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Review of the Railways (Access) Code Draft Report

30 October 2015

Dear Robert,

Aurizon welcomes the opportunity to respond to the Economic Regulatory Authority's **(Authority)** draft report on the review of the Railways (Access) Code 2000 **(Draft Report)**. In parallel, Aurizon has made confidential submissions to the Australian Competition & Consumer Commission in relation to the proposed acquisition of Asciano Limited by a consortium assembled by Brookfield Infrastructure Partners LP. The ACCC submissions reflect Aurizon's significant concerns about the proposed transaction and the reservations Aurizon has about the adequacy of the Code to constrain a vertically integrated entity.

Aurizon has previously made submissions in response to the earlier issues paper. These submissions advocated for the continuation of an access regime which gave primacy to promoting commercially negotiated outcomes but recommended that further information requirements be imposed on the access provider to significantly improve the effectiveness of those negotiations and substantially redress the imbalance in the negotiating power under the current access regime.

Since commencement of the review, Brookfield Rail's parent entity has sought informal merger clearance to acquire interests in Asciano. This would lead to the integration of rail freight services in the interstate and Western Australian markets. Under these circumstances Aurizon considers that the Western Australian Rail Access Regime **(WARAR)**, in its current form, is not suited to promoting the objectives of Railways (Access) Act 1998 (**the Act)** or those of the Competition Principles Agreement **(CPA)**. The scope of changes necessary to achieve an effective regulatory regime for such a material change in industry structure extends to the WARAR as a whole and therefore Aurizon has not sought to address these matters in this submission.

Aurizon's objectives for the review of the Code remain focussed on improving the effectiveness of the negotiate-arbitrate model applicable to a structurally separated below rail access provider. However, Aurizon does not consider that the Draft Report achieves this objective and the extent of the Authority's proposed changes are not sufficient for the WARAR to be deemed an effective access regime that could be re-certified.

This submission identifies that:

- The regime's prescriptiveness should be proportional to the level of the access provider's market power, the industry structure and the objective of promoting competition;
- the market conditions and structures differ considerably from those prevailing in the period of the Code's original design;
- there are a range of circumstances which incentivise access seekers to negotiate outside of the Code and this should not form the basis for concluding that changes to the Code should be limited;
- transitioning nominated corridors to the National Access Regime, or an alternate regulatory model, needs to occur in a highly coordinated way to ensure efficient and effective regulation applies;
- the ability, and potential, for unfair differentiation to occur between access negotiated inside and outside of the Code is inconsistent the objects of the Act;
- there is sufficient grounds to require an increase in the cost and asset performance transparency to improve the effectiveness of negotiation both inside and outside of the Code with minimal regulatory costs to the access provider;
- the pricing guidelines should be sufficiently augmented to include a requirement to promote the competition objectives of the Act; and
- the Code needs to improve the ability of an access seeker to pursue productivity and efficiency improvements during the term of an access agreement.

Prescriptiveness of the Code should be increased to Promote Competition

The Draft Report largely recommends the access regime continue in its current from with minimal changes identified to improve the effectiveness of the negotiation process. Where the Authority considers that an increased level of prescription might be necessary, the suggested approach is to consider transferring those routes to a more prescriptive regulatory model.

In assessing what routes should be subject to a more prescriptive regulatory model the Authority considers it would have regard to:

- the number of access applications for a particular and reasonably similar service (essentially the interstate rail freight task);
- whether the track condition is close to replacement costs where prices are likely to be close to, or at the ceiling level (some high value mineral commodities); and
- where there is less incentive for the infrastructure provider to negotiate access to its rail network including where the service provider is vertically integrated.

The Authority concludes that 'these circumstances do not prevail across all WA railway networks, but elements are apparent on some routes'. As a consequence, the Authority recommends that only the interstate route west from Kalgoorlie, and the TPI Railway should be transferred to a more prescriptive regime.

