotiate-arbitrate model. Frontier Economics' submission is **enclosed** with this submission. CBH agrees with the submissions made by Frontier Economics, and they are supported by the experiences of CBH that are set out in CBH's submissions.

Please direct any questions about these submissions to:

David Capper
General Manager - Operations
Co-operative Bulk Handling Limited

2. BACKGROUND TO CBH

2.1 Background to CBH Group

Co-operative Bulk Handling Limited (**CBH**) is a not for profit, non-distributing co-operative with grain producer members who reside in Western Australia (**WA**). The co-operative's commitment to maintaining a partnership with its WA grain grower members has helped build an industry that has been the backbone of the State's rural economy since the beginning of the bulk handling system in 1933. This partnership has also been the basis of CBH's strength and success.

During its life, CBH has constantly evolved, innovated and grown, with operations extending along the value chain from grain storage, handling and transport to marketing, shipping and processing. Now Australia's biggest co-operative and a leader of the nation's grain industry, CBH is controlled by approximately 4,200 WA grain growers. The co-operative exists for their benefit and the advancement of the grain industry in WA.

2.2 Background to CBH's supply chain

The nature of the operations and principal activities of CBH and its subsidiaries include:

(a) grain storage, handling and transportation services;

(b) grain trading and marketing; and

(c) engineering, constructing and investing in flour mills.

CBH is the largest exporter of wheat, barley and canola in Australia. In addition to its operations in WA, it also has trading, marketing and processing operations in the eastern states of Australia and overseas.

Within WA, CBH has 197 receival points for its commodities, which are located across the wheatbelt region of WA, operations at four ports located at Kwinana, Geraldton, Albany and Esperance, and the Metro Grain Centre (**MGC**) in Forrestfield. CBH's storage and handling system currently receives and exports around 90% of the annual WA grain harvest. 95% of WA's grain harvest is exported. CBH's long term rolling average grain rail freight task is approximately 6 million tonnes per year. However, due to the seasonal variability of the grain harvest, that range has varied between 3 million and 9 million tonnes per annum. The 2013/2014 harvest was a record year, with 15.9 million tonnes received.

The WA grain industry is significant to Australia's national economy. This is evidenced by the fact that up to 50% of grain exported from Australia originates from WA. CBH itself exports to over 250 customers in 30 countries. An efficient and cost effective railway network is therefore essential for CBH to ensure that WA grain growers are able to remain internationally competitive.

Approximately 70% of CBH's freight task is transported by rail to CBH's port facilities or the MGC. It is therefore a vital piece of CBH's supply chain.

2.3 CBH's recent experience in using the grain rail network

In 2010/2011, CBH made a decision to pursue enhanced "above rail" efficiencies, by investing $175 million in new rolling stock (locomotives and wagons) to be operated by a new "above rail" operator for the dedicated service of grain haulage in WA. That operator is Watco WA Rail Pty Ltd (**Watco**).

Unfortunately, the current management and operation of the WA grain rail network is making it difficult for CBH to realise any of the efficiency gains it has generated in its above rail operations. This is principally due to three factors:

(a) **Prices** - the railway owner's attempts to extract higher prices. Access payments to the "below rail" operator, BR, currently make up over 40% of CBH's rail supply chain costs. Comparatively, CBH estimates that WA grain growers are paying approximately 2.6 to 4 times what growers in eastern Australia pay for track access (that have higher speeds/mass).[2] Freight rates in Canada and the USA are also 30-50% lower than in WA. Due to a lack of transparency around issues such as access pricing and performance standards, there is also considerable uncertainty over how these access fees are being expended.

(b) **Performance standards** - track performance standards have been significantly decreasing. The present performance of the grain rail network has caused grave concerns about how it is being managed and as to its sustainability. There are currently 942 separate permanent speed and mass restrictions placed on Tier 1 and Tier 2 line sections (in addition to a range of temporary restrictions), despite government committing $164.5 million to fund required track maintenance.[3] These restrictions have severely hindered effective supply chain operations. As an example, the Beacon to Burakin line section only allows for 30 km/h operations for full trains, despite being re-sleepered as part of a recent government funding package.

(c) **Closure of lines** – BR's attempt to close operations on certain route sections that are covered by the Code. After CBH's and BR's previous access agreement ended, and the parties began to negotiate for a replacement access agreement (as discussed below), BR closed the following routes: Narrogin to West Merredin;

(i) Kulin to Yilliminning;

(ii) West Merredin to Kondinin; and

(iii) Perenjori to Maya.

This followed the closure of the York to Quairading and West Merredin to Trayning routes in late 2013. BR has also indicated its intention to close operations on the Toodyay West to Miling line from 31 December 2015. The closure of these routes, to which CBH requires access, has presented CBH with significant operational restrictions. Further, despite plans to close around 800 kilometres of track, BR has previously proposed a significant increase in access fees for the remaining parts of the grain rail network.[4]

2.4 Freight Rail Network Inquiry

The operation and management of the privatisation lease over the rail network held by BR was discussed in detail in the report of the Economics and Industry Standing Committee's (**Committee**) inquiry into the management of the WA freight rail network (Report No. 3 dated October 2014) (**Freight Rail Network Inquiry**). The Committee was highly critical of the way the railway network has been managed under the privatisation lease

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2 CBH has used pricing information published by ARTC to make this estimate. See: http://www.artc.com.au/library/Pricing%20Schedule%20Effective%2001072014%20updated%2007072014.pdf

3 CBH acknowledges that some of these permanent restrictions may be appropriate (for example, speed restrictions at curves or level crossings). However, CBH is concerned about the number and scale of the restrictions, and the fact that they are increasing.

4 Freight Rail Network Inquiry at paragraph 6.22.

arrangements, and expressed concerns about the ongoing safety and viability of the arrangements. CBH has similarly been persistent in its view that there is a need for increased and effective statutory or regulatory oversight into the performance of BR under its lease.

The Committee also discussed the effectiveness of the Code and made a number of recommendations directly relevant to this review. In particular, the Committee stated that the Code is "inherently flawed insofar as it does not lend sufficient certainty to rail network access negotiations."[5] It was recommended that this review include a critical evaluation of why so few access seekers have sought to use the Code.[6] In the ERA's Issues Paper (dated February 2015) (**Issues Paper**), the ERA acknowledged that this question is relevant to the extent that it informs whether the CPA objectives are being advanced.[7] CBH agrees with this assessment, and submits that the reason why more access seekers have not utilised the Code is due to its ineffectiveness in assisting negotiations.

The Committee discussed the process of CBH's access proposal in some detail. It stated that whatever outcome was reached, "it is clear that there exists significant room for improvement within the process."[8] The Committee identified the following issues with the Code:

(a) the length of the Code process – the time already taken to discharge the Code process must be regarded as one obvious reason for the Code's historic dormancy, particularly as there is no clear end in sight to CBH's proposal, some ten months into the process (as it was at the time the Freight Rail Network Inquiry was released);[9]

(b) confidentiality issues – the Committee regarded the confidentiality surrounding the process of determining floor and ceiling costs as unhelpful. It asserted that, as the ERA undertook independent cost calculations in the process of assessing the costs submitted by BR, "there is no good reason for the floor and ceiling costing process to take place under a shroud of secrecy";[10]

(c) network upgrades – the Code is not an adequate regulatory mechanism for access proposals requiring an upgrade to the network.[11] The Code offers no assistance whatsoever in the process of negotiating a network upgrade, a fact which calls into question the worth of having the Code at all, especially considering that rail technology is unlikely to regress over the remainder of the term of the lease. It was recommended that the ERA's review of the Code in 2015 include a review of its effectiveness in third party access requiring capital upgrades;[12] and

(d) the unhelpfulness of the floor and ceiling costs methodology – while the Committee appreciated the theory informing the use of floor and ceiling costs to guide negotiations, this was an element of concern with the Code process, for the following reasons:

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5 Freight Rail Network Inquiry at paragraph 6.68.

6 Economics and Industry Standing Committee, *The Management of Western Australia's Freight Rail Network*, Report No. 3, October 2014 (**Freight Rail Network Inquiry**), Recommendation 4.

7 ERA, Review of the *Railways (Access) Code 2000* (WA), Issues Paper dated February 2015 (**Issues Paper**) at [83].

8 Freight Rail Network Inquiry at paragraph 6.36.

9 Freight Rail Network Inquiry at paragraph 6.36.

10 Freight Rail Network Inquiry at paragraph 6.36.

11 Freight Rail Network Inquiry, Finding 17.

12 Freight Rail Network Inquiry at paragraph 6.68 and Recommendation 5.

(i) The fact that the Code permits such a vast gulf between nominated floor and ceiling costs limits the usefulness of these parameters in any negotiation.[13]

(ii) Inflexibility within the floor and ceiling cost regime leaves a potential access seeker in a difficult position if the performance standards associated with the ceiling cost are significantly in excess of what is required. Because the Code stipulates ceiling costs to be a function of the cost to replace existing line with modern equivalent assets, this cost may well pertain to infrastructure that exceeds the requirements of the relevant freight task.[14]

(iii) The ceiling cost may be an unrealistic parameter for access agreement negotiations.[15]

The Committee stated that, plainly, the experience of CBH demonstrates that the Code "does little to actually facilitate or aid access agreement negotiations." Further:

> it should not have taken the processing of [CBH's] access application for the ERA to realise that the Code is effectively broken, particularly as the floor and ceiling price mechanism lends only minimal transparency to the market for network access. Furthermore, negotiations under the Code can only begin at the conclusion of what is a lengthy process, and, as such, it seems obvious why access seekers have generally seen no point in turning to its provisions.[16]

In the view of the Committee, the historic dormancy of the Code ought at the very least to have provided evidence of some problem inherent to it,[17] and this dormancy "owes a great deal more to its impotence than its redundancy".[18] Further, the fact that parties have not utilised the Code does not necessarily indicate the existence of a robust, contestable market for access to WA's freight rail network.[19]

CBH supports the comments made by the Committee in relation to the inherent problems of the Code. They are directly relevant to whether the provisions of the Code are suitable to give effect to the CPA. CBH urges the ERA to take into account the comments in the Freight Rail Network Inquiry in relation to the Code, as part of the ERA's present review of the Code.

2.5 Background to CBH's access proposal

Between March 2012 and June 2014, CBH accessed the grain rail network under an interim commercial track access agreement with BR. CBH's "above rail" operator, Watco, held an operational track access agreement with BR covering the same period. In the lead up to the expiry of those agreements in June 2014, CBH engaged in extensive good faith negotiations with BR to reach an acceptable replacement agreement. These negotiations were carried out "outside of the Code" pursuant to section 4A of the Code.

13 Freight Rail Network Inquiry at paragraph 6.37.

14 Freight Rail Network Inquiry at paragraph 6.38.

15 Freight Rail Network Inquiry at paragraph 6.38.

16 Freight Rail Network Inquiry at paragraph 6.41.

17 Freight Rail Network Inquiry at paragraph 5.36.

18 Freight Rail Network Inquiry at paragraph 6.3.

19 Freight Rail Network Inquiry, Finding 10.

CBH therefore made the decision to seek access to the rail network under the Code. Following notices for, and correspondence about, required information and preliminary information under the Code, CBH formally submitted its proposal for access on 10 December 2013. CBH sought access to various routes and associated railway infrastructure for the purpose of transporting grain from its receival sites throughout the state to the port terminals operated by it, and sought to negotiate the provision of other additional services. CBH sought access to the routes that it used at that time, many of which CBH had used (either directly, or through third party haulage providers) since CBH was established in 1933.

CBH has faced considerable hurdles in seeking to obtain access under the Code. In Schedule 2 to this submission, CBH has set out a chronology of the key events that have occurred during the process. The following timeline in Figure 2.5 provides a summary of these events.

Figure 2.5 – Timeline of key events in access process

2013

23 October 2013 – CBH requested the "required information" and "preliminary information" from BR

10 December 2013 – CBH submitted its proposal for access under section 8 of the Code.

17 December 2013 – BR responded to CBH's access proposal under section 9 of the Code.

2014

7 January 2014 – the ERA gave public notification of the approval or determination of BR's costs under clause 10 of Schedule 4 of the Code, and invited submissions on them.

17 January 2014 – CBH commenced Supreme Court proceedings, seeking an injunction to compel BR to provide the pricing and costs information under sections 9(1)(c)(i) and (ii) of the Code, and declarations that its proposal was a valid proposal under the Code.

13 February 2014 – CBH and BR settled the Supreme Court proceedings, under a confidential Settlement Agreement. CBH clarified its access proposal.

20 March 2014 – CBH provided a preliminary submission on floor and ceiling costs to the ERA.

7 April 2014 – CBH provided a detailed submission on floor and ceiling costs to the ERA.

20 May 2014 – CBH provided notice under section 18(3) of the Code that there is a dispute between BR and CBH as to whether the requirements of section 15 have been met.

12 June 2014 – CBH referred the capacity dispute to arbitration.

27 June 2014 – CBH and BR entered into a short-term commercial track access agreement

30 June 2014 – the ERA made its determination of floor and ceiling costs under clause 10 of Schedule 4 of the Code. The interim commercial track access agreement on foot between CBH and BR expired.

22 – 23 September 2014 – Hearings were held for the capacity dispute arbitration.

24 September 2014 – The ERA published a redacted version of its costs determination.

14 October 2014 – CBH and BR entered into a further short-term commercial track access agreement

2015

11 February 2015 – The arbitrator made a final determination of the capacity dispute.

16 March 2015 – BR gave its notice of readiness to begin negotiations under section 19(1) of the Code.

18 March 2015 – CBH gave its notice of readiness to begin negotiations under section 19(3) of the Code.

26 March 2015 – Negotiations commenced under the Code.

Based on its experience during this protracted, bureaucratic, legalistic and frustrating process, CBH's view is that the Code process has been inefficient, unwieldy and problematic. This is evidenced by the following issues CBH has endured:

(a) a significant period of time has elapsed since CBH submitted its proposal for access under the Code;

(b) CBH has not received aspects of the required information, preliminary information and section 9(1)(c) information either at all, or in the time required by the Code.

(c) BR has claimed the CBH's access proposal is not a valid proposal, on the basis that CBH requested access to routes on which BR contended there was no capacity;

(d) BR has refused to give price and costs information required by section 9(1)(c) on the grounds of confidentiality;

(e) BR has refused to give price and costs information required by section 9(1)(c) for certain routes on which it contends there is no capacity (and for which CBH has requested access and contended that there is available capacity);

(f) CBH was forced to commence proceedings in the Supreme Court for declarations as to the validity of its proposal, and for an injunction mandating BR to provide the information required under section 9(1)(c);

(g) CBH and BR have engaged in an arbitration regarding whether the requirements of section 15 have been satisfied; and

CBH and BR have also entered into several interim commercial track access agreements during this time, to ensure service continuity for CBH while the Code process continued.

This process has had a significant negative effect on CBH, its members and its growers. CBH has been forced to expend significant time and resources in unnecessary and unproductive processes that have not taken it any further in its ultimate goal of negotiating reasonable terms of access for the benefit of its members. This has adversely affected the efficiency of its operations, and has resulted in increased costs for CBH, its members and growers.

CBH believes that it would not be in this position if there was a stronger and more effective regulatory framework in place for access seekers – one that effectively gives effect to the CPA.

3. LACK OF A STREAMLINED PATH TO NEGOTIATION

3.1 Overview of Code processes

The Code is based on a negotiate-arbitrate regulatory model. Under this model, an access seeker who elects to use the Code can take two steps to obtain access, being:

(a) **negotiate** – first, the access seeker uses the processes set out in the Code to make an access proposal and then to negotiate with the railway owner; and

(b) **arbitrate** – second, if the access seeker and railway owner cannot reach agreement, then the access seeker can refer the access dispute to an independent and binding arbitration process.

Although these are the two steps at a basic, conceptual level, the actual detail of the Code is considerably more complex, intricate and time-consuming. In general terms, the Code process involves the following phases:

Phase	Description
1	The access seeker gathers relevant information from the railway owner, using the mechanisms for "required information" under Part 2A of the Code and "preliminary information" under section 7 of the Code.
2	The access seeker makes a formal **access proposal** in respect of one or more routes, and preliminary issues are addressed – including a determination by the railway owner of the prices and costs for the proposed access under clause 10(1) of Schedule 4.
3	The ERA makes a **floor price and ceiling price determination** for the route or routes to which access is sought, under clause 10(3) of Schedule 4. The ERA may initiate a public consultation process on this determination.
4	The railway owner may require the access seeker to demonstrate: • its managerial and financial **ability** (section 14); and • that its proposed rail operations are within the **capacity** of the relevant routes (section 15). Negotiations cannot commence until these matters have been satisfied.
5	The railway owner enters into **negotiations in good faith** with the access seeker, with a view to making an access agreement in respect of the relevant routes.
6	The railway owner and access seeker either **make an access agreement** in respect of the relevant routes within 90 days of the commencement of negotiations, **or an access dispute arises**. If a dispute arises, the dispute is referred to arbitration, to be conducted in accordance with the *Commercial Arbitration Act 2012* (WA).

As can be seen, there are a number of pre-cursor steps that must be resolved before negotiations commence. These steps are technical and time-consuming, particularly if the timeframes given in the Code are not strictly adhered to (or even if they are).

3.2 Issues

CBH believes that the Code process is inherently flawed, and there are a number of underlying issues which prevent it from operating in a more efficient and timely manner. Many of these issues will also be addressed in other parts of this submission.

CBH submits that the Code process needs to be reconsidered at a fundamental level, so that it operates to facilitate a more streamlined path to a negotiated outcome. This is in line with the ultimate object of the CPA, which is to ensure economically efficient outcomes.

CBH has identified the following key issues with the Code process:

(a) **Timing and duration** – The Code process is too lengthy and slow, and provides many opportunities for the railway owner to delay progress. While some steps in the process do not have timeframes at all (eg the arbitration process), and others that do have stipulated timeframes may not be strictly adhered to.

As an example, the ERA is required to make a floor and ceiling price determination under clause 10(3) of Schedule 4 within 30 days after the railway owner provides the information under section 9(1)(c).[20] In CBH's case, the time required to make the determination was over 6 months – due to the fact that no costs determination had ever been made in relation to many of the routes, and because BR fundamentally changed its method of determining costs since the last costs determination in 2007. Given that this is the time required to make the costs determination, then this process should not effectively "hold up" the negotiation process. CBH believes there should be some scope for negotiations to commence while the determination is being made.

Even though CBH submitted an access proposal over 15 months ago, it has only recently commenced the negotiation process, and has not been provided a draft access agreement that includes pricing. This is in circumstances in which the Code has been invoked because the parties have been unable to negotiate a long-term agreement "outside" the Code, which means the access seeker is already under significant time pressure. Because of this delay, CBH has needed to re-negotiate an interim access agreement several times. Being in this period of delay has had a detrimental effect on CBH, its members and the efficiency of the WA grain industry. It has significantly affected its ability to secure efficient terms of access for the benefit of its members, and has put the competitiveness of its grain operations at risk. This is compounded by the fact there are no "transitional" provisions that provide "default" access until the process (which may include multiple arbitrations, and potentially litigation, and therefore could take months or years) is completed.

(b) **Technicality and lack of enforcement –** There are too many steps that must be completed before a railway owner's obligation to negotiate in good faith arises. These steps effectively "stop the clock" for other parts of the process (eg capacity disputes, costs determinations, section 10 approvals – which must be dealt with before the obligation to negotiation arises). At the same time, an access seeker can only commence an arbitration to resolve disputes during negotiation after the entire negotiation period has passed (or the railway owner agrees in writing that negotiations have broken down). This has the effect of frustrating the access seeker's ability to commence dispute resolution where it has reached an impasse with the railway owner. These processes need to be streamlined, so that they are not effectively suspended each time a dispute (or another regulatory or enforcement action) arises. As discussed above, the costs determination process should not effectively "hold up" negotiations (particularly where the time required to make the determination is several months). Rather, there should be some scope for negotiations to commence while the determination is being made. Negotiation should be able to be commenced as efficiently as possible, while at the same time, disputes should be dealt with in a timely manner, as and when they arise.

