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2015 Review of the Railways (Access) Code 2000 Issues Paper

The Department of Transport (DoT) supports the review of the *Railways (Access) Code 2000* (the Code) currently being undertaken by the Economic Regulation Authority (ERA).

The recent Inquiry report (issued in October 2014) by the Economics and Industry Standing Committee of the Legislative Assembly on the Management of Western Australia's Freight Rail Network, identifies a number of potential areas for improvements within the Code. The State Government's response to the recommendations and findings in the Inquiry highlighted that the Government is supportive of an outcome that will enhance freight efficiency and the utilisation of rail infrastructure. In the context of grain freight transport, the Inquiry raised a number of key policy challenges, as detailed below:

- The need to provide clarity on third party access arrangements to rail lines classified as 'Tier 3' in the Strategic Grain Network Review report (2009);
- The ERA facilitating rail access through the provision of a costing and pricing model that is underpinned by assumptions that are relevant to current industry practices;
- The usefulness of the Code in facilitating the negotiation-arbitration process to achieve acceptable outcomes within a reasonable timeframe, between the lessee and access seekers; and
- The availability of information such as freight rail network capacity and performance reviews in the public domain to promote transparency and accountability.

The DoT agrees with the ERA's position that the Code may remain dormant for the period during which there is no reason for it to be accessed. In such instance, dormancy does not necessarily indicate market failure.

In response to the ERA's invitation for public comment on the 2015 Review of the Code Issues Paper, the DoT has reviewed the issues identified in the ERA Issues Paper and has addressed them in line with the Government's response to the recommendations and findings from the Inquiry. In developing this submission, the DoT has consulted with the Public Transport Authority (PTA).

Clarity on third party access to Tier 3 rail lines

It is critical that the current review of the Code provides clarity and direction to the access negotiations between the lessee and users of 'Tier 3' rail lines. The Inquiry

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found that the lessee's decision not to renew any access agreement for the Trayning-Merredin, York-Quairading, Katanning-Nyabing and Tambellup-Gnowangerup lines in June 2009, was in effect a withdrawal of those lines from service. This suggests that Clause 6(e) of the Competition Principles Agreement (CPA) requirement is not being met. As noted in the ERA Issues Paper, Clause 6(e) requires the facilities owners to promote access and not hinder access. As indicated by the Inquiry findings, current arrangements do not promote access.

It is recommended that the ERA clarifies what mechanisms under Clause 6(f) (i.e. provide incentives to reduce costs) are available to promote third party access. Furthermore, there may be a case for the ERA to define a more prescriptive test under Section 13 (i.e. negotiating with proponent in good faith) of the Code.

Rail access based on relevant costing and pricing model

As noted by the ERA, the current asset valuation methodology prescribed in the Code needs to be reassessed. In 2010, the National Competition Commission (NCC) noted in its Final Review of the effectiveness of the WA Railway Access Regime that it is the only regulated industry to adopt the Gross Replacement Value methodology (GRV). NCC noted that Depreciated Optimised Replacement Cost (DORC) is the widely accepted asset valuation methodology for regulation in Australia. DoT understands that using the DORC methodology is common practice in infrastructure intensive industries, but potentially results in some degree of uncertainty regarding future asset valuation. The DORC methodology requires regular asset revaluations and may vary over time with changes in market conditions.

The DoT supports the ERA in identifying an appropriate asset valuation and costing methodology for rail infrastructure that is relevant to current industry needs. Consideration may be given to alternative methodologies such as DORC, historical value, and deprival value to assess suitability.

A review of the methodology used for setting floor and ceiling prices for rail access is useful in light of the current, ongoing negotiation-arbitration process between Brookfield Rail and Cooperative Bulk Handling. As defined in the Code, the floor price is calculated as the additional cost incurred by the operator in allowing access to a particular line for 12 months, while the ceiling price is the cost of replacing that line with a newly constructed line. This prescribed approach results in a large range between the floor and ceiling price. Consequently, it provides little assistance in facilitating an arbitration process as is evident from the current negotiation between Brookfield Rail and CBH for access to the grain network. Furthermore, the PTA has noted that the ceiling and floor pricing assessment which are based on forecast costs over 12 months may be skewed by the significant maintenance cost which occurs cyclically every 15 years.

There is value in considering a benchmark tariff for rail access using methodology such as the Weighted Average Cost of Capital (WACC), rather than upper and lower price boundaries as a basis for negotiating access price. The DoT supports, in principle, the



ERA considering alternative appropriate rail access pricing models that may be better suited to industry requirements. However, a benchmark tariff leaves little room for negotiation and assumes sufficient accuracy in the price, which may be unreasonable given the uncertainty of valuation.

Negotiation arbitration process

The ERA seeks comments on the time limit for the resolution of disputes between the rail owner and access seeker. The Rail Inquiry concluded that it is not possible to evaluate the usefulness of the Western Australian Railways Access Regime in resolving a dispute between the railway owner and an access seeker as the arbitration process has never been completed for any access proposal.

In this context, the DoT supports that the Code provides a time period for the resolution process to provide certainty to access commercial negotiation processes and some incentive for achieving appropriate outcomes.

Transparency of information

The ERA seeks comments on dissemination of information that the lessee claim as confidential. The DoT agrees with the principle of transparency of information. However, the tabling of reports and reviews in Parliament should always be assessed on a case by case basis, taking into consideration sensitive commercial-in-confidence information contained in the documentation, as well as confidentiality clauses contained in the legal contracts when there is a potential adverse impact on the company involved.

One example of where a high degree of confidentiality is respected and maintained is the State Agreements overseen by the Department of State Development. Not honouring the private sector need for confidentiality can have significant long term implications for industry entering into business agreements with Government, especially in an environment where Government will increasingly be dependent on the private sector to invest in major infrastructure projects.

Thank you for the opportunity to comment.

Yours sincerely

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