Aurizon notes that the Authority's recommendation does not specifically identify the intrastate routes managed by Brookfield Rail as fulfilling this criteria and warranting a more prescriptive

approach to ensuring the objects of the Act in relation to '*encouraging the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations*' is fulfilled.

The Authority's criteria is consistent with Brookfield Rail's own response to the issues paper which acknowledged that a more prescriptive regulatory model would be required to ensure the effective regulation of a vertically integrated provider. The Draft Report was published following the commencement of the Australian Competition and Consumer Commission's **(the ACCC)** market enquiry into the proposed acquisition of Asciano by Brookfield Rail. However, the Draft Report makes no reference to this proposed transaction. As a consequence, it is unclear from the Draft Report as to whether the Authority's exclusion of the intrastate network from being transferred to a more prescriptive regime considered the implications of the transaction and that it reflects the circumstances that currently prevail.

In this regard, Aurizon notes that the ACCC's Statement of Issues issued on 15 October 2015 has acknowledged stakeholder concerns regarding whether the current Western Australian Rail Access Regime would adequately restrain a vertically integrated Brookfield Rail from engaging in conduct which is incompatible with the objects of the Act and the CPA. Brookfield Rail's views and the Authority's own conclusions are consistent with these concerns. However the Draft Report does not recommend sufficient changes to the Code to provide an appropriate safeguard and facilitation of a contestable market for rail operations.

The matters identified in the ACCC's Statement of Issues contemplate the need for a substantive review of both the Code and the Act. That is, changes to the Code alone may not be sufficient to ensure effective regulatory oversight of a vertically integrated access provider. As changes to the Act are beyond the scope of the Authority's review of the Code this submission has been prepared on the basis of the following assumption:

> *the application of the WARAR will continue to apply to the existing prescribed routes included in Schedule 1 of the Code and subject to the current industry structure.*

Aurizon has not sought to identify what changes would be required to be made to WARAR to ensure effective regulatory oversight of Brookfield Rail should it, or a related party, acquire an interest in the downstream rail haulage market. In considering whether to approve the Brookfield acquisition of Asciano, and under what conditions that would be approved, the ACCC will determine the appropriate form of regulation. To the extent this requires the continuation of regulatory oversight of the Brookfield Rail network under the WARAR then there should be further opportunity to consider what changes need to be made to both the Code and the Act.

Market Conditions Differ Materially Relative to the Code's Original Design

Aurizon acknowledges that the WARAR has previously applied to a vertically integrated access provider on the narrow and standard gauge leases currently held by Brookfield Rail. However, this does not provide a reasonable basis to conclude that the WARAR remains appropriate for the potential significant changes in market structure and the subsequent changes which have occurred in the rail freight market. In responding to the initial 2005 Code review Pacific National noted that[1]:

> *Inducing competition in dependent markets is one of the fundamental aims of the CPA. However, the approach taken to the calculation of ceiling prices in Western Australia*

[1] Pacific National (2005) Submission to the Economic Regulation Authority on the Review of the Western Australian Railways (Access) Code (2000)

permits very high access charges to be set by WNR. This ability presents the possible risk of an access provider setting access charges high enough to deter competitive entry in the haulage of freight on the intrastate network. No above rail competitor has been able to enter the Western Australian intrastate network where competing haulage services have been sought by customers for minerals haulage.

The primary objective of the WARAR is to promote a contestable rail freight market by promoting entry to a more efficient competitor. In the absence of any explicit requirement for internal access charges to be determined with reference to a competitive neutrality objective, there is substantial scope in the setting of access charges between the floor and ceiling costs to preclude the entry of a more efficient competitor as the price would fall within the reasonable range and be applied in a non-discriminatory manner. That is, entry conceptually would only occur where it is efficient from the joint above and below rail cost and not solely on the costs in the downstream market. Therefore, entry becomes economically feasible where the total rail freight costs supports the below rail access price being close to the ceiling price.