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[20] Code, clause 10(3) of Schedule 4.

This problem is compounded by the lack of enforcement provided for under the Code. The ERA's, and an access seeker's, ability to effectively enforce the Code is significantly limited by the fact the provisions of the Code can only either be enforced by an injunction obtained by the ERA or an access seeker from the Supreme Court, or through arbitration (which are both expensive and time-consuming processes). This effectively provides a railway owner with opportunities (should it wish to use them) to delay and hamper the process by committing repeated "small" breaches of the Code, which have a significant cumulative impact.

(c) **Inappropriate threshold issues -** The Code currently operates so that the parties are unable to commence negotiations until the requirements of sections 14 and 15 have been met.[21] CBH believes there is no good reason why issues in relation to capacity and financial management/resources should hold up good faith negotiations between the parties. This issue has caused particular problems for CBH.

CBH is frustrated that issues such as these have held up the application of BR's obligation to negotiate with CBH in good faith. CBH had been willing for these issues to be discussed as part of the negotiation process, and believes that this would have led to a more efficient resolution of such disputes.

CBH believes that these problems mean that the provisions of the Code that deal with the process for obtaining access are entirely unsuitable to give effect to the following provisions of the CPA:

(a) Clauses 6(4)(a) to (c) of the CPA – As outlined in Schedule 1 to this submission, the principles emphasise the primacy of commercial negotiations between the parties. To give effect to these principles, the regime must create an environment in which the parties are able to enter into effective negotiations. This has been interpreted by the National Competition Council (**NCC**) and other regulators as encompassing a requirement to:

(i) sufficiently address information imbalances between the parties, to enable the access seeker to conduct meaningful negotiations;[22] and

(ii) provide sufficiently detailed information to the access seeker on the terms of access, including price, to ensure that an access seeker can understand the basis on which access is to be offered and make an informed decision.[23] This information must be made available in a transparent and timely manner.[24]

To give effect to economically efficient outcomes, the negotiation process needs to be efficient, timely and cost-effective. These principles require there to be a streamlined process to negotiations under the Code, as this is the ultimate goal of the negotiate-arbitrate model of access regulation. In order for commercial negotiations to be effective in reducing the length of the regulatory process, there need to be viable mechanisms that allow negotiation to occur in a more time-effective manner than traditional regulatory processes.[25] This can be facilitated, for

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21 Code, section 19.

22 NCC, Final Recommendation on certification of the Dalrymple Bay Coal Terminal Access Regime (dated 10 May 2011) at 5.23.

23 ESCOSA Final Inquiry at 4.2.1.

24 ESCOSA Final Inquiry at 4.2.1.

25 Rob Albon and Chris Decker, "International Insights for the Better Economic Regulation of Infrastructure", Working Paper No. 10, ACCC and AER Working Paper series, March 2015 (**BERI Working Paper**) at page 69.

example, by formal procedures and guidelines, by placing the information burden on regulated businesses, and by forcing the negotiating party to release more information, which could enhance the negotiation process.[26]

(b) Clause 6(4)(e) of the CPA - which requires the access provider to use all reasonable endeavours to accommodate the requirements of access seekers. As outlined in Schedule 1 to this submission, the NCC has interpreted this principle as requiring obligations to be placed on the access provider to respond to access requests and negotiate terms and conditions within a reasonable timeframe. CBH does not consider that a period of over 15 months is a "reasonable timeframe" for commencing negotiations.

(c) Clause 6(5)(a) – which states the underlying object of access regulation under the CPA. The NCC has indicated that, in applying this objective, three broad components must be addressed:

(i) ensuring the efficient use of infrastructure, particularly by preventing access providers from misusing market power by raising prices or refusing access to services;

(ii) facilitating efficient investment in essential infrastructure, particularly by ensuring that:

(A) infrastructure is maintained and developed appropriately;

(B) infrastructure owners earn sufficient returns to provide incentives for efficient investment; and

(C) incentives are minimised for inefficient development of infrastructure and for inefficient investment in upstream and downstream activities; and

(iii) promoting competition in activities that rely on the use of the infrastructure.[27]

CBH does not believe that these goals are given effect to by the provisions of the Code that deal with the access process. The delay CBH has experienced has significantly affected its ability to secure efficient terms of access for the benefit of its members, and has put the competitiveness of its grain operations at risk.

3.3 How these issues can be addressed

CBH believes that the processes under the Code need to be restructured, so that the Code can facilitate a more streamlined path to a negotiated outcome, in line with the CPA's object of ensuring economically efficient outcomes. These issues can be addressed together with the following submissions made by CBH:

(a) that there should be a reference tariff approach in place, where regulated prices are determined up-front (or at a minimum, that floor and ceiling costs determinations should be regularly made and published on the ERA's website) (see sections 4.2 and 4.3 below);

(b) that the section 14 and 15 requirements should not be threshold issues that hold up the negotiation process (see section 5.3 below);

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[26] BERI Working Paper at pages 69 and 70.

[27] Guide to Certification at 6.3.

(c) that there should be a timeframe imposed on arbitration (see section 6.3 below);

(d) the scope of when a "dispute" can arise under the Code must be extended, to allow the access seeker to commence dispute resolution at any time (see section 6.4 below);

(e) that there must be a tighter enforcement regime that means that the parties do not have to commence Supreme Court proceedings or arbitration to enforce Part 2 or Part 3 obligations (see section 8.1 below); and

(f) that there should be a provision that requires the status quo to be preserved under an existing access agreement between the access seeker and railway owner, where an access proposal process is underway between those parties for a replacement access agreement (see section 9.2 below).

These are all issues which will improve the ability of the Code to facilitate a more efficient path to a negotiated outcome.

There is also merit in considering a similar approach taken in the NSW and Victorian rail access regimes, and in the gas access regime in WA, regarding the publication of an access arrangement/undertaking. This significantly increases the efficiency of the entire access process, because cost determinations, indicative prices and template access agreements are in place up-front and are already approved by the regulator. This saves time and resources for each access seeker having to negotiate these issues with the access provider from scratch, and the regulator having to make approvals and determinations for each proposal – improving efficiency for all parties.

4. PRICING ISSUES AND SERVICE QUALITY

4.1 Overview

The ERA has invited comment on whether there is a better means of estimating the capital costs of a railway than the Gross Replacement Value (**GRV**) method prescribed under the Code.

CBH commissioned Frontier Economics to analyse the provisions of the Code against the CPA, and provide a report. That report is **enclosed** with these submissions, and sets out (among other things) the problems with the GRV approach. CBH agrees with and adopts those submissions.

As explained in Frontier Economics' submission, the GRV approach:

(a) is complex and not transparent to access seekers, as it relies on a "hypothetical" estimation of optimised replacement costs, which cannot be tied to current investments;

(b) appears to be implemented in a way that has the potential to enable railway owners to recover more than efficient costs; and

(c) appears to be based on the flawed premise that sending "build or buy" signals to access seekers will promote economically efficient outcomes when, in fact, they do not because a naturally monopolised market is one in which it is efficient for a single supplier to meet all demand.

In addition to these conclusions, CBH submits that the GRV approach is grossly out of step with what has actually happened in Western Australia, and the actual state of the railway network. Specifically the GRV methodology calls for a hypothetical assessment of the cost to build a new railway network in circumstances where the existing railway network is, for many routes relevant to the grain freight network, over 100 years old and built using very different technologies and techniques, resulting in an estimated capital cost that is completely inconsistent with the value of the existing network.

In the case of the grain freight network, this issue is compounded by the fact that BR originally acquired control of the network through leases from the State, and not by constructing the network itself. The total lease price paid by BR in December 2000 (then called WestNet Rail Pty Ltd) was $321,717,627.78 (including GST) for the entire railway network. CBH understands that this price was determined through competitive tender, and therefore represents a "market price". CBH believes that this actual purchase price is of fundamental significance, and is a factor which must be taken into account in determining an economically efficient price.

Even accounting for inflation, the acquisition price is significantly lower than the estimated GRV of $6.2 billion (let alone annual ceiling price of $526 million)—which is only for the grain network, and not the entire railway network. Despite this, the Code does not expressly prevent BR from receiving revenue up to the ceiling price, which would allow it to earn returns many orders greater than the long term weighted average cost of capital.

This effectively places BR in a position to earn monopoly rents on its investment in the railway network, at the expense of access seekers including CBH. This does not advance the object of the Code, nor does it give effect to the CPA (particularly the pricing principles in clause 6(5)(b)).

4.2 Suitability of light-handed approach to cost regulation

CBH believes that the approach in the Code to negotiating a price at a point between the floor and ceiling is not suitable to give effect to the objects and the pricing principles of the CPA.

As outlined in Schedule 1 to this submission, the pricing principles under clause 6(5)(b) of the CPA are intended to ensure that the access price promotes the efficient use of, operation and investment in, infrastructure, as a means of promoting effective competition in dependent markets. This means that regulated access prices should be set to cover the efficient costs of the railway owner, and to provide a return on investment that is in line with the risks involved. Given that prices are determined by negotiation, it is critical that the process of setting prices under the Code also gives effect to the negotiation principles under clauses 6(4)(a) to (c) of the CPA. These emphasise transparency of information, and require there to be an effective means for dealing with situations where the parties are unable to reach agreement. This is generally facilitated by procedures that are independent, transparent, and consultative, and that provide certainty to an access seeker.[28]

CBH has encountered a range of issues with the Code's approach to cost regulation. These include:

(a) There is a lack of up-front certainty regarding pricing. In particular, the spread of potential prices between the floor price and ceiling price is extreme. In CBH's case, the ceiling costs determined by the ERA are 2300% times larger than the floor costs. This provides no guidance to CBH as to the price it can expect to negotiate for access. This lack of certainty is a significant disincentive for access seekers to use the Code to negotiate access (and a key reason why so few access seekers have chosen to use the Code). Further, the pricing guidelines that are to be applied under clause 13 of Schedule 4 do not provide any further guidance, apart from overarching obligations as to what the prices should reflect. This makes it difficult for access seekers to have certainty or confidence in negotiated outcomes –undermining the effectiveness of the negotiate-arbitrate model promoted by the CPA. This point was supported by the Committee in the Freight Rail Network Inquiry, where it stated that "the fact that the Code permits such a vast gulf between nominated floor and ceiling costs limits the usefulness of these parameters in any negotiation."

(b) There is limited regulatory oversight of the price-setting process. Under section 21 of the Code, a proponent is able to apply to the ERA for an opinion as to whether or not the price sought by the railway owner in negotiations for an access agreement meets the requirements of clause 13(a) of Schedule 4. However, this opinion is not binding and is for the information of the applicant only.[29] As described in the Freight Rail Network Inquiry, this is essentially an "empty provision" and "irrelevant, which effectively means that the ERA has no role in establishing specific access prices."[30] As discussed above, the application of the objects clause in clause 6(5)(a) of the CPA includes a requirement to ensure the efficient use of infrastructure, particularly by preventing access providers from misusing market power. The lack of regulatory oversight under the Code is not suitable to address the imbalance in market power when dealing with a monopoly service provider.

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[28] Guide to Certification at 5.1 and 5.3.

[29] Code, section 21(4).

[30] Freight Rail Network Inquiry, at paragraph 5.18.

(c) The ceiling price does not provide a suitable constraint on the total price that can be charged and allows a railway owner to recover costs as if it were "gold plating" (when, in fact, it is not). This is because the ceiling price methodology is based on the cost of building a replacement network (based on modern equivalent assets). It does not reflect the current standard of the network. As explained above, while the use of a "modern equivalent asset" approach may be a reasonable methodology when dealing with a new railway, many of the grain lines are over 100 years old. Therefore, a price methodology that uses a modern equivalent asset to determine what the price should be to run on that asset is flawed. This also leaves the access seeker in a difficult position if the performance standards associated with the ceiling price (ie a brand new railway) are in excess of what is required (a point supported by the Freight Rail Network Inquiry). This is because the ceiling cost pertains to brand new infrastructure that exceeds the current requirements, and that also exceeds what the railway owner is currently willing to provide. This allows the railway owner to effectively price on a "gold plated" basis when determining its ceiling costs – making this an unrealistic parameter for access agreement negotiations.[31]

This methodology also fails to provide an incentive for the railway owner to invest in developing or maintaining the network. Rather, the railway owner is already compensated on the basis that it has invested in a new network. This creates a strong incentive for the railway owner to delay the cost of investing in new or replacement infrastructure. This problem has been recognised by the ACCC when applying a methodology equivalent to GRV to set prices for telecommunication services. The ACCC observed a comment made by Telstra to a Senate Committee that:

> "…the [cost] models [are] actually already optimised, so the cost pool out of which access prices are determined is already in place and in fact is already almost a [FTTN] network. What that means is that we could spend multiple billions of dollars doing a [FTTN] roll-out – multiple billions – and the total cost pool we are allowed to recover from wholesale and retail prices would not go up a jot."[32]

Evidence of this problem is also clear from the state of the WA grain rail network. CBH has been using many of the lines on the network since CBH was established in 1933. However, BR's costing principles (approved by the ERA in April 2011) (**Costing Principles**) appear to show that it is using much lower annuity lives in calculating the GRV for the purpose of the ceiling price determination.[33] The fact that BR has contended that the Tier 3 lines have no capacity, and has attempted to place them in "care and maintenance" also shows its failure to invest in new or replacement infrastructure on these lines. The Freight Rail Network Inquiry also stated that "an inadequate portion of fees paid since 2001 for access to certain line segments has been reinvested into those lines."[34]

While the floor price is set low, it is likely to be closer to the level of prices that should be charged in line with the pricing principles under the CPA – ie a level that is sufficient to cover efficient costs and provide a return on investment in line with the risks involved in the provision of access.

In contrast, other access regimes involve a more transparent method of determining access prices, based on the setting of reference prices that are approved by a regulator. For example:

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31 Freight Rail Network Inquiry at paragraph 6.38.

32 Senate ECITA Commission, 13 February 206, page 75.

33 Costing Principles (approved by the ERA on April 2011) (**Costing Principles**) at section 2.4 and Annexure 7.1.

34 Freight Rail Network Inquiry at paragraph 6.24.

(a) Under the Australian Rail Track Corporation's (**ARTC**) Interstate Access Undertaking (dated 15 July 2008) (**ARTC IAU**), ARTC commits to offering indicative services at indicative access charges set out in the undertaking.[35] The level and structure of these charges are reviewed and approved by the ACCC as part of its approval of the undertaking.[36]

(b) Under the Victorian *Rail Management Act 1996* (Vic), the railway owner is required to submit an access arrangement for approval by the regulator, including the price to be charged in respect of the provision of each reference service.[37] The regulator must then determine whether to approve the access arrangement, having regard to the pricing principles and Pricing Principles Order.[38] This leads to the development of approved reference tariffs for each reference service. For example, under Pacific National's access arrangement for the South Dynon Terminal Access Arrangement (approved in June 2012), Pacific National offers and publishes set reference prices for nine different reference services (under Annexure D).

(c) Under the *Queensland Competition Authority Act 1997* (Qld), the Queensland Competition Authority may require an access provider to develop a draft access undertaking for approval, and to give an access seeker a "reference tariff" (which is a price, or a formula for calculating a price, that has been approved by the authority), to set the basis for negotiation of the price for access to the service under an access agreement.

CBH believes there is merit in considering a similar reference tariff approach under the Code. This would provide certainty for access seekers that there is a regulated price in place, that can form the basis of fair and reasonable negotiations. Greater regulatory scrutiny over the price-setting process, and monitoring over the railway owner's performance, pricing and revenue, should also be considered, to ensure the railway owner is held accountable for complying with the pricing principles and is not permitted to misuse its market power or to effectively "gold plate" the costing of the network.

4.3 Operation of ceiling price test and over-payment rules in relation to access agreements outside the Code

Issues with ceiling price test

The ceiling price test under clause 8 of Schedule 4 of the Code places a cap on the revenue that is permitted to be recovered by the railway owner from all users (including third parties that have obtained access outside the Code) on a route. Based on the approved over-payment rules for BR's network, it does not appear that the over-payment rules are administered in this way. The ceiling price test takes into account revenue that is earned from users outside of the Code (and the railway owner's own use). However, the test is currently not capable of operating effectively for users outside of the Code, and is not capable of being enforced at all times. This has provided an opportunity for railway owners to extract monopoly profits from users outside of the Code (and, in turn, provide railway owners with an incentive to keep access seekers "outside" the Code where possible).

There are several issues with the test that have meant that it does not work as intended. These include the following:

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35 ARTC Interstate Access Undertaking dated 15 July 2008 (**ARTC IAU**), section 4.6.

36 Approved under section 44ZZA of the *Trade Practices Act 1974* (now the *Competition and Consumer Act 2010* (the **CCA**)).

37 *Rail Management Act 1996* (Vic), section 38W and 38X(1).

38 *Rail Management Act 1996* (Vic), section 38ZF; Rail Network Pricing Order 2005.

(a) It is difficult for the test to be enforced when there is no floor and ceiling price determination in place. This is because without a determination of the "total costs" in place under Schedule 4 of the Code, there is no transparency as to what the floor and ceiling prices are. The only express obligation to determine the "total costs" is triggered under clause 10 of Schedule 4 where a proposal has been made. Although the ERA has the power to make a determination of total costs under clause 9 of Schedule 4 if it considers that it is likely a proposal will be made, this is not a mandatory requirement (the ERA "may" determine the costs).

(b) By the same token, users and access seekers (whether inside or outside of the Code) have no way of knowing what the "total costs" or total revenue earned by the railway owner is, as that information is not published. Consequently, there is nothing to prevent the railway owner from breaching the ceiling price test, and extracting monopoly profits from multiple operators that allow it to recover more than its efficient costs and an appropriate commercial return on its investment.

(c) The effectiveness of the ceiling price test is further undermined if the railway owner is permitted to keep the determination of its costs confidential. For example, when BR made the determination of floor and ceiling costs under clause 10(1) of Schedule 4, these costs were kept confidential, and the ERA did not publish them as part of the public consultation process. The ERA also redacted significant elements of its final costs determination under clause 10(3) of Schedule 4. Without transparency in the cost determination process, access seekers and other users of the railway are not able to see what the "total costs" have been determined to be, and cannot assess whether the ceiling price test has been breached. This is a particular problem for the multi-user routes, which were the routes that BR had successfully requested to be redacted in the ERA's final determination.

(d) Further, even where the ceiling price test can be enforced, the over-payment rules only apply to operators outside the Code if the access agreement states that they apply.[39] The over-payment rules for BR (approved by the ERA in April 2011) (**Over-payment Rules**) state that:

> Access Revenue from Operators with Access Agreements negotiated outside the Regime (non-Regime operators) will also be included in evaluating [BR's] compliance with the Floor Price Test and Ceiling Price Test of the Code. furthermore, in assessing the extent of over-payment under section 47 of the Code, Access Revenues from non-Regime operators are included in the Ceiling Price Test. However, since the Code does not provide non-Regime operators a legal entitlement to any refund for any over-payment, such over-payments will be returned to [BR] unless otherwise specified in an Access Agreement with an Operator.

This outcome is inconsistent with the purpose of the over-payment rules, which is to address breaches of the ceiling price test in clause 8 of Schedule 4.[40] While the ceiling price test takes into account payments that are made by third parties who have obtained access outside of the Code, there is no provision for over-payments to be returned to out-of-Code operators. In combination with how hard it is to use the Code, this then provides the railway owner the opportunity to extract monopoly revenue from operators outside of the Code. This gives the railway owner incentives to keep access seekers outside of the regime provided by the Code.

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[39] Over-payment Rules for Brookfield Rail Pty Ltd, approved by the ERA in April 2011 (**Over-payment Rules**) at section 3(6).

[40] Code, section 47.

Operation of the test needs to be clarified

The operation of the ceiling price test therefore needs to be clarified, to ensure that it operates at all times and can be enforced at all times. There should be regular (ie annual) determinations of the applicable costs for the rail network and whether the ceiling price test has been met by the railway owner, which determinations should be made available to the public. Regular "mop-ups" should be able to be enforced if excess revenue has been charged - including provision for over-payments to be returned to operators outside of the Code. This approach is consistent with the "line in the sand" approach proposed by Frontier Economics in Part 3 of its submission to this review.

Examples can be taken from other access regimes, which require the railway owner to monitor and report on its costs. For example:

(a) Under the South Australian Rail Access Regime (**SARAR**), the regulator has the power to require the railway owner to provide certain information relevant to monitoring the costs of railway services provided by the operator. If the operator fails to comply, it is subject to a maximum civil penalty of $60,000.[41] The regulator then has a duty to report to the Minister, if requested, on the costs of railway services.[42]

(b) ARTC also undertakes to comply with considerable reporting requirements to the ACCC on its costing models and compliance with the applicable floor and ceiling tests. In the HVAU, ARTC must submit annual reports to the ACCC on, among other things, its compliance with the ceiling test, including allocation of the total under or over amount to customers. ARTC must also provide its spreadsheet or other models underlying calculations relevant to reconciling its access revenue with the applicable ceiling limit.[43] The structure of the access undertaking also means that the regulator approves ARTC's costs up-front, before the undertaking comes into effect. This avoids the problem under the Code that there is only a calculation of the "total cost" carried out once a proposal has been made.

The Over-payment Rules and Costing Principles applicable to BR's grain rail network provide for limited audits to be carried out by the ERA. However, CBH does not believe that these audits are sufficient to address the significant information asymmetries held by the railway owner, and to ensure that the ceiling price test is being met for users outside of the Code. Further, CBH has not been able to find reports of these audits on the ERA's website since 2009.

(a) BR's Over-payment Rules currently provide for an annual audit of the Over-payment Accounts by an independent auditor appointed by BR, but only if there are operators with access agreements under the Code.[44] Given that there are currently no operators with access agreements under the Code, it appears as if no such audits are being carried out. The ERA is also required to monitor BR's compliance with the Over-payment Rules through an audit of BR's obligations under the Over-payment Rules every 3 years, which is to be published on the ERA's website.[45] CBH notes that it has only been able to find records of these audits up until 2009 on the ERA's website.

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41 *Railways (Operations and Access) Act 1997* (SA), section 60.

42 *Railways (Operations and Access) Act 1997* (SA), section 64.

43 HVAU, Schedule G.

44 Over-payment Rules at page 5 (point 15).

45 Over-payment Rules at page 11.

(b) BR's Costing Principles require the ERA to monitor compliance through an audit conducted every two years. The ERA is required to publish this report on its website.[46] Again, CBH notes that it has only been able to find records of these audits up until 2009 on the ERA's website.

Cost requirement review

Previously, the ERA required a periodic review of floor and ceiling costs for the grain rail network to be carried out every three years.[47] However, in the ERA's decision in relation to the requirements for railway owners to submit floor and ceiling costs (dated August 2011) (**Cost Requirement Review**), the ERA determined that:

(a) it would only re-determine costs, if the ERA expects is likely that a new access proposal will be made, or if the railway owner initiated a re-determination;

(b) all floor and ceiling costs which are published in relation to clause 9 and 10 determinations will apply for five years (instead of three); and

(c) the ERA will not require railway owners to submit costs for re-determination at the expiration of the five year period (where previously, an automatic re-determination of costs was required on the expiration of the previous determination).

The ERA stated its view that a redetermination of costs is an "unnecessary regulatory requirement" in the absence of an access proposal being made for all or part of that route.[48] It also saw "limited circumstances when an existing determination would provide any more than a broad usefulness in indicating the likely terms to be offered by a railway owner".[49]

CBH does not agree with this assessment, and believes that the ERA's decision to reduce the amount of cost information available has placed users and access seekers at a disadvantage in dealing with the monopoly railway owner. Indeed, one of the primary rationales underpinning access regulation is to remedy the disparity of bargaining power between an access provider and access seeker. A key way to do this is by addressing the information asymmetry between the access provider and access seeker. Regular cost determinations are necessary to ensure continued compliance with the costing principles and over-payment rules, and is in the interests of potential access seekers and entities operating under agreements made inside and outside the Code. Further, the availability of transparent floor and ceiling costs (and publication of those costs) is critical to ensure ongoing transparency of costs and to address information asymmetries held by the monopoly owner (as will be discussed in section 7.3 below). The lack of available pricing information was identified by Karara Mining Ltd, in its submission to the Freight Rail Network Inquiry, as one of the reasons why it did not proceed under the Code (as discussed further in section 7.3 below).

CBH does not agree that the costing model provides "sufficient technical information for potential access seekers."[50] The ERA's decision to cease the cost re-determinations is also in direct contrast to other statements made by it regarding the importance of cost determinations in administering the railway owner's over-payment account.[51] For

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46 Costing Principles at page 19.

47 ERA, Final Decision on the Review of the Requirements for Railway Owners to submit Floor and Ceiling Costs (dated August 2011) (**Cost Requirement Review**) at paragraphs 24 and 25. This requirement is not set out in the legislation, but was stipulated in each floor and ceiling cost determination published by the ERA.

48 Cost Requirement Review at paragraph 46.

49 Cost Requirement Review at paragraph 72.

50 Cost Requirement Review at paragraph 73.

51 Cost Requirement Review at paragraph 43.

example, the ERA acknowledged that revenues may breach the ceiling price test, if the ceiling cost is not re-determined.[52] However, placing the responsibility on the railway owner to initiate such a re-determination is not effective to ensure that the ceiling price test can be enforced - as the railway owner has no incentive to request such a re-determination.

The fact that no costs determination had ever been made in relation to many of the routes on the grain rail network, and that BR fundamentally changed its method of determining costs since the last costs determination in 2007, was a key reason why the costs determination made by the ERA for CBH's access proposal took over 6 months to make. CBH believes that if regular costs determinations were required to be made and kept up-to-date, then there would not have been such a delay in the costs determination made under clause 10 of Schedule 4 for CBH's access proposal.

At the absolute minimum, CBH believes that the requirements to periodically re-determine the floor and ceiling costs applicable to the grain rail network should be re-instated on a more regular basis (ie annually), and the ERA should publish these reviews on its website in the interests of transparency for access seekers and users.

4.4 Minimum service quality standards

The Code imposes no substantive obligations on the railway owner in relation to performance requirements and minimum service standards. Rather, performance requirements are matters for which provision is to be made in the access agreement,[53] or (in the case of BR) otherwise enforced by the Public Transport Authority (**PTA**) as the lessor of the railway networks.

A railway owner has little incentive to maintain the performance of the network out of existing access revenue in the absence of firm obligations to do so, or unless an access seeker agrees to fund the very work that should be the core responsibility of a railway owner. The recent criticism of BR's performance on the grain rail network in WA (for example, in the Freight Rail Network Inquiry) demonstrates the need for minimum standards to be imposed as a firm obligation under the Code, rather than being open for negotiation.

Performance standards are a key issue for CBH in its negotiations with BR for access to the WA grain rail network. The efficient operation of the grain rail network is a critical component of the grain supply chain, helping to ensure WA grain growers remain internationally competitive. However, while access fees have been increasing, performance standards on the network have been steadily decreasing. CBH has been increasingly concerned about the current standard of the grain rail network, given the considerable speed and mass restrictions placed on Tier 1 and Tier 2 line sections, and the closure of the Tier 3 sections. These restrictions have significantly affected the efficiency of CBH's operations and, in respect of the Tier 3 lines, has meant that CBH has had to utilise other means to transport its grain to port (such as road). As stated in the Freight Rail Network Inquiry, "notwithstanding the express requirements of the lease, some parts of the rail network have not been maintained so that they are fit for purpose."[54]

Not only has this caused issues for the efficiency of CBH's rail operations, but it has also proven to be difficult in negotiating an access agreement (both inside and outside the Code). Without an enforceable minimum standard, CBH is unable to know whether BR is offering terms that are below the minimum standards in the lease or not, or whether the lease has standards that are unworkable. It is also difficult to assess the reasonableness

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52 Cost Requirement Review at paragraph 137.

53 Code, clause 11 of Schedule 3.

54 Freight Rail Network Inquiry at paragraph 7.21.

of any price offered, as CBH does not know what it is paying for in relation to the minimum standard performance, speed or weight that it should be getting for the access fees paid by it. Without an enforceable minimum standard, there is no effective way for CBH to have this discussion with BR during negotiations.[55]

An example of this failure can be found in the closure of the Quairading to York line by BR in October 2013. This line was closed following a derailment on the line.[56] However, this is despite obligations in the privatisation lease to maintain the lines to their initial performance standards. CBH also notes the findings of the Freight Rail Network Inquiry in relation to the withdrawal of this line from service in June 2009. During June 2009, the PTA advised that the Trayning to Merredin, York to Quairading, Katanning to Nyabing and Tambellup to Gnowangerup lines were withdrawn from service. However, according to the Freight Rail Network Inquiry, the suspension of these lines from service was not undertaken pursuant to any specific provision of the lease, and may in fact have been a breach of the lease.[57] The Freight Rail Network Inquiry stated that the lessee's ability to suspend these lines without consequence is an example of the inadequacy of the lease instrument to protect the state's interests,[58] and:

> the fact that [the suspension] could occur demonstrates an inherent problem with the lease. There are no clear remedies if there is a unilateral withdrawal of lines or suspension of lines from service.[59]

CBH is also concerned that the ability of a railway owner to "close" a line (or otherwise put it in "care and maintenance") may potentially be used by the railway owner as leverage to obtain a favourable access price, or other terms. For example, the railway owner could argue that, unless access prices are increased, then a route will be closed (or, if already closed, will not be re-opened).

This evidence shows an overwhelming need for the Code to take a more rigorous approach to regulating the availability, quality and standard of access services. The failure of the Code to address minimum service standards is not suitable to give effect to the following provisions of the CPA:

(a) Clause 6(5)(a) - the object of encouraging efficient use of, and investment in, railway facilities. This object is not currently being met in respect of the grain rail network. BR has allowed the railway network to deteriorate to a point where BR has decided to close some lines, and to impose significant operational restrictions on others. This has affected CBH's ability to conduct its operations efficiently. A major cause of this is the failure of the Code to regulate and enforce performance standards by BR. This object is not, and cannot, be given effect to if BR has no incentive to ensure a minimum standard of service.

(b) Clause 6(4)(i)(iv) - which provides that the terms and conditions of access should take into account the interests of users. In relation to a similar provision concerning the interests of prospective access seekers, the ACCC has noted that the interests of access seekers include a consideration of:

    (i) whether the service standards meet the reasonable needs of the user, including whether the access provider has demonstrated a commitment to ongoing maintenance of the service; and

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55 Freight Rail Network Inquiry at paragraph 6.31.

56 Brad Thompson, "Wheatbelt rail lines to close" published in the West Australian dated 3 October 2013 (available at https://au.news.yahoo.com/thewest/countryman/a/19223720/wheatbelt-rail-lines-to-close/).

57 Freight Rail Network Inquiry at 7.88 at Findings 22 and 23.

58 Freight Rail Network Inquiry, Finding 24.

59 Freight Rail Network Inquiry at 3.113.

(ii) whether the use of the infrastructure service is unnecessarily limited by restrictive standards imposed by the access provider.[60]

This can similarly apply in relation to existing users. In this case, the failure to provide for any minimum service standards is not in the interests of users. Rather, it is in their interests that the access provider is held to ongoing obligations to maintain its services, and is held accountable for the quality of service delivered.

(c) Clause 6(4)(i)(vii) – which provides that the terms and conditions of access should take into account the economically efficient operation of the facility. The NCC and the courts have stated that this means the facility should be operated in an "economically efficient" manner (as that term is understood by economists).[61] CBH believes that the current state of grain rail network shows that it is not currently being operated in an economically efficient manner by BR. This view was clearly supported by the views of the Committee under the Freight Rail Network Inquiry, which recommended that there be more proactive management by the PTA in relation to BR's performance obligations under the lease.[62] BR clearly has no incentive to do so if it is not held to any firm performance standards under the Code.

The ACCC has also supported the specification of minimum service quality standards as an important part of access regulation.[63] In its approval of the HVAU, the ACCC emphasised the importance of including incentives in the HVAU that should promote the economically efficient operation and use of infrastructure (consistent with the objects of the National Access Regime), and that should encourage ARTC to reduce costs and improve productivity (consistent with the pricing principles under the National Access Regime).[64] In accordance with this, the ARTC access undertakings have more satisfactorily addressed performance standards in the following ways:

(a) Under ARTC's IAU, ARTC is under an overarching obligation to maintain the network in a condition which is fit for use by the operator to provide rail transport services, having regard to the terms of its access agreements.[65]

(b) Under the HVAU, ARTC is required to negotiate in good faith the key performance indicators to be included in an Access Agreement. These are specifically required to be consistent with the performance indicators contained in the "NSW Lease" between ARTC and State of NSW over the Hunter Valley rail lines and infrastructure.[66] If the parties do not agree otherwise, the key performance indicators will be a subset of certain key performance indicators set out in Schedule D to the HVAU.

ARTC is also required to prepare and publish on its website a proposed performance incentive scheme which has the objective of encouraging ARTC, through financial reward, to improve operating, maintenance and capital

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60 ACCC, Approval of ARTC's 2008 Interstate Rail Access Undertaking dated 15 July 2008 (**ARTC IAU Approval**) at [30].

61 NCC, Guide to Certification of State and Territory Access Regimes dated November 2013 (**Guide to Certification**) at 4.37 and *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [133].

62 Freight Rail Network Inquiry at paragraph 7.56.

63 Productivity Commission 2013, *National Access Regime*, Inquiry Report no. 66, Canberra (**PC 2013 Inquiry**) at page 94.

64 ACCC, Approval of the ARTC's HVAU dated 29 June 2011, section 5.6.

65 ARTC IAU, section 8.1.

66 HVAU, section 13.2(b)(ii).

expenditure efficiency and achieve desirable safety performance. This scheme is developed through a consultative process, where ARTC must invite submissions from access holders and other stakeholders on the proposed scheme, and lodge with the ACCC a report for addressing options for the proposed scheme.[67]

Similar performance regimes should be considered under the Code, in particular by:

(a) Incorporating minimum service standards that the railway owner must meet. In particular, BR is under minimum performance standards under its lease arrangements with the State, including to maintain the network to a "fit for purpose" standard. Minimum service standards imposed under the Code should be linked to the higher of the standard required under the privatisation lease, and the standard required to be fit for the access seeker's present-day purpose, for a consistent approach. This could be similar to the provision in the HVAU regarding consistency with the "NSW Lease". To make this effective, CBH believes that users should be able to have input into the standard that is considered "fit for purpose". Existing users of the line are in the best position to judge what standard is required for their present and reasonably anticipated future purposes. A mechanism should be introduced that would allow users to have input into the minimum service standard requirements, for example, through a consultation process overseen or managed by the ERA.

(b) Ensuring the pricing adopted under the Code reflects the level of service standards actually being provided. This can be achieved by requiring the railway owner to provide information on how its price relates to the level of service quality being provided (as discussed at section 7.3 below) and develop a performance incentive scheme that has financial consequences for the railway owner if it does not comply with the minimum service standards.

(c) Express obligations, consistent with other access regimes, that expenditure undertaken by a railway owner be expenditure that would be undertaken by a hypothetical prudent railway owner, acting efficiently and in accordance with good industry practice.

[67] HVAU, sections 13.3, 13.4 and 13.5.

5. ISSUES RELATING TO CAPACITY

5.1 Meaning of capacity

CBH submits that the meaning of "capacity" under the Code needs to be clarified. The current definition is uncertain and there is scope for parties to apply different meanings to the term (and, perversely, for a different interpretation to be applied to each access proposal). For example, parties may interpret "capacity" as referring to the underlying infrastructure capacity of the particular route, or on the other hand, as referring to the current state of repair of the route.

However, arbitrations under the Code are private and are not binding on subsequent access proposals. The meaning of the term therefore needs to be clarified, to ensure it is interpreted consistently by all parties.

CBH submits that, on a proper interpretation, capacity refers to the underlying infrastructure capacity of the particular route, and not its current state of repair. CBH notes that the ERA has supported this interpretation. In its determination of costs relevant to CBH's access proposal dated 10 December 2013 (dated 30 June 2014), the ERA stated that it:

> "considers that the Code refers to extensions and expansions in the sense of creation of capacity in excess of the existing MEA specification of the route. The ERA considers that restoring capacity on the Tier 3 routes would not be considered an extension or an expansion in that sense, but more properly a repair or restoration as this would bring capacity back up to the MEA standard."[68]

5.2 Sections 8(4) and (5) – extensions and expansions

CBH supports clarifying the meaning of sections 8(4) and (5) of the Code such that there is certainty that a proponent can propose an extension or expansion at any time after making a proposal.

The intended effect of the Code must be to allow the parties to propose extensions or expansions at any time, including before or during negotiations. This is the only meaning that would give effect to the CPA. As outlined in Schedule 1 to this submission, clause 6(4)(j) of the CPA, read together with clause 6(4)(a), requires that matters of extension and expansion should be subject to negotiation between the parties. To properly facilitate such negotiations, it must be possible for an access seeker to propose an extension or expansion at any time.

Further, the failure to specify an extension or expansion in an access proposal should not provide a reason for the railway owner to refuse to deal with the proposal (or to claim that it is not a valid proposal). Following receipt of CBH's access proposal, BR claimed that CBH could not seek access to certain routes that it stated had no capacity (ie the Tier 3 lines). BR then refused to deal with CBH in relation to those lines and claimed that CBH's proposal was not valid in relation to those lines, until and unless CBH specified an extension or expansion. The railway owner should not be permitted to dispose of an access proposal in this way – ie to refuse to deal with the proposal for a failure to specify an extension or expansion.

The ERA itself has acknowledged this position, in its decision in accordance with the requirements of section 10 of the Code of Brockman Iron Pty Ltd's access proposal to the

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[68] ERA, Determination of costs relevant to CBH's access proposal dated 10 December 2013 (dated 30 June 2014) at paragraph 71.

network operated by The Pilbara Infrastructure Pty Ltd (dated 14 August 2013) (**TPI's section 10 decision**). The ERA stated, at page 5, that it was:

> of the view that the failure to specify an extension or expansion in an access proposal does not invalidate the [access proposal].

5.3 Sections 14 and 15 requirements

(a) Status as threshold issues

The Code currently operates so that the parties are unable to commence negotiations until the requirements of sections 14 and 15 have been met.[69] CBH believes there is no good reason why issues in relation to capacity and financial management/resources should hold up good faith negotiations between the parties. CBH submits that sections 14 and 15 should not be treated as threshold issues that must be satisfied before the parties can commence negotiations. Rather, they are issues that should form part of negotiations between the parties.