Achieving the Act's objective of facilitating a contestable market for rail operations would require the access provider to have regard to offering competitively neutral access charges. King and Gans[2] define competitive neutrality as holding when:

For a given number of firms in the downstream market, the behaviour of the integrated firm in the downstream market does not differ from that of its competitors solely as a consequence of its integration. That is, the regulated upstream facility's ownership could be transferred to any downstream competitor (or an independent owner) without any resulting change in behaviour in the downstream market.

Competitively neutral access charges must not fall below the level required for the owner of the regulated facility to recover its efficient costs of providing the service, including a return on investment commensurate with the commercial and regulatory risks. However, the return on investment should not be framed around full economic replacement costs but rather have regard to the invested capital and/or transaction values to balance the interests of service provider with objects of the Act.

More generally, Aurizon has the following concerns about the adequacy of the Code to constrain a vertically integrated operator:

- a negotiate/arbitrate model may prove inadequate when faced with the significant imbalance of bargaining power between a vertically integrated operator of natural monopoly infrastructure and a non-integrated access seeker;
- lack of effective price controls combined with the wide range between floor and ceiling prices arguably creates a need for prices to be set by a regulator at economically efficient levels to enable competition to continue in contestable markets;
- lack of a prohibition on unfair differentiation, including between access seekers and the access provider's own business in relation to price and non-price terms and conditions (e.g. allocation of train paths, particularly premium train paths; day of operations and maintenance planning practices; limiting double stacking, over-length and special trains to hamper productivity; implementing unfavourable and restrictive load tables; responsiveness to operational change requests; reduction of track speeds

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[2] King. S,P and Gans. J,S. (2005) Competitive Neutrality in Access Pricing, *The Australian Economic Review*, vol. 38, no. 2, p. 129.

under the guise of maintenance and unfair applications of technical and safety standards); and

- inadequacy of ring-fencing regimes which are not supported by periodic audits (including at the request of an access seeker) and strong enforcement powers.

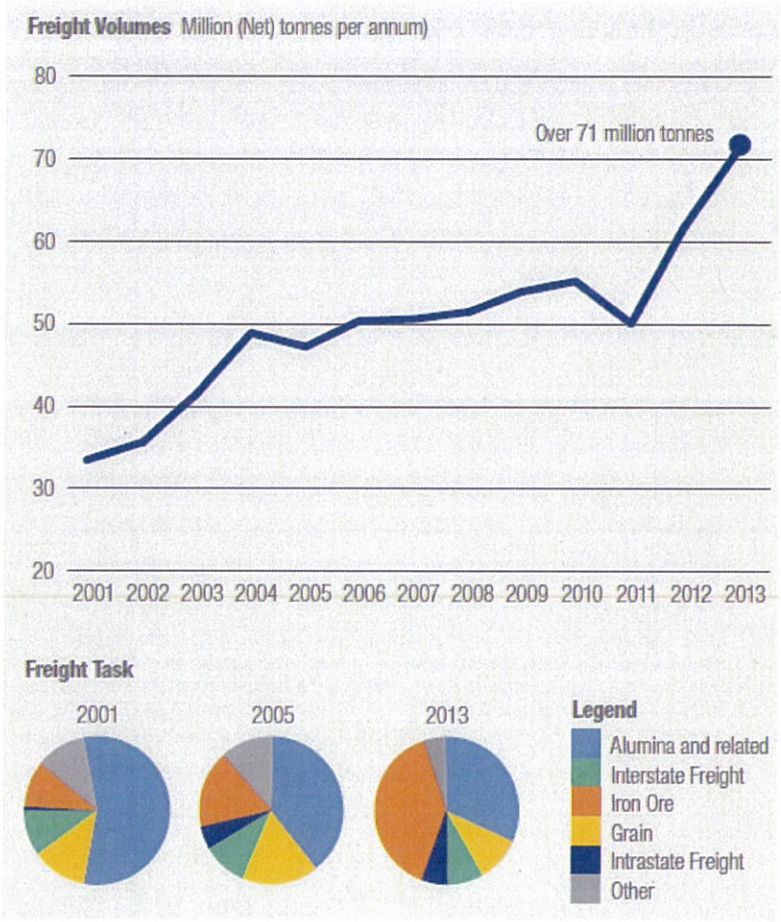
The Authority may be interested in the discussion in the Queensland Competition Authority's draft decision on the 2015 Queensland Rail Draft Access Undertaking and associated reports and submissions regarding the valuation of the Western System regulatory asset base and revenue adequacy. Subject to satisfying both the competitive neutrality objective and the recovery of efficient costs constraint then the access provider's below rail profits should be indifferent to the identity of the rail operator in the downstream market.