As discussed above, this issue has caused particular problems for CBH. Due to a dispute around whether the section 15 capacity requirements had been met by CBH, BR and CBH engaged in an arbitration under the Code. This took over nine months to resolve, and is one of the main reasons why CBH has not been able to proceed to negotiations sooner. CBH is frustrated that issues such as these have held up the application of BR's obligation to negotiate with CBH in good faith. CBH had been willing for these issues to be discussed as part of the negotiation process, and believes that this would have led to a more efficient resolution of such disputes.

The status of sections 14 and 15 as threshold issues is not suitable to give effect to the CPA, which emphasises the primacy of commercial negotiations between the parties. As discussed above, the purpose of clauses 6(4)(a) to (c) is to allow the parties to reach agreement by commercial negotiation first and foremost. Further, clause 6(4)(j) has been interpreted by the NCC as requiring matters of extension/expansion (which are tied to the issue of capacity) to be subject in the first instance to negotiation. Allowing the access provider to hold up negotiations on the basis of capacity issues is not a suitable way to give effect to these negotiation principles.

CBH notes that the ERA itself has indicated that there should be opportunities after commencement of negotiations for the railway owner to raise matters of the type covered by sections 14 and 15, in TPI's section 10 decision. The ERA stated that, at page 7 of the decision:

> the scheme of the rail access regime does not require a proponent to undertake feasibility studies or include evidence of its financial standing in its access proposal. Rather, it is clear from Part 3 of the Code that there are opportunities, after commencement of negotiations, for the railway owner to require a proponent to provide information with respect to its financial resources to carry on the proposed rail operations and how its proposal for access can be accommodated on the route.

While the specific processes in section 14 and 15 must occur before negotiations can commence, CBH agrees that matters concerning the capacity of a route, any extension or expansion of a route, and the financial standing and resources of an access seeker, can be—and properly should be—addressed as part of negotiations, rather than as a pre-cursor to them.

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[69] Code, section 19.

Further, other rail access regimes do not allow these issues to delay good faith negotiations. For example under the SARAR, the operator is required to negotiate in good faith with an access proponent on whether its requirements as set out in the access proposal could reasonably be met, and if so, the terms and conditions for the provision of access[70] This means that issues of capacity are treated as part of the negotiation process – which is more suitable for giving effect to the principles of negotiation set out in the CPA. Further, under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**), there is no requirement for the parties to resolve issues relating to capacity or financial management before negotiations commence.

This issue is also tied to the need for the Code to facilitate a more streamlined path to negotiation under the Code. This is discussed in more detail at section 3 above.

(b) Inappropriate onus on the access seeker – section 15

If section 15 is to remain in place as a threshold issue, then CBH believes that it inappropriately places the onus on the access seeker to show that its proposed operations can be accommodated on the route. This is due to the information asymmetry that the railway owner has in relation to the rail network. The access seeker does not have sufficient information or expertise in relation to the rail network (including, for example, knowledge of the underlying capacity of the route, or of other user's requirements) to make a judgment as to whether its operations can be accommodated.

Rather, it is the railway owner who is best placed to assess the capacity of the rail network. The onus should be on the railway owner to carry out the capacity analysis and determine whether the proponent's proposed operations can be accommodated on the route (in particular, having regard to its obligations under clause 6(4)(e) of the CPA to use reasonable endeavours to accommodate the requirements of persons seeking access). The NCC has interpreted clause 6(4)(e) as requiring obligations to be placed on the access provider to:

(i) provide a written explanation as to why a particular request for access cannot be accommodated (including likely prospects for future access); and

(ii) use all reasonable endeavours to accommodate a request for access to spare capacity.[71]

It is inconsistent with these requirements to force the access seeker to prove the capacity of the railway network (especially where it has limited information about the railway network). In general, the timeliness of decision-making can be improved by ensuring that the informational burden is placed on those best able to bear it.[72]

Placing the onus on the railway owner is more consistent with the approach taken in other jurisdictions. Generally, it is the railway owner who has responsibility for carrying out a capacity analysis/capacity allocation, and to assess whether there is sufficient capacity to meet the access seeker's request. For example:

(i) Under Pacific National's Access Arrangement for the South Dynon Terminal, it is required to carry out capacity allocation of available capacity, in

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70 *Railways (Operations and Access) Act 1997* (SA), section 32(1).

71 Guide to Certification at 5.6 and Essential Services Commission of South Australia, 2009 South Australian Rail Access Regime Inquiry – Final Inquiry Report dated October 2009 (**ESCOSA Final Inquiry**) at 4.2.1.

72 BERI Working Paper at page 100.

accordance with the capacity allocation protocol (found at Annexure B of the Access Arrangement). This sets out the procedure that Pacific National must follow on receipt of an access application in assessing whether there is sufficient capacity to meet the access seeker's request.[73]

(ii) Under the ARTC IAU, ARTC is required to undertake a "Capacity Analysis" as part of preparing an Indicative Access Proposal for the access seeker. The Capacity Analysis identifies whether there is sufficient available capacity to meet the requirements of the applicant, and if not, the extent to which additional capacity is required. It also sets out how capacity is to be allocated in the case of multiple applicants.[74]

CBH believes there is also merit in clarifying section 15 (if it is to be retained) to address the relevant criteria for raising a capacity argument. Otherwise, railway owners are too easily able to use capacity issues as a reason to avoid negotiations, or to attempt to hinder access by the access seeker (which is inconsistent with clause 6(4)(m) of the CPA). For example, the railway owner should be under a more robust obligation to:

(i) assess the capacity of the route, in line with specified criteria; and

(ii) determine whether the access seeker's requirements can be accommodated on the route (also in line with specified criteria); and

(iii) provide a written and detailed explanation as to why a particular request for access cannot be accommodated (including likely prospects for future access).

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[73] Pacific National's access arrangement for the South Dynon Terminal Access Arrangement (approved in June 2012), Annexure A, clause 5 and Annexure B.

[74] ARTC IAU, Part 5.

6. DISPUTE RESOLUTION

6.1 Sections 24 and 26 – panel of arbitrators

Sections 24 and 26 of the Code establish a process for the ERA to appoint an arbitrator from a panel of persons selected solely by the ERA. The ERA may only include or remove persons from the panel on the recommendation of the Chairman of the WA Chapter of the Institute of Arbitrators and Meditators Australia (**IAMA**). The parties to the dispute have no ability to participate in the process of establishing the panel or appointing the arbitrator.

In CBH's experience, this can discourage access seekers from relying on the arbitration process under the Code. Every dispute is different, and may require arbitrators of different experiences and backgrounds. In some cases, the parties are better placed to judge this than IAMA, or potentially the ERA.

CBH also cannot see any reason why the ERA must act only the recommendation of the Chairman of IAMA (who need not consult with anyone, including IAMA itself). Parties to commercial disputes routinely agree on an arbitrator without the need for the intervention of a regulator or an arbitrary body such as IAMA – it is not controversial to allow them to do so. CBH is also unclear as to why one organisation that has no "official" status should have such a critical role under the Code. IAMA is not the only person or body who is capable of making such a recommendation – the ERA itself could make this recommendation. Further, given that it is the Chairman of IAMA who is making the recommendation, there is risk that third parties could view the Chairman as being placed in a position where he or she has an apparent conflict of interest between making independent recommendations to the ERA, and his or her role as a representative of IAMA if he or she makes a recommendation from the IAMA membership.

The failure to allow the parties to participate in the appointment process does not give effect to the following provisions of the CPA:

(a) clause 6(4)(c) of the CPA - which provides that the right to negotiate access should provide for an enforcement process. As outlined in Schedule 1 to this submission, this requires there to be an effective means for dealing with situations where the parties are unable to reach agreement.[75] To be effective, the parties must have confidence in the dispute resolution process, which is generally facilitated by transparent and consultative processes. It will facilitate more effective dispute resolution, in line with these requirements, if the parties are able to appoint an arbitrator in which they have confidence.

(b) clause 6(4)(g) of the CPA - which specifically states that the owner and access seeker should be required to appoint and fund an independent body to resolve the dispute. This implies that the parties should be free to appoint an arbitrator amongst themselves, rather than the regulator doing so.

This issue was discussed by the NCC in its final recommendation on the certification of the SARAR. The NCC noted that arbitrator appointment was made by the regulator (the Essential Services Commission of South Australia) rather than the parties.[76] However, clause 6(4)(g) could still be satisfied because the parties were able to be involved in the appointment process. Before appointing an arbitrator, the regulator was required to

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[75] Guide to Certification at 5.1.

[76] NCC's Final Recommendation on the certification of the SA Rail Access Regime dated 26 May 2011 (**SARAR Final Recommendation**) at page 35.

consult with each of the parties and attempt to make an appointment that is acceptable to all parties.[77]

CBH submits that the parties should, at a minimum, be able to agree on an arbitrator, or have a right to nominate persons to the panel for the ERA to choose from. However, it would be reasonable to retain the right of the ERA to appoint the arbitrator where the parties cannot agree on an appointment.[78]

6.2 The ERA as the arbitrator?

As an alternative, Frontier Economics has suggested that the ERA could take the role as the arbitrator under the Code, in line with other access regimes (see section 2.3.5 of Frontier Economics' submissions).

CBH's position is that it would be appropriate for the parties to have the right to appoint their preferred arbitrator. However, the proposal by Frontier Economics may be worthy of further exploration. A range of factors would need to be addressed, including the additional resources the ERA is likely to require, given that it does not currently undertake an arbitration role under the Code.

CBH also believes that (as set out in section 6.5 below), an arbitration (whether by the ERA or an independent arbitrator) should be subject to merits review.

6.3 Time limit on arbitrator decision

CBH supports a time limit being imposed for the conclusion of an arbitration under Part 3 Division 3 of the Code. CBH has experienced considerable delay in progressing its access proposal under the Code, due to the need to commence dispute resolution in relation to section 15 requirements. The arbitration process took over nine months, from the date that CBH submitted a notice of dispute to the railway owner, to the date that a final arbitration determination was made. This delay had a detrimental effect on CBH's ability to secure efficient access to the rail network for the benefit of its members and the WA grain industry.

Imposing a time limit would ensure that costs are minimised and that negotiations can be commenced more efficiently, consistent with the negotiate-arbitrate principles under the CPA, and the overall objective of ensuring economically efficient outcomes. It would also redress the railway owner's market power, by facilitating a quicker and more streamlined path to negotiation (in line with CBH's submissions in section 3 above).

CBH also notes that, under clause 2.6 of the Competition and Infrastructure Reform Agreement dated 10 February 2006 (**CIRA**) (which aimed to reinforce the principles agreed under the CPA), the parties agreed to introduce requirements that regulators be bound to make regulatory decisions within six months, provided it has been given sufficient information. This has been implemented in other jurisdictions - for example:

(a) In South Australia, the award must be made within six months from the date the dispute was referred to arbitration.[79]

(b) Under Part IIIA of the CCA, the ACCC is required to make a final determination within 180 days from the time the application is received (with provision being made for certain disregarded time).[80]

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77 *Railways (Operations and Access) Act 1997* (SA), section 37(2).

78 SARAR Final Recommendation at page 36.

79 *Railways (Operations and Access) Act 1997* (SA), section 50A.

(c) In Victoria, dispute resolution is carried out by the regulator, the Essential Services Commission (**ESC**), which is given 45 days to make a dispute resolution decision.[81] The ESC can also make an "interim decision" in respect of a dispute, before making a final decision.[82] This may provide the parties with greater certainty as to the likely outcome of a dispute, while awaiting full resolution.

6.4 Extended scope of meaning of disputes

(a) Second Review Recommendation 3 – not supported

CBH notes the ERA's Second Review Recommendation 3, that section 25 of the Code should be amended such that the definition of "disputes" includes all information provision and negotiation obligations on railway owners under Parts 2 and 3 of the Code. CBH agrees that there is a need for the Code to improve the ability of parties to enforce the information provision and negotiation obligations under Parts 2 and 3. However, it does not believe that submitting these kind of obligations to arbitration under the Code will lead to efficient or timely outcomes. An arbitration process can be lengthy and unpredictable (even if a time limit is imposed on arbitration, as CBH submits it should). It would be disruptive and costly for the access seeker to have to commence arbitration proceedings every time the parties disagree about what information has been or must be provided. Further, an arbitrator may not necessarily be the most appropriate person to enforce these obligations. These are often not disputes about negotiation or factual issues, but rather compliance with statutory obligations (such as information provision obligations). It is more appropriate for the ERA to enforce these kinds of statutory obligations, by issuing orders, penalties or infringement notices (as discussed in section 8.1 below).

Instead of submitting these kinds of issues to arbitration, there should a more streamlined enforcement process (led either by the access seeker or the ERA) to enforce the Part 2 and Part 3 obligations under the Code. CBH's submissions on this issue are outlined in more detail at section 8.1 below.

(b) Revising meaning of disputes

However, CBH does believe there is merit to revising the meaning of "disputes", so that the parties do not have to wait out the entire negotiation period before they can refer a matter to arbitration. Currently, the parties are only in "dispute" if:

(i) the railway owner has refused to negotiate in good faith;

(ii) there is a dispute about section 14 and 15 requirements; or

(iii) the parties have entered into negotiations but have not reached agreement on the provisions to be contained in an access agreement before the termination day, or before the termination day, the parties have jointly made a written determination that the negotiations have broken down.

This has the effect of frustrating the access seeker's ability to commence dispute resolution where it has reached an impasse with the railway owner. For example, the access seeker may believe that it has exhausted its ability to negotiate with the railway owner on a certain issue or at all. However, it is incapable of commencing dispute resolution until the entire negotiation period has passed, or the railway

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80 CCA, section 44XA.

81 *Rail Management Act 1996* (Vic), section 38ZY.

82 *Rail Management Act 1996* (Vic), section 38ZZO.

owner agrees that negotiations have broken down (which the railway owner may not easily agree to if it does not want to go to arbitration). This outcome is not suitable to give effect to the principles of negotiation and dispute resolution under clauses 6(4)(a) to (c) of the CPA, or the CPA's object of ensuring economically efficient outcomes. As discussed above, these principles emphasise the need for a timely, transparent and efficient process. This means that disputes should be able to be dealt with in a timely manner, as and when they arise. It is not efficient to force an access seeker to waste time and money in waiting out a negotiation period, until it can commence effective dispute resolution.

Other jurisdictions define "dispute" more broadly and allow the access seeker to commence dispute resolution at any time the parties are unable to agree (rather than forcing the parties to wait out a specified period). For example:

(i) Under Part IIIA of the CCA, either party may notify the ACCC that an access dispute exists if a third party is unable to agree with the provider on one or more aspects of access to a declared service.[83]

(ii) Under the SARAR, a dispute arises if the proponent fails to obtain an agreement on the proposal, after making reasonable attempts to reach agreement with the operator.[84] This means the access seeker can raise a dispute at any time, if it feels it has already made a reasonable attempt to agree on particular issues. It also doesn't need the agreement of the operator to exercise these rights.

(iii) Under the National Gas Law (**NGL**),[85] the access seeker is able to notify the dispute resolution body of an access dispute at any time that it is unable to agree with the service provider about one or more aspects of access.[86] The access arrangement for the Dampier to Bunbury Natural Gas Pipeline (made under the NGL and approved by the ERA on 5 October 2012) also specifically recognises the need to resolve disputes as and when they arise in a timely and cost effective manner.[87]

CBH believes that the scope of when a "dispute" can arise under the Code must be extended, to allow the access seeker to commence dispute resolution at any time. The ultimate goal of the Code should be to facilitate a more streamlined path to a negotiated outcome, in line with the CPA's object of ensuring economically efficient outcomes.

CBH notes that section 35 of the Code already provides protection for the integrity of the dispute resolution process – ie by providing that an arbitrator may terminate an arbitration if the referral to arbitration was vexatious, the subject matter of the dispute is trivial, misconceived or lacking in substance, or if the other party has not engaged in negotiations in good faith.

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83 CCA, section 44S.

84 *Railways (Operations and Access) Act 1997* (SA), section 34(c).

85 *National Gas Access (Western Australia) Law* as applied as a law of Western Australia under section 7 of the *National Gas Access (WA) Act 2009* (**NGL**).

86 NGL, section 181.

87 See the revised access arrangement for the Dampier to Bunbury Natural Gas Pipeline (approved on 5 October 2012), section 24.2.

6.5 Merits review

Clause 6(5)(c) of the CPA outlines the requirements of merits review, where merits review of decisions is provided for in an access regime (although does not require an access regime to provide for merits review). While the Code does not currently contain a merits review mechanism, CBH believes that it may be appropriate for merits review of arbitration determinations to be available to an access seeker, particularly given the recommendations made in other parts of this submission.

The NCC has stated that a decision on whether or not to include merits review in an access regime may be informed by issues including:

(a) the likely complexity and extent of regulatory intervention;

(b) the potential impact of regulation on property rights and values;

(c) the risk of "gaming" of processes by participants; and

(d) the need to balance potential delays to access against the need to protect the rights of affected parties.[88]

In particular, CBH believes it may be advantageous for the parties to be able to invoke merits review in a relation to an arbitration that is concerned with pricing issues or performance standard issues. The arbitrator is given limited guidance in determining access disputes, apart from compliance with the Part 5 instruments and the general overarching principles in clauses 6(4)(i), (j) and (l) of the CPA. There is significant room for flexibility in interpreting and applying these principles, particularly in relation to pricing, where there is a very wide gap between the floor price and ceiling price that is presented to the arbitrator. Merits review would assist in giving the access seeker sufficient oversight over the price setting process - in circumstances where there is limited regulatory intervention, but significant consequences of an unfavourable decision.

However, if merits review is considered, CBH believes that there is a need to balance this process with the need to reduce the scope of delay in the process. Part 5 of the NGL is an example of a limited merits review regime which deals with this balance in an efficient way.[89] For example, merits review is only able to be made to the Australian Competition Tribunal (**Tribunal**) for "reviewable regulatory decisions" on certain specified grounds, and the Tribunal is only permitted to have regard to certain "review related matter." The Tribunal is also required to consult with users and consumers before it makes a determination, and must be satisfied that its decision will result in a "materially preferable decision" that contributes to achieving the national gas objective.[90] CBH notes that merits review of arbitration determinations is also provided for under Part IIIA of the CCA.[91]

6.6 Precedent value of arbitration determinations

As access arbitrations under the Code are "private", and the determinations are subject to the strict confidentiality requirements imposed by the *Commercial Arbitration Act 2012* (WA), arbitration determinations currently have no "precedent" value to other access seekers. Those restrictions essentially mean that arbitration determinations can only be disclosed with the consent of both parties.

This creates a number of issues, including:

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88 Guide to Certification at 6.13.

89 Guide to Certification at 6.15.

90 Guide to Certification at 6.15.

91 CCA, section 44ZP.

(a) potentially inconsistent outcomes for access seekers, even if the access seekers are seeking the same service and are otherwise in the same position as each other; and

(b) "wasted" time and effort for access seekers, as the decisions made in one arbitration determination cannot be transferred to another. By contrast, a railway owner can develop its strategy and arguments based on its past experience in other access arbitrations.

CBH submits that these issues should be addressed by making arbitration determinations public (subject to appropriate protections to allow for genuinely confidential information to be "redacted").

7. INFORMATION DISCLOSURE REQUIREMENTS

7.1 Outline

One of the fundamental ways in which a railway owner is able to exercise, and otherwise take advantage of, its market power over an access seeker is through maintaining an information asymmetry. This is expressly recognised in clauses 6(4)(a) – (c) of the CPA, which require a facility owner to:

(a) sufficiently address information imbalances between the parties, to enable the access seeker to conduct meaningful negotiations;[92] and

(b) provide sufficiently detailed information to the access seeker on the terms of access, including price, to ensure that an access seeker can understand the basis on which access is to be offered and make an informed decision.[93] This information must be made available in a transparent and timely manner.[94]

As outlined in this part of the submission, CBH's experience is that the information asymmetry between railway owner and access seeker is not suitably addressed in the Code, and a railway owner is able to utilise that to its advantage.

7.2 Part 2A – Publication of information

CBH supports the ERA's Second Review Recommendation 1, that Part 2A should impose a further requirement that the information required to be provided by a railway owner under sections 6(a) and 6(b) of the Code should be published on the railway owner's website. This would make it easier for prospective users to access the required information, without needing to spend time and resources in making requests to the railway owner for that information (and CBH notes that there is nothing in section 7A which requires the railway owner to provide the information in a hard-copy format within a reasonable time).

In responding to CBH's requests for the required information under the Code, BR simply referred CBH to its website. CBH needed to make repeated requests for the required information to be provided in full in a hard-copy format, as required by section 7A of the Code. Any requirement for the required information to be published on the railway owner's website would therefore need to be effectively enforced by the ERA, to ensure that all required information is published and kept up-to-date.

CBH also submits that, from a practical perspective, the specification of the required information in Schedule 2 of the Code needs to be improved. Items 4(l) and (m) of Schedule 2 require the railway owner to provide details of the "total gross tonnage" and "total tonnage of freight carried" (effectively a net tonnage). This demand information creates practical issues because it is not set out in a way that can be easily assessed by the access seeker. There are two issues with this information:

(a) "Gross tonnes" and "net tonnes" does not align with the standard measure used for demand in the rail industry – which is gross tonne kilometres (or **GTKs**). GTKs are based on gross tonnes, plus estimated rolling stock weight, multiplied by track kilometres travelled by each gross tonne. CBH submits that the demand information in items 4(l) and (m) should be provided in GTKs, to ensure alignment with the measures used practically by the parties, and to ensure that usage can be more easily assessed by the access seeker.

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92 NCC, Final Recommendation on certification of the Dalrymple Bay Coal Terminal Access Regime (dated 10 May 2011) at 5.23.

93 ESCOSA Final Inquiry at 4.2.1.

94 ESCOSA Final Inquiry at 4.2.1.

(b) The data in items 4(l) and (m) does not include the origination point for the usage on each route section. This makes it difficult to assess the actual proportion of usage on that section. CBH submits that items 4(l) and 4(m) should be amended to include a specification of the origination point for the usage data.

7.3 Need for increased information disclosure and transparency

(a) Background to issues

An access seeker who wishes to make a proposal under the Code has several sources of information available to it regarding the railway network and the proposed terms and conditions of access. The required information under Part 2A, the preliminary information under section 7 and the publication of the Part 5 instruments, effectively amount to a description of the network and a summary of the prospective terms and conditions of access that the railway owner proposes. However, CBH believes that the information disclosure requirements of the railway owner under the Code need to be clarified and significantly strengthened to adequately give effect to the relevant principles in the CPA.

As discussed above, the principles in clauses 6(4)(a) – (c) of the CPA emphasise the primacy of commercial negotiations between the parties. This encompasses a requirement for the railway owner to:

(i) sufficiently address information imbalances between the parties, to enable the access seeker to conduct meaningful negotiations;[95] and

(ii) provide sufficiently detailed information to the access seeker on the terms of access, including price, to ensure that an access seeker can understand the basis on which access is to be offered and make an informed decision.[96] This information must be made available in a transparent and timely manner.[97]

CBH believes that the Code does not adequately give effect to these principles, as it does not promote the transparency of information nor address information asymmetries between the railway owner and access seeker. This is a significant disincentive for access seekers to use the Code. In particular, the access seeker is not able to access sufficiently detailed information regarding important issues such as pricing and performance standards. In CBH's case, to understand the price it may need to pay for access, to understand why capacity is not available, and to prepare for effective negotiations.

CBH is not the only proponent who has struggled with the lack of information disclosure and transparency under the Code. Karara Mining Ltd (**Karara**) is presently party to an access agreement negotiated directly with BR "outside the Code", but had originally looked to the Code for support in gaining access to the freight rail network operated by BR.[98] After seeking the advice of the ERA and independent legal advice, Karara formed the view that the regulatory framework could not provide sufficient certainty for achieving its desired outcome within an acceptable timeframe, and concluded that engaging the Code would be a "waste of time".[99]

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95 NCC, Final Recommendation on certification of the Dalrymple Bay Coal Terminal Access Regime (dated 10 May 2011) at 5.23.

96 ESCOSA Final Inquiry at 4.2.1.

97 ESCOSA Final Inquiry at 4.2.1.

98 Freight Rail Network Inquiry at paragraphs 6.46 and 6.49.

99 Freight Rail Network Inquiry at paragraph 6.50.

For the purposes of the Freight Rail Network Inquiry, Karara gave evidence to the Committee which demonstrates the public interest in ensuring greater transparency and availability of pricing information under the Code. Karara identified (amongst other things) the lack of existing pricing information as a key impediment to relying on the provisions of the Code. Karara stated that because there was "no real mechanism to get a floor and ceiling price and there was no information on existing floor and ceiling prices, [the Code] was completely ineffective and of no use".[100] Karara informed the Committee that there was "not enough transparency on all [the] inputs into how a tariff would be calculated".[101] The Code was contrasted with the greater transparency found under the regulatory framework for rail access in the Queensland market (which provides for a register of previous deals and transparency on previous access terms), which was suggested by Karara as functioning to facilitate better negotiations.[102] Similarly, Karara noted that there is a greater level of transparency within the mining industry generally as to applicable mining rates, given that there is a range of service providers and the ability to access the cost models used by contract miners. However, in the WA freight rail market, Karara noted that "there is only one realistic provider of the service, and getting real insights into what their true costs are is much more difficult". [103]

Ultimately, Karara elected to negotiate "outside the Code" for access. However, Karara described to the Committee the difficulties it faced in negotiating with a monopoly provider in an unregulated market, where there was essentially "a monopolistic provider of those services [which] puts the balance of the negotiation power too much on one side and not enough on the company that is trying to get access to that infrastructure".[104] Overall, Karara submitted that the lack of regulation "jeopardised the deal", and that "there could have been a better deal… if there was a stronger regulatory framework".[105]

In the following paragraphs, CBH addresses the need for greater transparency in relation to pricing and service quality, and identifies specific aspects of the information provision requirements that require clarification.

(b) Increased disclosure of pricing information

The Code does not provide for sufficient information to be made available to an access seeker regarding access prices and the methodology on which these prices are based. As part of the preliminary information under section 7, the railway owner is only required to provide an initial indication of the "price that the entity might pay for access". This is provided without any information on how this price was derived, or the principles or costs on which it was based.

This was insufficient for it to understand whether this price was reasonable, how it related to the pricing guidelines under the Code, and how the prices were attributable to each route requested by CBH. From a commercial and practical perspective, it is difficult to prepare a proposal for access without knowing the access charges for each route, and the costs on which they are based.

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100 Freight Rail Network Inquiry at paragraph 6.51.

101 Freight Rail Network Inquiry at paragraph 6.55.

102 Freight Rail Network Inquiry at paragraph 6.52.

103 Freight Rail Network Inquiry at paragraph 6.53.

104 Freight Rail Network Inquiry at paragraph 6.56.

105 Freight Rail Network Inquiry at paragraph 6.61.

Further, under section 9, the railway owner is only required to provide the floor price and ceiling price for the proposed access, the costs for each route section on which those prices have been calculated, and a copy of the costing principles.

CBH believes that this level of information is not sufficient for it to properly understand the basis on which the proposed access is to be provided on a route-by-route basis. CBH also had no indication of how these prices had been derived, how they related to the pricing guidelines under the Code, or how they related to the level of service that CBH would be getting. CBH has been forced to seek injunctive relief in order to have full disclosure of the costs required for each route under section 9(1)(c) of the Code.

This outcome does not give effect to the following provisions of the CPA:

(i) Clauses 6(4)(a) – (c), which promote principles of commercial negotiation. As discussed above, these principles require the access seeker to be provided sufficient information on the terms of access, including price, to understand the basis on which access is being proposed, and to prepare for effective negotiations.

(ii) Clause 6(4)(e), which provides that railway owner must use all reasonable endeavours to accommodate the requirements of persons seeking access. The NCC has interpreted this principle as requiring obligations to be placed on the railway owner to (among other things) provide access seekers with sufficient information to understand the indicative terms and conditions, and how access prices or tariffs have been derived.[106]

Pricing disclosure requirements in other jurisdictions are far more detailed and require greater transparency of pricing outcomes. Methods that have been adopted in other jurisdictions include the preparation of an access arrangement, which is approved by an independent regulator. The access arrangement often requires the railway owner to publish indicative access charges that an access seeker can expect to pay for each service. The access arrangement may also be accompanied by "access arrangement information", which sets out, in a clear and focused way, detailed information up-front in relation to how prices have been derived and how they relate to pricing principles. For example:

(i) In South Australia, the operator is required to provide a detailed "information brochure" to any applicant on request, containing a statement of the terms and conditions on which the operator is prepared to make the infrastructure available for use. This is given before a proposal has been made. The brochure must refer to any relevant pricing principles and show how the terms and conditions relate to, or compare with, relevant pricing principles.[107] It must provide:

(A) indicative floor and ceiling prices for all significant railway services, being services it provides that are, or are highly likely to be, subject to access interest;

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106 Guide to Certification at 5.6 and ESCOSA Final Inquiry at 4.2.1.

107 *Railways (Operations and Access) Act 1997* (SA), section 28.

(B) accompanying statements explaining how the floor and ceiling prices relate to each aspect of the pricing principles, including the value of the real rate of return used and the latest regulatory asset values used, by railway segment;

(C) the prices for any other items for which a charge would be made (eg for particular services or items of plant);

(D) any price penalties that may apply (eg delays or disruptions caused to other services);

(E) the basis for charging any direct costs arising from the applicant's operations (eg due to damage caused); and

(F) any other prices that would be charged.[108]

This provides for far greater information disclosure than under the Code, which only requires indicative floor and ceiling prices under section 7(1), and limited price and costs information under section 9 (without any such accompanying statements).

(ii) Under the ARTC IAU, ARTC is required to publish indicative access charges, which are approved by the ACCC as part of its approval of the undertaking. The indicative charges comprise a variable tariff and flagfall tariff for each segment.[109] The undertaking also sets out the pricing principles that govern the setting of access charges and the structure of charges.[110] The access seeker can request ARTC to provide further details on the incremental cost for each segment to which access is being sought, and the "Economic Cost" determined in accordance with the undertaking.[111] This is provided before an access application is even made.

(iii) In Victoria, the *Rail Management Act 1996* (Vic) requires a railway owner to submit an access arrangement for approval by the ESC. Under the access arrangement, the railway owner must set out, up-front, details of each "reference service" which it proposes to provide, including the price, or methodology for the calculation of the price, to be charged in respect of the provision of each reference service.[112] These are then subject to approval by the ESC. The access arrangement also includes "access arrangement information", being information that is reasonably required to understand how the elements of the access arrangement have been derived.[113]

CBH believes that the Code should require the railway owner to provide more detailed and transparent pricing information at a preliminary stage, before negotiations commence. This information should be provided without confidentiality claims being made by the railway owner, including in relation to multi-user routes (detailed submissions on this point are in section 8.2 below). There is merit in following the approach taken in other jurisdictions to the publication of indicative access charges (which may be subject to regulator scrutiny), and statements explaining how the charges have been derived. This

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108 ESCOSA, Final Decision on the Information Kit Review (dated March 2010) (**Information Kit Review**), section 4.3.

109 ARTC IAU, section 4.6; HVAU, section 4.14.

110 ARTC IAU, Part 4.

111 ARTC IAU, section 3.3(ix).

112 *Rail Management Act 1996* (Vic), section 38X(1)(a)(iv).

113 *Rail Management Act 1996* (Vic), section 38W(2).

would enable the access seeker to understand the charges it may be expected to pay for access before commencing negotiations, and to have confidence that these are consistent with the pricing principles. There should also be greater regulatory scrutiny of this information (ie having indicative prices subject to up-front regulator approval) to ensure the railway owner is held accountable for its compliance with the pricing principles.

As discussed in section 4.3 above, CBH believes that the decision of the ERA in the Cost Requirement Review to reduce the cost re-determinations imposed on a railway owner has placed users and access seekers at a disadvantage in dealing with the monopoly railway owner. The continued availability of transparent floor and ceiling costs (and publication of those costs) is critical to ensure ongoing transparency of costs and to address information asymmetries held by the monopoly owner. CBH does not agree that the costing model provides "sufficient technical information for potential access seekers."[114] At the absolute minimum, CBH believes that the requirements to periodically re-determine the floor and ceiling costs applicable to the grain rail network should be re-instated on a more regular basis (ie annually), and the ERA should publish these reviews on its website in the interests of transparency for access seekers and users.

(c) ***Performance indicators and service quality***

As discussed above, CBH considers that the Code does not adequately deal with issues relating to service quality. Nor does it adequately deal with performance indicators. This is left to negotiation between the parties. However, CBH believes that greater transparency and disclosure of performance indicators and service standards is warranted to give effect to the CPA, by ensuring that access seekers are informed about the quality of services provided, and railway owners are held accountable for service standards. A related issue is whether the Code should impose minimum service standards on railway owners. This is discussed further at section 4.4 above.

CBH makes this submission particularly in the context of the deteriorating performance standards on the grain rail network. While access fees requested by BR have been significantly increasing, performance standards have been decreasing. For example, there are currently 942 separate permanent speed and mass restrictions placed on Tier 1 and Tier 2 line sections[115], which significantly hinder effective supply chain operations. Further, CBH has experienced ongoing issues in relation to the closure of the Tier 3 lines, which has meant that CBH has had to look to other supply chain solutions to transport its grain to port. CBH has been increasingly frustrated by these restrictions, as they have significantly affected the efficiency and competitiveness of its grain operations. Without adequate transparency around BR's performance, CBH is concerned that BR has had no incentive to ensure a minimum standard of service on the grain rail network.

Further, CBH does not know what it is paying for in relation to the minimum standard performance, speed or weight that it should be getting for the access fees paid by it. As an example, BR has proposed to further increase access fees, despite the restrictions and closures outlined above, and without changing the performance standards delivered by it. CBH acknowledges that, due to the intervention of the Freight Rail Network Inquiry, it has obtained a copy of the privatisation leases of the railway network, including the initial lease performance

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114 Cost Requirement Review at paragraph 73.

115 As previously indicated, CBH accepts that some speed restrictions are appropriate. However, CBH is concerned about the high number of them, and the fact that they are increasing.

standards. However, this does not explain how or why speed and weight restrictions are imposed, and the Code does not include a performance standard regime. Without transparency around these issues, there is no way for CBH to effectively have this discussion with BR during negotiations.[116]

The failure of the Code to provide transparency around performance issues fails to give effect to the following provisions of the CPA:

(i) Clauses 6(4)(a) – (c) - as discussed above, these require the access regime to adequately address information imbalances between the parties, and to provide sufficiently detailed information on the terms of access (which would include the quality of that access). Currently, there is a significant information imbalance regarding performance, such that CBH and members of the public have had limited transparency around BR's obligations to maintain the network in a "fit for purpose" standard.

(ii) Clause 6(4)(e) - which requires the railway owner to use reasonable endeavours to accommodate the requirements of the access seeker. As discussed above, this encompasses a requirement to provide access seekers with sufficient information to understand the terms of access, which would include terms as to service quality.

(iii) Clause 6(4)(i)(iv) - which provides that the terms and conditions of access should take into account the interests of persons holding contracts for use of the facility. The ACCC has noted that the interests of users include a consideration of:

(A) whether the service standards meet the reasonable needs of the user, including whether there is transparency in service quality and whether the access provider has demonstrated a commitment to ongoing maintenance of the service; and

(B) whether the ongoing operational arrangements allow users to be reasonably informed about the service.[117]

In this case, the failure to provide any transparency around service quality is not in the interests of users.

(iv) Clause 6(4)(i)(vi) - which provides that the terms of access should aim to ensure the facility is operated in an "economically efficient" manner. There is no incentive for BR to ensure this has been met, if there is no transparency around its maintenance and performance obligations.

(v) Clause 6(5)(a) – which states the object of encouraging efficient use of, and investment in, railway facilities. It is clear that this object is not currently being met in relation to the grain rail network. BR has allowed the railway network to deteriorate to a point where BR has decided to close some lines, and to impose significant operational restrictions on others. This has affected CBH's ability to conduct its operations efficiently. CBH believes a major cause of this situation has been the lack of transparency around BR's performance obligations - there has been no way for users, access seekers or regulators to monitor or enforce adequate performance by BR.

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116 Freight Rail Network Inquiry at paragraph 6.31.

117 ACCC, Draft decision on approval of ARTC's 2008 Interstate Rail Access Undertaking (dated April 2008) (**ARTC IAU Draft Approval**) at page 30.

CBH believes that the Code should require greater transparency of performance standards, by requiring the railway owner to provide information up-front on performance indicators (including details on how indicative prices relate to the level of service quality to be provided), and to undertake periodic reporting and measurement of performance indicators. CBH believes that these issues should be addressed within the Code. The information that is provided in relation to performance as part of the Part 5 instruments, or the standard access agreement provided by the railway owner as part of the required information and preliminary information, is not sufficient to address the significant information asymmetries between the railway owner and access seeker. Further, the railway owner's access agreement is not subject to the approval of the ERA – meaning there is no regulatory scrutiny over any performance issues that may be provided in that agreement.

Examples should be taken from other jurisdictions, such as the following:

(i) In South Australia, the railway owner is required to provide a person with a proper interest in making an access proposal with an indication of the likely price on which the operator would be prepared to provide the service.[118] The likely price must be based on indicative information provided by the applicant to the operator about its possible usage of the railway infrastructure. However, in the absence of this information, the likely price must be accompanied by a set of assumptions on which the likely price is based, including the level of service quality that is to be provided at the likely price.[119] The Information Kit for the SARAR provides that the likely price should provide meaningful pricing information to the applicant, and so should go beyond the indicative floor and ceiling price and the accompanying statement) provided as part of the Information Brochure.

(ii) In the review of Victoria's rail access regime (carried out by the ESC in February 2010), the ESC recommended that the access provider should be required to publish appropriate performance indicators. The ESC was of the view that the publication of performance indicators is an important element in enabling access seekers to be informed about the quality of services provided and therefore support effective commercial negotiation, transparency and efficient planning and resource utilisation.[120]

(iii) In ARTC's IAU, ARTC is required to measure and report on certain performance indicators at quarterly and annual intervals.[121] These include indicators relating to reliability, network availability, transit time, temporary speed restrictions and track condition. It also undertakes annual reporting of its unit costs for costs areas including infrastructure maintenance, train control and operations.[122]

In the ERA's draft report on the Code review in 2010, the ERA stated that the RAA does not provide the power for the ERA to require a railway owner to provide information on performance indicators.[123] CBH does not agree with this position. The RAA contains wide powers for provision in the Code to be made for:

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118 *Railways (Operations and Access) Act 1997* (SA), section 29(1)(c)(i).

119 Information Kit Review, section 4A.1.

120 ESC's report on the Review of the Victorian Rail Access Regime dated February 2010 (Volume 2) at page 92.

121 ARTC IAU, section 8.2.

122 ARTC IAU, Table 2 of Schedule G.

123 ERA, Draft report on the Review of the *Railways (Access) Code 2000* (dated November 2010) at paragraph 36.

(i) provisions that are to govern the content of agreements with the railway owner and determinations by an arbitrator (section 4(2)(c)(i));

(ii) the rights, powers and duties that are to apply in relation to the negotiation, making and implementation of agreements (section 4(2)(c)(ii));

(iii) duties and requirements in relation to the provision of access that are to be complied with by the railway owner (section 4(2)(c)(iii));

(iv) the ERA to have supervisory and other functions for the purposes of the Code, including a function of determining certain requirements in relation to access that are to binding on the railway owner (section 4(2)(d)); and

(v) the functions of the ERA (section 6(1)(ca)).