The exclusion of this requirement in both the Western Australian and South Australian rail access regimes was a contributing factor as to why third party entry had not occurred where the access provider is, or was, vertically integrated given the low volumes and revenues prevailing in those markets. The scale and capacity to pay in these markets also presented barriers to entry associated with an entrant operator achieving a minimum efficient scale.

The interstate rail freight market was always effectively separated since the related operator of WestNet prior to structural separation of the below rail infrastructure in Western Australia did not participate in the interstate freight market. Third party entry and competition has emerged as a result of the fact that the market provided the scale to support above rail investment. Similarly, the freight mix and volumes on the Brookfield Rail network has also changed considerably since separation, largely driven by the commodities boom and development of iron ore export chains.

The rail freight market has matured, diversified and grown since the commencement of WARAR and its design and operation needs to have regard to supporting effective and sustainable competition if the access provider becomes a market participant in the market for rail operations. It is therefore necessary that competitive neutral access charges play an important role in achieving that objective. The change in scale and mix of the Western Australian Rail Freight Market is shown in the following figure:

Brookfield Rail's freight volumes and task proportions, 2001-13[3]



There has been significant experience across various jurisdictions and industries in designing effective regulatory frameworks since the WARAR Code was introduced. Prior to the entry of WATCO and the inclusion of FMG under the WARAR market reviews of the WARAR were at best theoretical.

Transitioning to an Alternate Regulatory Model is Desirable

The Draft Report includes the recommendation that:

> *The Government implement the 2006 Competition and Infrastructure Reform Agreement (CIRA) in respect of the interstate route west from Kalgoorlie, and the TPI railway.*

Clause 3.1 of CIRA required that a simpler and consistent national system of rail access regulation should apply to interstate rail track from Perth to Brisbane using the Australian Rail Track Corporation Access Undertaking to the ACCC as a model. Aurizon has sympathy with this approach and considers it desirable if the proposed Brookfield/Asciano merger proceeds as the ACCC would then be in a position to deal with disputes over access.

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[3] Brookfield Rail 'About Us' Fact Sheet, 19 January 2015, accessible at http://www.brookfieldrail.com/assets/br_files/Communications%20Material/140530%20BR%20Corporate%20Fact%20Sheet%20FINAL.pdf

It is uncertain from the Draft Report how this recommendation could be implemented. Presumably, on the basis of the Authority's reference to removal of the nominated routes from Schedule 1, this would permit the relevant services to be declared under that national access regime as they would no longer be subject to an effective access regime. However, this does little to promote regulatory certainty if this leads to the service not being subject to an effective access regime while that process occurs.

Aurizon supports the transfer of the interstate route to the national access regime as envisaged under CIRA to promote a consistent and more efficient regulatory approach to infrastructure of national significance. Nevertheless, Aurizon foresees a range of practical difficulties with the recommendation to transfer the interstate rail network segment to the ACCC. Firstly, declaration would not necessarily permit the ACCC to require an access undertaking to be given in the form consistent with ARTC Interstate Access Undertaking and therefore the CIRA objective would not be satisfied. Second the route in question is also utilised by intrastate freight services which would remain subject to the WARAR. This has the potential to lead to a significant increase in the regulatory burden for the access provider in complying with two regulatory frameworks but also the prospect of significant regulatory uncertainty and inconsistency in the operation of the two regimes. This would include:

- the potential conflict and inconsistency in the operation of segregation arrangements that Brookfield Rail would be required to develop and comply;
- material differences and duplication in accounting separation and other regulatory accounting and reporting practices; and
- substantial differences in the determination of allowable revenues over the common route where different approaches are applied in the determination of key building block parameters such as the asset valuation, deprecation, economic life, cost allocation methodologies and application of revenue cap/overpayment rules.