These would clearly include requirements as to performance.

(d) Clarifications

There are several aspects of the information disclosure requirements that CBH submits need to be clarified. These are:

(i) *Provision of prices on a route-by-route basis (sections 7 and 9)*

As discussed above, sections 7(1) and 9(1) should be clarified to remove any argument to the effect that the railway owner is required to provide prospective prices for each route. It is not sufficient for the railway owner to merely provide a global floor and ceiling price for all routes. Rather, prices must be provided on a route-by-route basis.

(ii) Provision of prices for routes to which the railway owner contends there is no capacity (sections 7 and 9)

Sections 7(1) and 9(1) should also be clarified to remove any doubt that the prospective prices must be provided for every requested route, and not only those for which the railway owner claims there is capacity. Section 9(1)(c) states that the railway owner must provide the floor price and ceiling price for the "proposed access", meaning the access set out in the proposal. Whether there is capacity on these routes is a question to be determined under the section 15 process. The railway owner should not be permitted to refuse to provide the information in section 7(1) and 9(1) on the basis that it believes there is no capacity on certain routes.

(iii) Requirement to provide a draft access agreement (section 9(3a))

Section 9(3a) provides that the railway owner must give the proponent a draft access agreement following the determination of floor and ceiling costs under Schedule 4. CBH submits that the scope of this obligation should be clarified to ensure that the draft access agreement is complete and includes a proposed tariff (encompassing all components), based on the determination of floor and ceiling costs. Further, the proposed pricing should be provided on a route-by-route basis, consistent with CBH's submissions in paragraph (i) above.

CBH recently commenced commercial negotiations under the Code, but has still not seen a draft access agreement that includes pricing on a route-by-route basis from BR. Without this information, CBH had no information on BR's position prior to commencing negotiations. This has made it difficult for CBH to effectively prepare for negotiations. It also fails to give effect to

clauses 6(4)(a) to (c) of the CPA, which, as discussed above, require the access seeker to be given sufficient information to properly prepare for meaningful negotiations.

CBH notes that the draft access agreement referred to in section 9(3a) of the Code is not the same as the "form of the railway owner's standard access agreement" referred to in section 6 of the Code, or the "terms, conditions and obligations that the railway owner would want to be included in any access agreement" referred to in section 7(1)(a)(iii) of the Code. Rather, the draft access agreement should be a draft of the complete access agreement that the railway owner proposes prior to entering into negotiations. It must provide for, in detail, each of the matters specified in Schedule 3 to the Code, including the "prices and charges" that are to apply.[124]

The proposition that a draft access agreement should be a complete document, which includes prices on a route-by-route basis, is supported by the natural and ordinary meaning of the word "agreement", and the scheme established by the Code as a whole. It is also supported by the fact that the railway owner is not required to provide the draft agreement until after the ERA makes a floor and ceiling costs determination. If it was not required to include prices and charges, then there would have been no need to make provision of the agreement contingent on the ERA's floor and ceiling cost determination.

(e) Status of information disclosed by a railway owner

CBH is also concerned that the Code may permit railway owners to provide information on a "confidential" and "without prejudice privilege" basis, meaning that the substance of the information cannot subsequently be relied on in an arbitration. This significantly undermines the efficacy of, and complicates, a subsequent arbitration, as it means that the railway owner can wholly resile from positions put to an access seeker during negotiations (or at other times in the process), and potentially otherwise slow the arbitration down on technical points about whether an access seeker has presented a point relying on information that is subject to without prejudice privilege. CBH submits the Code should be clarified to make it expressly clear that without prejudice privilege does not attach to information provided by a railway owner to an access seeker during negotiations.

7.4 Part 5 Instruments

(a) Public consultation of Part 5 instruments

CBH supports Second Review Recommendation 4, in relation to amending section 45 to include the costing principles and over-payment rules, in order to ensure consistency in the public consultation process across all Part 5 instruments. Given the importance of the issue of access pricing in meeting the object of the Code, and the fact that the over-payment rules apply to the entire network, it is in the public interest that these instruments are open to public consultation.

(b) Ability to negotiate away from the Part 5 instruments

CBH believes that the status of the Part 5 instruments should be revised. Instead of being binding on the parties, they should be a "back-stop"/safety net only - ie statements as to the basis on which the railway owner is prepared to (and required

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[124] Code, section 17(1)(a).

to) offer access. Parties should be allowed to negotiate away from the Part 5 instruments if required in the circumstances (with some limited exceptions). The Part 5 instruments should merely facilitate commercial negotiations, not replace them.

Given that CBH is the largest user of the grain rail network, the Part 5 instruments (particularly the train management guidelines and train path policy) have the potential to significantly affect the operation of CBH's supply chain. However, the Code provides that the Part 5 instruments are binding on the railway owner, and in the case of the train path policy, must be observed by the railway owner and proponent in negotiating and making an access agreement.[125] Further, CBH does not have a right to participate in the process of negotiating or approving the Part 5 instruments (other than during public consultation on the approval of the instruments). This means that it has no way of ensuring that the procedures in relation to train management and train paths will operate in a way that accommodate its requirements, and that will produce efficiencies for its rail operations.

Requiring all access seekers to comply with these instruments fails to take into account the circumstances of each access seeker. This risks causing unintended efficiencies in rail operations. It is inconsistent with following provisions of the CPA:

(i) Clause 6(4)(e) of the CPA - which requires the access provider to use reasonable endeavours to accommodate the requirements of access seekers. The requirements of individual access seekers cannot be reasonably accommodated, if all access seekers are required to be bound to fixed instruments that they do not have a say in developing (apart from participating in public consultation on the approval of these instruments).

(ii) clause 6(4)(f) - which states that the regime should allow for access to be provided on different terms and conditions to different users. This is supported by the principles of negotiation in clauses 6(4)(a) to (c), as it is based on the notion that the terms of access should be open to be negotiated between the parties, first and foremost.

CBH believes it is more in line with the principles of negotiation under the CPA for the Part 5 instruments to merely facilitate commercial negotiations, without being binding. They should act as a safety net, if the parties cannot otherwise agree on suitable procedures. These arrangements should be subject to some limited exceptions, for example, the parties should not be able to negotiate a departure from the Part 5 instruments where this would result in disrupting the operation of the network or would affect other users.

CBH notes that it is not commenting on the Part 5 instruments themselves at this stage. As indicated by the ERA in the Issues Paper, the Part 5 instruments are to be reviewed in a separate process with key stakeholders.[126] CBH encourages a separate review of the Part 5 instruments and would welcome the opportunity to comment on the Part 5 instruments in detail as part of this process.

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125 Code, sections 40(2), 43(2) and 44(1).

126 Issues Paper at paragraph 32.

8. REGULATORY FUNCTIONS

8.1 Tighter enforcement regime under the Code

The obligations imposed under the Code are only enforceable by commencing arbitration proceedings (and then only for limited kinds of "disputes"), or by applying to the Supreme Court for an injunction.[127] There are few other sanctions imposed on a railway owner for failing to comply with its obligations. This means there is no real incentive for the railway owner to comply with the Code, other than the threat of court proceedings or an unfavourable award at arbitration. In addition, as described in the Freight Rail Network Inquiry, the role of the ERA in regulating the market for access to the freight rail network can "best be described as minimal."[128]

In CBH's experience, this lack of enforcement power has made it difficult and costly to enforce the railway owner's preliminary obligations, such as information provision requirements. For example, CBH has been forced to either seek injunctive relief in the Supreme Court, or suffer the consequences of non-compliance. This process has significantly delayed its progress in negotiations, and has been an inefficient use of its time and resources. This outcome is not suitable to give effect to the CPA. In particular, clauses 6(4)(a) – (c) require the regime to create an environment in which the parties are able to enter into effective negotiations, and require there to be an effective enforcement mechanism. As discussed above, this requires the railway owner to comply with its obligations to negotiate in a timely and efficient manner. CBH does not consider that a period of over 15 months to reach negotiations is timely or efficient – and it is certainly not efficient to have to overcome the significant hurdles found within the Code in order to enforce its rights to negotiate.

As discussed in section 6.4 above, CBH does not believe that extending the meaning of "disputes" to encompass the Part 2 and Part 3 obligations will sufficiently address this problem. This will result in the parties needing to commence arbitration proceedings each time there is a dispute about whether a party has complied with its obligations. In most instances, this process could be longer and more costly than Supreme Court proceedings. Arbitration is also not an appropriate forum for enforcing regulatory obligations.

Instead, the Code should be amended to introduce a tighter, more streamlined enforcement regime, with clearer obligations. CBH believes that there are two major issues that need to be addressed as part of this:

(a) The consequences for failing to comply with the provisions of the Code should be more significant. Procedural requirements of the Code (eg Part 2 and Part 3 obligations) should be elevated to offences, or at the very least, civil penalty provisions. Sanctions and penalties should apply for a failure to comply with these provisions. Compensation should also be available for persons (including access seekers) who have suffered loss or damage as a result of a contravention of the Code.

(b) The ERA's enforcement powers need to be increased, so that it can take a more active role in enforcing the Code. For example, the ERA should have the power to issue infringement notices to enforce a failure to comply with the Code. At an absolute minimum, the ERA should be able to give directions or recommendations in relation to the railway owner's obligation to comply. This would at least ensure a degree of certainty and confidence by the access seeker that its rights can be enforced, without needing to resort to expensive and disruptive court proceedings.

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127 *Railways (Access) Act 1998* (WA), sections 36 and 37.

128 Freight Rail Network Inquiry at paragraph 5.31.

Addressing these issues will improve the ability of the Code to facilitate a more streamlined path to negotiated outcomes (in line with the discussion at section 3 above).

The ability is to impose civil pecuniary penalties through both infringement notices and court action, and other sanctions on businesses for non-compliance with regulatory obligations is part of the regulatory environment is most jurisdictions.[129] Generally under other rail access regimes, civil penalties are imposed on the railway owner for failing to meet certain obligations, including information provision obligations. The regulator is given the power to enforce these penalty provisions on behalf of the access seeker. For example:

(a) Under the SARAR, if the railway owner fails to provide the access seeker with the required "information brochure", it is taken to be guilty of an offence and is subject to a maximum penalty of $20,000.[130] The court is also empowered to order compensation of persons who have suffered loss or damage as a result of a contravention of the Act or an arbitration award, on application by the regulator or an interested person.[131]

(b) In Victoria, the *Rail Management Act 1996* (Vic) imposes pecuniary penalties on parties who fail to comply with certain penalty provisions. Examples of penalty provisions include where the railway owner fails to comply with the terms of an access arrangement (which encompasses obligations under that access arrangement to provide information to the access seeker and to comply with negotiation guidelines).[132] The ESC has the power to apply to the Supreme Court for an order in respect of a contravention by a person of a penalty provision. If the Court is satisfied that a person has contravened a penalty provision, or has attempted to do so, it may order the person to pay a pecuniary penalty of up to $1,000,000.[133]

(c) The NGL, which the ERA is also responsible for administering in WA, has a tight and effective enforcement regime that includes penalty provisions and the issuing of infringement notices. The ERA has the power to issue an infringement notice to a person if it has reason to believe it has breached a civil penalty provision. An infringement notice imposes an infringement penalty on the person for the breach (which is up to $20,000 for a body corporate).[134]

CBH believes that the Code needs to include an infringement notice mechanism, so that the ERA can take a more active role in enforcing the Code.

8.2 Confidentiality issues

The current confidentiality regime in section 50 of the Code does not allow a railway owner to make confidentiality claims over the provision of information that is required to be provided under the Code. However, due to its ambiguous drafting, section 50 has been applied so as to permit the railway owner to make extensive confidentiality claims invoking section 50. This makes it difficult to establish a transparent process, in line with the objects of the CPA.

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129 BERI Working Paper at page 71.

130 *Railways (Operations and Access) Act 1997*, section 28(6).

131 *Railways (Operations and Access) Act 1997*, section 66.

132 *Rail Management Act 1996* (Vic), section 38ZZT.

133 *Rail Management Act 1996* (Vic), section 38ZZZE.

134 NGL, sections 277 and 279.

CBH considers that there are two broad issues in relation to the confidentiality regime under the Code:

(a) that the railway owner should not be permitted to claim confidentiality over information that it is required to provide under the Code; and

(b) that the ERA should be compelled to publish regulatory decisions made under the Code, including costs determinations, in full and without confidentiality restrictions.

Information required to be provided under the Code

There are a number of features of the Code that can only operate effectively if the railway owner is required to disclose information about its operations and its pricing. For example:

(a) the railway owner's obligation to publish in hard copy format, the "required information" (Part 2A of the Code);

(b) the requirement to submit the Part 5 instruments for approval (and the publication of those instruments by the ERA);

(c) the processes for public consultation on the determination of costs under clause 9 of Schedule 4 and clause 10 of Schedule 4;

(d) the railway owner's requirements under section 48, to provide the section 9(1)(c) information (that is, proposed floor and ceiling prices, the costs for each route section on which those prices have been calculated, and the approved costing principles) that it provided to the access seeker to **any entity** who requests it (whether or not the person is an operator, proponent, potential proponent, or whether the person has any interest in the railway); and

(e) the ERA's requirement under section 39 to keep a register of access agreements and section 33 determinations that is available for inspection by any person.

These requirements clearly establish a presumption of disclosure, consistent with addressing the information asymmetry in which the railway owner has an interest in maintaining.

Notwithstanding this, CBH has experienced considerable difficulties in getting full disclosure of the information that it is entitled to receive under the Code without extensive confidentiality claims being made over that information. For example, CBH was not able to obtain the full information required under section 9(1)(c) of the Code because of confidentiality claims imposed by the railway owner.

This made it difficult for CBH to prepare for effective negotiations under the Code, and caused it to expend time and resources in unnecessary and unproductive enforcement processes.

Confidentiality issues have also significantly undermined the effectiveness of the public consultation processes under the Code. For example, the ERA is entitled to seek public submissions on its decision whether to approve the railway owner's determinations of costs under clause 10 of Schedule 4 of the Code.[135] However, if the railway owner claims confidentiality over aspects of the costs determined by it under clause 10(1), the public is effectively called upon to comment on costs that it cannot see. For example, when the ERA invited public submissions on BR's cost determination under clause 10(1) of Schedule

[135] Code, clause 11 of Schedule 4.

4 of the Code, it did not publish BR's proposed costs on its website. This meant that the public had no knowledge of the costs they were being asked to comment on. All seven public submissions given in response made the point that the "process of calling for public submissions on a floor and ceiling cost determination is somewhat absurd where the terms of the lease and terms of access sought are not similarly made public."[136]

As noted by one party in its evidence to the Freight Rail Network Inquiry, permitting BR to invoke clause 50(3) in these circumstances "makes it impossible for interested parties (such as end users) to make genuinely informed comment on the appropriateness of the access provider's costs, and so makes any public consultation on such costings problematic."[137] The Committee stated that it could not "see how public submissions might aid the process of determining floor and ceiling prices for rail access when information required to calculate those prices is confidential."[138] Further, as discussed below, confidentiality claims have been permitted to be made over the determination itself, making it impossible for parties to see whether their submissions have been taken into account.

The extent of these confidentiality claims has also caused reputational damage to CBH, due to its inability to advise its members and growers of its progression under the Code process, and of important pricing issues that directly affect their interests. The inability of CBH to share such information has made it appear that CBH is not progressing the matter and is not effectively representing the interests of its members and growers. This also adds to the information imbalance and power imbalance between CBH and BR when negotiating an access agreement.

This outcome is entirely inconsistent with the principles in the CPA, which call for transparent and efficient regulatory processes. As discussed above, clauses 6(4)(a) to (c) of the CPA require that sufficiently detailed information is provided to the access seeker on the terms of access, including price, to enable it to make an informed decision and understand the basis on which access is proposed. This emphasises the need for transparency of information between the parties, to address any information imbalance. The ERA has also acknowledged in previous decisions that the intent of the Code is to provide transparency in costs, and that a level of ongoing cost transparency is advantageous to achieving the objectives of the rail regime.[139] These principles cannot be met if the railway owner is then permitted to claim confidentiality over aspects of this information.

Publication of ERA decisions

CHB believes that the ERA should be required to publish, in full, pricing information and decisions that it makes under the Code without significant confidentiality restrictions. This would include publishing, in full, determinations of costs under Schedule 4 of the Code. On a proper interpretation of the Code, CBH believes the floor and ceiling costs determination made by the ERA is not, in any sense, confidential information belonging to the railway owners. It is rather a hypothetical calculation made by the ERA of the total costs of building the route "from scratch" using lowest cost modern equivalent assets (and the calculation of the total costs for a route is to be the same for all operators) (clause 8(2) of Schedule 4 to the Code), and the incremental costs of providing access to each route (the **floor price**) of that hypothetical railway.

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136 Freight Rail Network Inquiry at paragraph 6.8.

137 Freight Rail Network Inquiry at paragraph 6.9.

138 Freight Rail Network Inquiry at paragraph 6.10 and Finding 16.

139 ERA, Final Decision in the Review of the Requirements for Railway Owners to Submit Floor and Ceiling Costs dated August 2011 at paragraphs 66 and 70.

This view is supported by the findings of the Committee in the Freight Rail Network Inquiry. The Committee stated that it saw the ERA's publication of a redacted version of its determination of costs for BR's network as a positive step by the ERA, as "this information should be in the public domain, something that is anticipated in the Code."[140] The Committee also stated that, notwithstanding section 50(3), "section 50 of the Code makes it clear that its intent is to make this information public precisely for the purpose of enhancing transparency within the rail access marketplace".[141]

The NCC also supports the publication of regulatory processes, including arbitration determinations on access disputes (subject to addressing confidentiality issues).[142] In the NCC's view, this is critical to address information asymmetries between the access provider and access seeker, and provide greater certainty about the arbitrator's likely approach to resolving subsequent disputes.[143] For example, under the ARTC IAU, the arbitrator has the power to publish its determination at its discretion (subject to considering submissions by either party in relation to confidential or commercially sensitive information).[144] Under the Code, the ERA is only required to publish a register of determinations.[145]

CBH submits that there is a legitimate public interest in the prompt publication of decisions, particularly decisions that followed a public consultation process. To deny the public the opportunity to see whether, and how, those submissions were taken into account risks eroding confidence in the public consultation process. For example, the ERA's floor and ceiling cost determination for The Pilbara Infrastructure's (**TPI**) route subject to Brockman Iron's access proposal (dated September 2013) was heavily redacted. In fact, the parts of the decision from pages 16 through to 37, which contained a breakdown of the GRV determination, were largely all redacted, as was the determination of the operating and overhead costs. TPI's costing model was kept confidential – which is in direct contrast to the ERA's statements in its 2011 Cost Requirement Review about its intention to continue to publish costing models. At paragraph 73 of the Cost Requirement Review, the ERA stated that:

> By far, the most useful component of existing determinations is the railway owner's costing model, which the [ERA] currently publishes as a part of every determination. The costing model provides sufficient technical information for potential access seekers to estimate route replacement costs and route expansion costs which may apply to any future access proposal. The [ERA] will continue to publish railway owners' costing models.

If the determinations are not published, and the costing models are not published, there is very limited cost transparency. This is inconsistent with other statements made by the ERA in relation to the importance of transparency in costs. In the Cost Requirement Review, the ERA stated that "the intent of the Code is to provide transparency in costs",[146] and that "ongoing cost transparency… is advantageous to the achievement of the objectives of the rail regime."[147]

In the Freight Rail Network Inquiry, the Committee also described the difficulty it faced itself in requesting a full, unredacted, copy of the ERA's costs determination. The Committee's initial request for a copy of the determination was denied on the grounds of

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140 Freight Rail Network Inquiry at paragraph 1.65.

141 Freight Rail Network Inquiry at paragraph 6.17.

142 Guide to Certification at 5.18.

143 Guide to Certification at 5.18.

144 ARTC IAU, section 3.12.4(b)(viii).

145 Code, section 39.

146 Floor and Ceiling Costs Review at paragraph 70.

147 Floor and Ceiling Costs Review at paragraph 66.

confidentiality. It was only after the Committee Chairman authorised the Clerk of the Legislative Assembly (under the *Parliamentary Privileges Act 1891* (WA)) to issue a summons to the ERA Chairman ordering the production of the determination, that the Committee received a full copy of the determination on 14 July 2014.[148] In CBH's view, it is remarkable that a parliamentary committee was required to go to such lengths to obtain a full copy of a relevant regulatory document.

The Committee agreed that there is a need for transparency regarding how access fees are calculated, if "for no other reason than to assuage concerns that the network operator may in some way be abusing its monopoly power".[149] The Committee therefore decided to publish that part of the ERA's determination of the floor and ceiling costs that was produced by the ERA's independent consultant. However, this decision was superseded by the ERA's publication of a redacted version of the determination. The Committee stated that there is more merit in increasing transparency within the market for access to the rail network by publishing the bulk of the determination.[150]

CBH submits that there is a significant public interest in the floor and ceiling process and its outcome. Entities using the network have a legitimate reason to know, and understand, the ceiling costs, particularly as the over-payment rules apply to the entire railway network. The ERA's determination about total costs for a route (the ceiling price) and, indirectly, incremental costs for a route (the floor price) provides guidance to current operators on the multi-user routes and potential proponents about the ceiling price, and an indication of the floor price, should the operator or proponent wish to make an access proposal under the Code. Those operators and potential proponents would be guided and assisted by having that information available to them, which would in turn facilitate the achievement of the main object of the RAA. If information used in regulatory decisions is made public, this will allow for more transparent decision-making, meaning that stakeholders can understand how regulatory decisions have been arrived at.[151] However, disclosing too little information about the regulatory process decreases the ability for these third parties to understand the rationale for the decision, and this can also limit the ability of the regulator to apply a regulatory framework.[152]

Other jurisdictions have recognised the public interest in publishing this kind of information. For example, under the SARAR, the regulator has the power to disclose confidential information to the public, if it considers it is in the public interest to do so.[153] Similarly, under the NGL, the ERA has the power to disclose information given to it in confidence if it is of the opinion that, although the disclosure would cause detriment to the person who gave the information, the public benefit in disclosing it outweighs that detriment.[154] In general, there is a trend in other jurisdictions for increasing transparency in regulatory processes and for greater public access to documents collected and used in those processes.[155]

CBH therefore believes that the ERA should be required to publish its determination in full, without confidentiality restrictions, in the public interest.

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148 Freight Rail Network Inquiry at paragraph 6.16.

149 Freight Rail Network Inquiry at paragraph 6.19.

150 Freight Rail Network Inquiry at paragraphs 6.19 and 6.20.

151 BERI Working Paper at page 59.

152 BERI Working Paper at page 70.

153 *Railways (Operations and Access) Act 1997* (SA), section 33A(5).

154 NGL, section 329(1).

155 BERI Working Paper at page 63.

9. ISSUES RELATED TO OBJECTS OF THE CODE

9.1 Objects clause does not incorporate upstream or downstream markets

Clause 6(5)(a) of the CPA requires that an effective access regime should incorporate an objects clause that provides a clear statement that the purpose of regulating third party access is to promote economic efficiency in the operation, use of and investment in significant infrastructure, thereby promoting competition in upstream or downstream markets. This reflects the underlying goal of access regulation under the CPA.

The RAA provides that the Code is to be established to give effect to the CPA.[156] The object of the RAA is to "establish a rail access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations."[157] While this object is contained in the RAA, which is not the subject of this review, the ERA has acknowledged in the Issues Paper that while the RAA may be reviewed to an "incidental extent."[158] CBH believes that the object of the RAA is relevant, to the extent that it informs the application and interpretation of the Code and whether the CPA objectives are being advanced.

The object of the RAA aims to broadly implement clause 6(5)(a) of the CPA. However, the only market to which it is directed is the contestable market for rail operations. The regime does not recognise other upstream or downstream markets that rely on the use of the rail network, including, for example, WA grain markets. This failure was recognised by the NCC in its final recommendation of the certification of the WA Rail Access Regime (dated 13 December 2010) (**WARAR Final Recommendation**), where it noted that the objects clause does not refer to "promoting effective competition in upstream or downstream markets".[159]

To the extent that the regime does not specifically acknowledge the relevant upstream or downstream markets, it is not suitable to give effect to clause 6(5)(a) of the CPA. Simply referring to a market for "rail operations" is not a realistic reflection of the markets that rely on the use of the infrastructure. Failing to properly capture these markets may lead to distorted outcomes, whereby the Code is not applied in a way that will promote competition in those markets.

CBH submits that the regime should acknowledge, as part of its objects, the WA grain market, either expressly or implicitly as one of a broader range of markets to which the regime is directed. This would help to ensure that the rights and interests of WA grain growers to access the rail network are taken into account when making decisions under the Code. Without this, there is a risk that the Code will be applied in a way that is inconsistent with promoting competition in the WA grain market (as one of the largest markets that rely on the use of the rail network). As discussed above, CBH considers that the Code is currently not achieving the objective of promoting competition in the WA grain market. The costly, inefficient and lengthy processes CBH has been forced to endure has also impacted growers, who compete in international export markets.

9.2 Section 8 – preservation of status quo pending access proposal

The Code does not address the situation in which an access seeker has an access agreement currently on foot with the railway owner, but wishes to proceed under the Code to negotiate a replacement access agreement. As discussed above, the Code

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156 RAA, section 4(1).

157 RAA, section 2A.

158 Issues Paper at [52].

159 NCC, Final recommendation of the certification of the WA Rail Access Regime dated 13 December 2010 (**WARAR Final Recommendation**) at 9.16.

processes can be time consuming and unpredictable, particularly if the parties are unable to reach agreement and must proceed to arbitration. While the Code process is underway, the existing arrangements in place between the access seeker and railway owner may come to an end, and the access seeker may be forced to accept unfavourable interim arrangements to ensure service continuity for their business.

In CBH's case, it had to engage in negotiations "outside" the protections of the Code for extensions to its interim arrangements over the 15 months after lodging its proposal, to ensure continuity for its supply chain. Those arrangements have been on terms that are unfavourable to CBH. This has greatly affected the efficiency of its operations, and has resulted in increased costs for CBH, its members and its growers.

CBH believes the Code should be amended to include a provision that requires the status quo to be preserved under an existing access agreement between the access seeker and railway owner, where an access proposal process is underway between those parties for a replacement access agreement. This would recognise the access seeker's interest in maintaining access to the rail network on reasonable terms while the Code process is followed, without needing to spend considerable time and resources in negotiating numerous extensions to interim arrangements. This amendment is required to give effect to the following provisions of the CPA:

(a) clause 6(4)(e) - which provides that railway owner must use all reasonable endeavours to accommodate the requirements of persons seeking access. This may include a requirement for service continuity eg - for access rights to be secured from the date its existing commercial arrangements expire; and

(b) the underlying objective of access regulation under clause 6(5)(a). As discussed above, this objective encompasses a requirement to promote competition in activities that rely on the use of the railway, and to ensure the efficient use of infrastructure (particularly by preventing access providers from misusing market power). CBH believes that the competitiveness of its grain operations has been jeopardised by the need to negotiate unfavourable interim arrangements.

CBH also notes that railway owners may attempt to include a provision in an access agreement made outside the Code, which prevents users from seeking access under the Code in the future. This is in contrast to the requirements of clause 6(4)(m) of the CPA. In the Freight Rail Network Inquiry, the Committee recommended that Part 4A of the Code be amended to make it clear that parties are not able to expressly prohibit the future operation of the Code under an access agreement.[160] CBH supports this recommendation - it is necessary to ensure that the requirements of clause 6(4)(m) of CPA are met.

9.3 Structure of out-of-Code arrangements vs inside Code arrangements

CBH believes there is a fundamental issue with the way the Code treats arrangements for access outside the Code separately to arrangements that are regulated under the Code. If the parties choose to negotiate for access otherwise than under the Code, then the nothing in the Code (including the Part 5 instruments) applies in relation to the negotiations or any resulting agreement.[161] Access seekers "outside the Code" are only bound by the requirements of the *Rail Safety Act 2010* (WA).

CBH understands that the reason for this is to allow flexibility to the parties to come to their own arrangements, without the need for regulatory intervention. However, a fundamental problem could arise with this position once an access proposal has been

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160 Freight Rail Network Inquiry, Recommendation 6.

161 Code, section 4A.

made under the Code. The provision appears to give an opportunity to a railway owner to exercise its market power by making unattractive access offers "under" the Code, and simultaneously making better offers (but which remain unfavourable to the access seeker) "outside" the Code, as a means to persuade the access seeker to accept a deal outside the Code. Additionally, it appears to give an opportunity for a railway owner to represent to an access seeker that it is better to negotiate "outside the Code" (and without its protections against the use of market power) than "inside" the Code because the Code will likely lead to delay and unfavourable outcomes for the access seeker.

CBH submits that the Code does not provide a sufficient restraint on the information asymmetries, market power and bargaining power of the railway owner, and does not provide sufficient protection to access seekers. This means there is considerable uncertainty as to the potential outcomes under the Code process.

The Code also provides incentives for a railway owner to pursue agreements outside the Code. As discussed above, the current over-payment rules encourage the railway owner to keep access seekers outside the Code (see section 4.3). While the ceiling price test takes into account payments that are made by third parties who have obtained access outside the Code, there is no provision for over-payments to be returned to out-of-Code operators. This gives the railway owner an incentive to keep access seekers outside of the regime provided by the Code—as the railway owner is permitted to retain any monopoly profits from access seekers outside of Code. As mentioned earlier in these submissions, railway owners may be tempted to keep users outside the provisions of the Code, under the terms of access agreements made outside the Code. This was recommended to be expressly prohibited under the Code, in the Freight Rail Network Inquiry.[162]

These factors effectively allow the railway owner to use its market power to negotiate agreements in its favour outside the Code. This is not suitable to give effect to the objects clause of the CPA – which promotes economically efficient outcomes. As discussed above, the NCC has indicated that the application of an efficiency objective encompasses a requirement to ensure the efficient use of infrastructure, particularly by preventing access providers from misusing market power by raising prices or refusing access to services. CBH does not believe that the Code currently provides a sufficient restraint on railway owners from using their market power by attempting to keep access seekers outside of the Code process. Even outside the Code, access seekers face considerable difficulty in negotiating with a monopoly provider in an unregulated market.

As Karara described to the Committee as part of the Freight Rail Network Inquiry, there is essentially "a monopolistic provider of those services [which] puts the balance of the negotiation power too much on one side and not enough on the company that is trying to get access to that infrastructure".[163] Combined with how hard it is to use the Code (as CBH's submissions above have shown), this essentially forces access seekers to bear the risk of unregulated negotiations with the monopoly provider.

CBH believes that the Code protections should continue to be available to access seekers who choose to negotiate "outside the Code". In particular, once an access proposal is made, the access seeker should be able to bring evidence of any offer made by the railway owner before the arbitrator (including offers purportedly made "outside the Code"). There is also a need to address how access agreements agreed outside the Code and within the Code are to be reconciled. In the WARAR Final Recommendation, the NCC expressed concern about this issue, stating that the Code is silent on how potentially competing priorities may be managed.[164] As part of this, the underlying issues with the

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162 Freight Rail Network Inquiry, Recommendation 6.

163 Freight Rail Network Inquiry at paragraph 6.56.

164 WARAR Final Recommendation at 7.3.

application of the ceiling price test and over-payment rules to operators outside of the Code need to be addressed (see submissions at section 4.3 above).

Alternatively (and consistently with CBH's submissions above), the need for a distinction between "outside the Code" and "inside the Code" should be reviewed – so that:

(a) any access seeker has an automatic right to negotiate access, unimpeded by sections 14 and 15 requirements and any questions as to the validity or form of its proposal; and

(b) if the access seeker cannot reach agreement, then it has an automatic right to invoke the arbitration process.

CBH believes that this structure is more suitable to give effect to the underlying negotiate-arbitrate model promoted by the provisions of the CPA. It is also the way in which access has been regulated in other markets, including the NGL, the National Access Regime (in Part IIIA of the CCA) and the SARAR. For example, under the SARAR, there is no distinction between operators outside the regime, and operators inside the regime. There is one pathway for access seekers to seek access, and this applies in relation to all operators and railway services that the Act is declared to apply to.[165]

Any concerns about commercial flexibility can then be addressed in other ways - for example, by allowing the parties to negotiate away from the Part 5 instruments (with those instruments merely acting as a safety net, with some limited exceptions such as the over-payment rules).

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165 *Railways (Operations and Access) Act 1997* (SA), section 7.

SCHEDULE 1 - APPLICATION OF CPA

1. Overview of CPA

The CPA is an intergovernmental agreement that was entered into by the Commonwealth, State and Territory Governments in 1995 to record commitments to implement competition policy reform throughout Australia, including in relation to third party access to essential infrastructure.

The provision of the CPA which is relevant to this review is clause 6, which relates to third party access to significant infrastructure. Clause 6 sets out the following:

(a) Under clause 6(1), the Australian governments agreed to the establishment of a national third party access regime (which agreement formed the basis for Part IIIA of the CCA).

(b) Under clause 6(2), the governments agreed that States and Territories would retain the ability to establish their own access regimes to regulate access to services in their own jurisdictions. The national access regime would not apply to services covered by a State or Territory regime that was determined to be "effective" under the CPA.

(c) For a State or Territory regime to be effective, it is required to conform to the principles set out in clauses 6(3), (4) and (5) of the CPA. These are the provisions that are relevant to be assessed as part of this review.

The purpose of meeting these principles is to improve the quality of access regulation, by improving the ability of the Code to meet the underlying objective of access regulation – which is economic efficiency.[166]

The Code was declared to be an effective access regime by the Parliamentary Secretary to the Treasurer on 11 February 2011. That declaration is in force until 11 February 2016, where it was determined that any extension of the period of certification should tie into this review. CBH notes that the focus of the ERA's review of the Code is different from an assessment as to whether the Code is an effective access regime. The NCC has repeatedly indicated its view that the process of certification does not involve an assessment of whether the access regime is "optimal", and does not necessarily require that the regime provides the most effective means of achieving efficient access outcomes. Rather, certification only requires an assessment that the regime satisfactorily addresses the clause 6 principles.[167] However, the focus of this review is directed to the suitability of the Code to give effect to the CPA. This requires a thorough assessment of each of the provisions of the Code against the principles in the CPA, to determine whether they provide the most effective means of implementing the CPA.

In the following table, CBH provides a detailed analysis of the meaning and interpretation of each of the relevant clause 6 principles. This analysis provides the context against which the suitability of the provisions of the Code must be assessed.

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166 PC 2013 Inquiry at page 188.

167 WARAR Final Recommendation at 4.10.

2. Meaning and interpretation of CPA principles

Clause of CPA	Analysis
Clause 6(3)	
Clause 6(3)(a)	Clause 6(3)(a) requires that the coverage of an access regime should be limited to a narrow range of services, ie significant infrastructure facilities that meet the requirements set out in clauses 6(3)(a)(i) to (iii). Given that the scope of this review is limited to services provided by means of railways to which the Code already applies, CBH does not intend to comment on the appropriateness of the Code's coverage.
Clauses 6(3)(b) and (c)	Clause 6(3)(b) provides that the access regime must reasonably incorporate each of the principles referred to in clauses 6(4) and 6(5). Clause 6(3)(c) only requires the regime to take a reasonable approach to incorporating each of these principles. Because of this, there may be a range of regulatory arrangements that are capable of achieving the same effect. It is therefore necessary to assess whether the clause 6 principles have been given effect to by the Code as a whole, and with regard to any interdependencies between different aspects of the Code.[168]
Clause 6(4)	
Clause 6(4)(a) – (c) Negotiated access	*Negotiate-arbitrate model* Clauses 6(4)(a) to (c) establish a negotiate-arbitrate model of access regulation. This is the model that was supported by the Hilmer Review and the CIRA as the core principle for access regulation.[169] It recognises the primacy of commercial negotiations between the parties, with an enforcement process to be relied on only if and when the parties cannot agree. This approach aims to reflect outcomes that would have come about from commercial negotiations in a competitive market, while limiting the costs of regulation. It is taken to be most appropriate for regulation in circumstances where a single service provider deals with a few large, well-resourced and well-informed access seekers.[170] However, this model can be less effective in circumstances where a large service provider deals with multiple, small and less well-resourced or well-informed access seekers, or where there is an information or negotiation imbalance. For example, it is often the access seeker who needs access, but the railway owner may not need the access seeker to earn revenue. There is therefore an imbalance in bargaining power, weighing heavily on the side of the railway owner. It may be more appropriate in these circumstances for the regime to be more prescriptive, to address issues of information and negotiation power imbalances. For example, the regime may prescribe terms and conditions of access upfront, such as in an approved access undertaking.[171] This approach is taken in NSW[172] and Victoria.[173] *Principles of negotiation* To give effect to the principles of negotiation, the regime must create an environment in which the parties are able to enter into effective negotiations.

168 Guide to Certification at 3.3.

169 Hilmer Committee (Independent Committee of Inquiry into National Competition Policy) 1993, *National Competition Policy*, AGPS, Canberra, at pages 255-256; CIRA, clause 2.2.

170 Guide to Certification at 3.14.

171 Guide to Certification at 3.15.

172 *Transport Administration Act 1988* (NSW).

173 *Rail Management Act 1996* (Vic).

Clause of CPA	Analysis
	Most often, the access provider is in an advantageous negotiating position, because it has more complete information on the rail network and on the terms of access than the access seeker. This kind of information imbalance can result in costly and prolonged access negotiations.[174] In order for commercial negotiations to be effective in reducing the length of the regulatory process, there needs to be viable mechanisms that allow negotiation to occur in a more time-effective manner than traditional regulatory processes. Formal procedures and guidelines can expedite this process, for example, by forcing negotiating parties to release more information, which could enhance the negotiation process.[175] The regime must address the information imbalance between the access seeker and railway owner, to enable the access seeker to conduct meaningful negotiations.[176] For example, sufficiently detailed information on the terms of access, including price, must be provided to an access seeker, to enable it to make an informed decision and to understand the basis on which the proposed access is to be provided.[177] This information must be made available in a transparent and timely manner.[178] Importantly, the regime should provide an effective means for dealing with situations where the parties are unable to reach agreement.[179] To be effective, the parties must have confidence in the dispute resolution process. This is generally facilitated by procedures that are independent, transparent and consultative.[180] Certainty of arbitrated outcomes is also an important component of effective negotiation. This is because the presence of an arbitration can affect the way the parties negotiate, and in turn, directly affect the terms of negotiated agreements.[181] For example, where the parties have guidance as to what an arbitrator will decide, it is likely that their negotiations will resemble what they expect the arbitrated outcome will be.[182] It is therefore critical that the arbitration process is designed to create efficient outcomes, by applying the dispute resolution principles outlined in clause 6(4)(i) below.
Clause 6(4)(d) Lapse of right to negotiate without regular review	Clause 6(4)(d) provides that there must be periodic review of the need for access regulation to apply to a particular service, without automatically revoking any existing contractual rights. This principle recognises the need to maintain commercial certainty for both operators and users.[183] As this review is limited in scope to the railways to which the Code already applies, CBH does not intend to discuss this principle in further detail.
Clause 6(4)(e) Reasonable endeavours to accommodate the requirements of persons seeking access	Clause 6(4)(e) provides that the regime must require the access provider to use all reasonable endeavours to accommodate the requirements of access seekers. The regime can either incorporate this clause explicitly, or through general provisions that have the same effect. The NCC has interpreted this principle as requiring obligations to be placed on the access provider to:

174 PC 2013 Inquiry at page 126.

175 BERI Working Paper at page 69.

176 NCC, Final Recommendation on certification of the Dalrymple Bay Coal Terminal Access Regime (dated 10 May 2011) at 5.23.