Therefore implementing CIRA's recommendation would require substantial regulatory coordination and information sharing between multiple economic regulators. Aurizon notes that some of these issues would be partially mitigated through the transfer of not just the interstate corridor but all routes covered under the standard gauge lease. However, issues will remain in relation to different regulatory approaches between the narrow and standard gauge networks.

Ultimately, this is a matter for the Western Australian Treasurer as responsible Minister for the Act, but it suggests that a coordinated approach would be required between multiple government agencies to manage the transition to an effective alternate regulatory access regime.

Of course, if the proposed merger were to proceed these issues may need to be dealt with by the ACCC as part of its clearance of the transaction.

Access Negotiations Outside of the Code

A key factor which appears to have contributed to the Authority's position to propose minimal changes to the Code is that it considers the apparent lack of access being negotiated under the Code does not provide evidence of the Code's failure. Aurizon does not support the Authority's conclusion that it is too early to objectively assess the effectiveness of the Code as there is sufficient anecdotal evidence and sound reasons for negotiations occurring outside of the Code as a direct consequence of the Code's construction. That is, on the balance of probabilities the negotiations outside of the Code are more likely related to the Code's deficiencies rather than its success. This is further amplified under the WARAR relative to

other regimes which include an access undertaking as the matters to be negotiated and therefore the potential areas for dispute are broader.

The reasons for the predominance of negotiations outside of the Code are varied and may differ among different access seekers. The most significant driver of an access seeker's preferences to conduct negotiations outside of the code is the uncertainty of outcomes associated with negotiating under the Code.

The extremely wide band between floor and ceiling cost and the lack of predictability of the potential outcomes from arbitration within this range are not conducive to encouraging commercial negotiation under the Code. It is also reasonable to expect that the access provider's proposal under the Code is likely to be materially greater than the access charge that would be obtained from negotiating outside of the Code. The incentives for the service provider to offer the highest price feasible are in part a consequence of the construction of the Code itself. As the arbitrator is required to have regard to the comparable prices for access negotiated under the Code, the service provider will rationally seek to maximise the potential price outcomes obtained under the Code to protect its commercial interests for future negotiations under the Code.

As the access provider's pricing proposals increase substantially from historical pricing, and approach the price ceiling, the potential worst case outcomes under the Code will more closely approximate the price offered outside of the Code. In this scenario the access seeker's incentives to negotiate under the Code will also increase. These incentives are observable in the current CBH negotiations where CBH elected to commence negotiations under the Code in response to the materiality of the price increases proposed by Brookfield.

Even where arbitration has occurred under the Code, the matters which were considered as relevant by the arbitrator in making its findings are of little practical guidance to other access seekers due to the requirement for the arbitrated outcome to remain confidential.

Another key factor in access seekers negotiating outside of the Code relates to the potential need for the access provider to extend or expand the facility to accommodate those rights. Assuming the access seeker and the access provider are unable to agree reasonable terms then the matter of the price for the expansion is referred to the independent arbitrator. The access regime should not compel the access provider to fund the expansion if it does not consider the price determined by the arbitrator is reasonable.

Should the access provider form this view there is no clarity under the Code as to what process would be followed to permit the access seeker from funding the upgrades. The implications of the uncertainty of the expansion or upgrade obligations under the Code were highlighted in the Western Australia Economics and Industry Standing Committee report on the Management of Western Australia's Rail Freight Network which stated[4]:

> *Because the Code imposes no obligation upon Brookfield Rail to perform any upgrade, extension or expansion to any route, Karara Mining formed the view that the regulatory framework could not provide sufficient certainty for achieving its desired outcome within an acceptable timeframe. As such, Karara Mining elected to simply negotiate directly with Brookfield Rail for access. In essence, having considered its provisions and mode*

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[4] Western Australia Legislative Assembly (2014) The Management of Western Australia's Rail Freight Network, Economics and Industry Standing Committee, Report No. 3, p.112.

of operation, Karara Mining concluded that engaging the Code would be a waste of time.