177 ESCOSA Final Inquiry at 4.2.1.

178 ESCOSA Final Inquiry at 4.2.1.

179 Guide to Certification at 5.1.

180 Guide to Certification at 5.3.

181 PC 2013 Inquiry at page 118.

182 PC 2013 Inquiry at pages 118 and 119.

183 Guide to Certification at 5.5.

Clause of CPA	Analysis
	(a) provide access seekers with sufficient information to understand the indicative access terms and conditions, and how access prices or tariffs have been derived; (b) respond to access requests and negotiate terms and conditions within a reasonable timeframe; (c) provide a written explanation as to why a particular request for access cannot be accommodated, including likely prospects for future access; or (d) use all reasonable endeavours to accommodate a request for access to spare capacity.[184] Importantly, the regime must ensure that access seekers have sufficient information to enable them to make informed decisions and to negotiate effectively.[185]
Clause 6(4)(f) Access need not be on exactly the same terms and conditions	Clause 6(4)(f) requires that the regime allow for access to be provided on different terms and conditions to different users. This means that the scope for commercial negotiation should be not limited by any fixed terms or conditions. Rather, the role of fixed terms and conditions should be to facilitate commercial negotiations, and to act as a safety net when the parties cannot agree.[186] This is consistent with the principles of commercial negotiation discussed in clauses 6(4)(a) to (c) above.[187]
Clause 6(4)(g) Appointing an independent dispute resolution body	Clause 6(4)(g) requires that the parties should have recourse to an independent dispute resolution body, to be appointed and funded by the parties. As discussed above, it is critical that the parties have confidence in the dispute resolution process. The arbitration framework must therefore be designed to produce outcomes that are efficient, effective, commercially viable and consistent.[188] The arbitrator must have sufficient resources and information gathering powers, appropriate expertise, the ability to seek expert advice from an independent regulator, and the power to determine the process including confidentiality and timeframe matters.[189] However, the costs of arbitration should not deter parties from seeking access.[190] The NCC has indicated that the regime may or may not empower the arbitrator to determine certain terms of access, including reference tariffs. The question is not whether it is preferable to require the arbitrator to apply reference tariffs, but whether the approach taken by the regime promotes "good policy competitive access outcomes at fair and reasonable prices".[191] The NCC has also commented that it is in the public interest to publish arbitration determinations on access disputes (subject to addressing confidentiality issues). In the NCC's view, this is critical to address information asymmetry between the access provider and access seeker, and provide more certainty about the approach the arbitrator may take to resolving subsequent disputes.[192]

184 Guide to Certification at 5.6 and ESCOSA Final Inquiry at 4.2.1.

185 Guide to Certification at 5.6 and ESCOSA Final Inquiry at 4.2.1.

186 Guide to Certification at 5.8.

187 WARAR Final Recommendation at 7.43.

188 Guide to Certification at 5.14.

189 Guide to Certification at 5.14.

190 Guide to Certification at 5.17.

191 Guide to Certification at 5.13.

192 Guide to Certification at 5.18.

Clause of CPA	Analysis
Clause 6(4)(h) Binding nature of decision	Clause 6(4)(h) requires that the arbitrator's decision, and the ultimate decision of any appeals body, must be binding on the parties. This means that the enforcement process should be supported by legislation, and the regulator or courts should be able to impose sanctions and remedies if a party does not comply.[193] The NCC has indicated that this provision is generally satisfied by setting a time in which an arbitrator's decision must be reflected in a contract between the parties, although an access seeker can decide not to be bound by the arbitrator's ruling.[194]
Clause 6(4)(i) Factors the dispute resolution body can take into account	Clause 6(4)(i) provides that the arbitrator is required to take into account the following matters in deciding on the terms and conditions for access: *(a) The owner's legitimate business interests and investment in the facility* What is a "legitimate" interest in business may be open to a number of differing interpretations, but has been interpreted by the courts as a reference to what is allowable and appropriate in commercial or business terms.[195] In relation to terms and conditions of access, the concept encompasses the interest of the service provider in recovering the costs of its infrastructure and its operating costs and obtaining a normal return on its capital.[196] Legitimate business interests do not extend to the service provider achieving a higher than normal commercial return.[197] In the context of the WA gas access regime (the Gas Access Code, which preceded the NGL), this was held to mean that the actual price paid and invested in a facility by the access provider should be taken into account in determining the terms and conditions of access (including reference tariffs).[198] These should be designed to allow the access provider to recover the actual investment made in the facility, at least over the expected life or operation of the facility, together with an appropriate or reasonable return on investment.[199] *(b) The costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets* This criterion requires that the costs to be taken into account in determining the terms of access are the actual costs to the owner in providing access. They do not include costs incurred as a result of over-investment, costs that are unnecessarily incurred, or costs that are based on an inappropriate allocation of common costs. Any monopoly profits lost as a result of access and increased competition cannot be taken into account.[200] *(c) The economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake* This criterion requires, if an extension is made at the cost of someone other than the access provider, that the access terms and conditions

193 Guide to Certification at 5.19.

194 Guide to Certification at 5.20.

195 *Telstra Corporation Limited* [2006] AcompT 4 at [89].

196 *Telstra Corporation Limited* [2006] AcompT 4 at [89].

197 *Telstra Corporation Limited* [2006] AcompT 4 at [136].

198 *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [130].

199 *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [130].

200 Guide to Certification at 5.29.

Clause of CPA	Analysis
	should take into account the economic value to the access provider of the extension. For example, if an access seeker bears the cost of extending the facility, and the extension is expected to provide benefits to the access provider, then the access price could be lower than it would otherwise be, to reflect the value of the benefits to the access provider.[201] *(d) The interests of all persons holding contracts for use of the facility* The terms and conditions of access should take into account the interests of users. In considering a similar provision in relation to the interests of "persons who might want access to the service" (ie access seekers, rather than users) the ACCC considers that it is generally in the interests of access seekers that: (i) prices reflect the efficient provision of the service and are not designed to generate significant monopoly profits; (ii) prices reflect efficient investment choices, and do not reflect the choice of inappropriate technology, construction of facilities much larger than can be justified or earlier than necessary replacement of plant and equipment;[202] and (iii) prices and returns are sufficient for the access provider to have incentives to maintain and invest in the facility.[203] The ACCC also identified various issues that should be considered in assessing the interests of access seekers, including: (i) whether there are incentives for the access provider to improve efficiency over time (including whether prices provide incentives for efficient investment by the access provider); (ii) whether the approach to valuing assets is appropriate; (iii) whether the processes for negotiating and setting prices are clear and transparent; (iv) whether sufficient information is available to access seekers to engage in meaningful negotiation; (v) whether the ongoing operational arrangements allow access seekers to be reasonably informed about the service; (vi) whether the service standards meet the reasonable needs of the user (including whether the access provider has demonstrated a commitment to ongoing maintenance of the service, and whether there is transparency in service quality); and (vii) whether the use of the infrastructure service is unnecessarily limited by restrictive standards imposed by the access provider.[204] These may be equally applied in the case of users who hold contracts for the use of the facility.

201 Services Sydney Pty Ltd and Sydney Water Corporation – Arbitration report dated 19 July 2007.

202 ARTC IAU Draft Approval at page 30.

203 Services Sydney Pty Ltd and Sydney Water Corporation – Arbitration report dated 19 July 2007.

204 ARTC IAU Draft Approval at page 30.

Clause of CPA	Analysis
	(e) *Firm and binding contractual obligations of the owner or other persons (or both) already using the facility* This criterion suggests that the regulator is required to take into account any prices that have been contractually agreed by a service provider.[205] *(f)* *The operational and technical requirements necessary for the safe and reliable operation of the facility* This criterion requires that terms of access should not lead to arrangements that encourage the unsafe or unreliable operation of a facility.[206] This is more relevant to considering the non-price terms and conditions, such as any relevant technical requirements or standards. Access prices should also be based on a method of supply that meets the relevant operational and technical requirements that are necessary for the safe and reliable operation of the facility.[207] Only those costs that are required or needed to achieve the safe and reliable operation of the facility should be considered (and not other unnecessary expenditure, inappropriate allocations of common costs or over-capitalisation).[208] *(g)* *The economically efficient operation of the facility* The terms and conditions of access should aim to ensure that the facility is operated in an "economically efficient" manner (as the term is generally understood by economists).[209] This means that the terms of access should allow the access provider to recover the efficient costs of operating and maintaining the relevant infrastructure.[210] There is the potential for tension between this criterion and the legitimate business interests of the access provider, at least in the short run. However, economic efficiency implies that the access provider is able to earn a normal return over the long run – which is consistent with both the legitimate business interests of the access provider and the long-term interests of end-users.[211] *(h)* *The benefit to the public from having competitive markets* It is also relevant to take into account the public benefit from having a workably competitive market (that is, one in which no firm has a substantial degree of market power in the longer term). The public benefit that must be taken into account is the efficiency gain from having a workably competitive market.[212] In the context of the Code, the relevant competitive market is that for the operation of rail services. The arrangements in the Code should therefore aim to promote the public benefit resulting from having an efficient and competitive market for rail operations.
Clause 6(4)(j) Extensions	Clause 6(4)(j) provides that the owner of the facility may be required to extend

205 *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [31].

206 ACCC, Guide to the resolution of access disputes dated April 2006 at 57.

207 LCS Access Dispute, Digiplus/Telstra, Reasons for Final Determination (August 2010) at 12.

208 Guide to Certification at 5.36.

209 Guide to Certification at 4.37 and *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [133].

210 ACCC, Guide to the resolution of access disputes dated April 2006 at 2.16.

211 Guide to Certification at 5.39.

212 Guide to Certification at 5.42.

Clause of CPA	Analysis
and expansions	the facility if necessary, subject to certain protections. The economic rationale for this requirement is to prevent access providers from deliberately delaying investment in infrastructure, or allowing facilities to have sub-optimal capacity, in order to limit competition or gain monopoly profits.[213] Read together with the principles of negotiation in clauses 6(4)(a) – (c) above, this principle requires that matters of extension and expansion should be subject, in the first instance, to negotiation between the parties. Where the parties cannot reach agreement, the arbitrator should have the power to require the owner to extend or permit extension of the facility.[214] This principle has also been interpreted by the NCC, Australian Competition Tribunal and Productivity Commission as including a power to order expansions.[215]
Clause 6(4)(k) Material change in circumstances	Clause 6(4)(k) provides for an access arrangement to be revoked or modified following a material change of circumstances. This principle should not be interpreted in a way that would affect the certainty of contracts that are already on foot.[216] The NCC has indicated that an appropriate way to address this requirement is to include in the access agreement any factors that would allow the agreement to be varied or reopened in the future.[217] This in part covered by clause 16 of Schedule 3, which requires access agreements to make provision for variation.
Clause 6(4)(l) Impeding existing rights of a person to use a facility	Clause 6(4)(l) provides that a dispute resolution body should only prevent a person's existing right to use a facility when it has considered the case for compensating that person. This does not mean that an access regime must allow the arbitrator to impede existing rights. However, where the arbitrator can do this, it must also have the power to consider and determine compensation, if appropriate.[218]
Clause 6(4)(m) Hindering access to the service	Clause 6(4)(m) requires that the regime prohibit conduct for the purpose of hindering access. This applies to existing users and access providers, and may be incorporated either explicitly or through other provisions that have the same effect. The regime should also effectively prohibit conduct by a vertically integrated service provider, who may hinder access by unfairly providing favourable terms of access to a related entity.[219]
Clause 6(4)(n) Separate accounting arrangements	Clause 6(4)(n) requires separate accounting arrangements to be imposed on access providers for the elements of the business covered by the regime. The NCC has indicated that the availability of relevant accounting information is necessary for access seekers and regulators to assess the terms and conditions of access.[220] Access providers should be required to make available financial information that focuses exclusively on the parts of their business subject to the regime. To satisfy clause 6(4)(n), the NCC has considered that the regime should include provisions that require the access provider to: (a) maintain a separate set of accounts for each service that is the subject of an access regime;

213 PC 2013 Inquiry at page 129.

214 Guide to Certification at 5.61 and WARAR Final Recommendation at 8.53.

215 Guide to Certification at 5.63 and PC 2013 Inquiry at page 129.

216 WARAR Final Recommendation at 8.58.

217 Guide to Certification at 5.65.

218 WARAR Final Recommendation at 8.67.

219 Guide to Certification at 5.68 and 5.69.

220 NCC, Final recommendation on the certification of the SA Ports Access Regime (dated 10 March 2011) (**SA Ports Access Final Recommendation**) at 5.62.

Clause of CPA	Analysis
	(b) maintain a separate consolidated set of accounts for all of the activities undertaken by the access provider; and (c) allocate any costs that are shared across multiple services in an appropriate manner.[221]
Clause 6(4)(o) Access to financial statements	Clause 6(4)(o) provides that the dispute resolution body and other relevant bodies (eg the regulator and appeals bodies) should have a right to inspect all financial documents relating to the access service. The purpose of this principle is to ensure that the arbitrator and regulator have access to all information that is necessary to assess and settle issues relating to access.[222]
Clause 6(4)(p) Consistency of State and Territory access regimes	Clause 6(4)(p) provides that where a service is subject to access regimes in more than one state or territory, those regimes should be consistent and should provide for a single process, a single dispute resolution body and a single enforcement forum. These considerations are relevant for a service located in more than one jurisdiction, or where multiple access regimes apply to a service located in a particular jurisdiction. The purpose of this principle is to ensure there is a single seamless and consistent process for obtaining access to a service, promoting timely and efficient access outcomes.[223] It may be relevant, as part of this principle, to consider the extent to which the Code is consistent with other related state access regimes. For example, in the WARAR Final Recommendation, the NCC raised the issue of consistency between the Code and the ARTC IAU that is in place for the track between Kalgoorlie and the South Australian border.[224] As part of the CIRA, the State and Territory governments agreed to implement a consistent system of rail access regulation, based on the ARTC IAU model, for all nationally significant rail corridors (including between Perth and Kalgoorlie) where the benefits of such consistency exceeded the cost.[225] CBH notes that the Council of Australian Governments (**COAG**) Business Regulation and Competition Working Group and the COAG Reform Council have determined that the ARTC model should not be applied in WA until it can be demonstrated that the benefits of this approach outweigh the costs.[226] However, the CIRA has efficiently upheld the ARTC IAU as the preferred form of regulation to give effect to the objective of economic efficiency. It may therefore be relevant, in assessing the suitability of the Code to give effect to the CPA, to consider the extent to which the Code departs from the ARTC IAU.
Clause 6(5)	
Clause 6(5)(a) Objects clause	Clause 6(5)(a) requires that the regime incorporates an objects clause that provides a clear statement that the purpose of regulating third party access is to promote economic efficiency in the operation, use and investment in infrastructure, thereby promoting competition in upstream and downstream markets. This reflects the underlying goal of regulating access, which is to promote efficiency.[227] The NCC has indicated that the application of an efficiency objective encompasses three broad components:

221 SA Ports Access Final Recommendation at 5.63.

222 SA Ports Access Final Recommendation at 5.118.

223 SA Ports Access Final Recommendation at 5.18.

224 WARAR Final Recommendation at 6.

225 CIRA, clause 3.1.

226 2009 COAG Reform Council Report: Report to the Council of Australian Governments on Implementation of the National Reform Agenda, March 2009, page 58-59.

227 Guide to Certification at 3.9.

Clause of CPA	Analysis
	(a) ensuring the efficient use of infrastructure, particularly by preventing access providers from misusing market power by raising prices or refusing access to services; (b) facilitating efficient investment in essential infrastructure, particularly by ensuring that: (i) infrastructure is maintained and developed appropriately; (ii) infrastructure owners earn sufficient returns to provide incentives for efficient investment; and (iii) incentives are minimised for inefficient development of infrastructure and for inefficient investment in upstream and downstream activities; and (c) promoting competition in activities that rely on the use of the infrastructure.[228] The purpose of this objects clause is to provide guidance to the parties, regulators and arbitrators, resulting in more consistent decision-making. This is intended to minimise disputes and misunderstandings, which saves time and reduces costs.[229] However, inserting an objects clause alone is unlikely to be effective. It is important to ensure that the objects are pursued in an operational sense. This will depend primarily on the issue of access pricing,[230] as discussed below.
Clause 6(5)(b) Regulated access pricing principles	The principles set out in clause 6(5)(b) are intended to ensure that the access price promotes the efficient use of, operation and investment in infrastructure as a means of promoting effective competition in dependent markets. These pricing principles require that regulated access prices should be set to cover efficient costs and provide a return on investment that is commensurate with the risks involved. This should reflect, as closely as possible, the outcomes that would be expected in an effectively competitive market.[231] *(a) generate expected revenue for a regulated service/s that is at least sufficient to meet the efficient costs of providing access to the regulated service/s and include a return on investment commensurate with the regulatory and commercial risks involved* The principle requires that access prices should reflect efficient costs, not actual costs. This gives the access provider an incentive to achieve cost efficiencies.[232] *(b) allow multi-part pricing and price discrimination when it aids efficiency* The regime should recognise that multi-part pricing and price discrimination can promote efficiency in some circumstances, provided discriminatory prices are not used for anti-competitive purposes. This principle supports clause 6(4)(m), which requires the regime to prohibit conduct for the purpose of hindering access.[233] *(c) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour its downstream operations, except to the extent that the cost of providing access to other*

228 Guide to Certification at 6.3.

229 Guide to Certification at 6.2 and 6.4.

230 Corones, *Competition Law in Australia* (Thomson Reuters, 5th edition, 2010) at [14.25].

231 Guide to Certification at 6.5.

232 Guide to Certification at 6.9.

233 Guide to Certification at 6.10.

Clause of CPA	Analysis
	operators is higher This principle requires the regime to expressly prohibit vertically integrated service providers from setting terms and conditions of access that discriminate in favour of its downstream operations.[234] *(d) provide incentives to reduce costs or otherwise improve productivity* This principle requires that access prices should provide incentives to reduce costs or improve productivity. This is intended to reflect behaviour in an effectively competitive market, where businesses need to continually improve their performance to gain cost advantages over their competitors.[235]
Clause 6(5)(c) Merits review	Clause 6(5)(c) outlines the requirements of merits review, where merits review of decisions is provided in the regime. This does not require the regime to provide for merits review. The Code does not currently contain a merits review mechanism. However, given CBH's submissions, it may be appropriate for merits review to be available to an access seeker, particularly in relation to decisions concerning performance requirements.

234 Guide to Certification at 6.11.

235 Guide to Certification at 6.12.

SCHEDULE 2 – CHRONOLOGY OF KEY EVENTS

Date	Event[236]

236 References in this table to "Parts", "sections" and "Schedules" are to Parts, sections and Schedules of the Code.

Date	Event[235]

Date	Event[235]

Date	Event[235]