It is reasonable to expect that if access seekers considered the Code more effective, they would increasingly look to negotiate inside the Code and therefore the Authority should consider how the Code should be amended to improve its effectiveness.

Discrimination between Negotiations Conducted Inside and Outside of the Code

The drafting of the Code makes it clear that the obligation to not unfairly differentiate between access seekers does not extend to differences in terms and conditions between access negotiated inside and outside of the Code[5]. While changes to the underlying legislation may be required to address this, it is something Aurizon wishes to draw to the ERA's attention.

Due to singificant concerns regarding the potential for discriminatory pricing of access for interstate rail freight services Aurizon and SCT Logistics sought authorisation from the ACCC to collectively negotiate the terms and conditions of access. Unfortunately, authorisation does not compel Brookfield to negotiate collectively or preclude it from seeking to impose confidentiality restrictions which limit the authorised conduct from occurring. The application for authorisation noted that:

> *While an access seeker may ask the ERA to assess whether the price offered is fair in relation to that which other parties are paying this does not extend to the price of access agreements negotiated outside of the Code. As a consequence, the WARAR does not preclude the service provider from unfairly differentiating between an access agreement negotiated inside the Code from one negotiated outside of the Code. Even where both access seekers elect to negotiate under the Code there is no process to jointly arbitrate an access dispute on the same matter and this could still lead to differential outcomes.*

Brookfield Rail's submission to the ACCC regarding the application for collective negotiation argues that this is not in fact the case and that the independent arbitrator would have sufficient discretion to obtain details of prices negotiated outside of the Code under s.29(1). This would appear contrary to the Authority's stated position in the Draft Report that:

> *The Authority does not consider that it is appropriate for the provision of section 16 to apply to commercial agreements outside of the Code, or for the regulator to have access to such agreements as a matter of course, as argued by Aurizon.*

Brookfield Rail's submission did not identify any restrictions in the Act or the Code that would prohibit them from engaging in discriminatory pricing between agreements inside and outside of the Code. As an access holder is not aware of the terms and conditions of its competitor's access arrangements it is unable to determine whether it is subject to unfair differentiation which can occur through a range of practices such as volume discounts, fixed tariff components, take or pay and other arrangements that can have profound implications on a railway operator's ability to effectively compete in the relevant market for rail operations.

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[5] Clause 4A(1)(b) requires that 'if the parties choose to negotiate an agreement for access otherwise than under this Code, nothing in this Code applies to or in relation to the negotiations or any resulting agreement

The ability for the access provider to unfairly differentiate between access agreements negotiated inside or outside of the Code is fundamentally incompatible with the objects of the Act and objects clause in the CPA. In order for the Code to comply with the CPA it must adequately address how it gives effect to the objects of the access regime.

Improving Cost and Service Quality Transparency

An access provider should be required to disclose the information relevant to the determination of efficient costs with claims for confidentiality being subject to a demonstration of reasonable commercial damage from disclosure.

The practical consequence of floor and ceiling costs being determined under clause 10 of Schedule 4 is that the participation of a broader range of stakeholders in that process is restricted. Therefore, the limited disclosure of information increases the prospect that an alternate set of costs could be valid under a subsequent determination or that a material error would be found in a previous determination.

It is difficult to envisage how a subsequent access seeker would be able to influence the floor and ceiling costs for a route in relation to its own proposal where the route is subject to clause 10 determination from a previous proposal. The subsequent access seeker is therefore prejudiced by its inability to participate in the initial cost determination and the implications for legal appeals by the access provider if the regulator sought to apply a cost determination which materially differed from an earlier determination on the basis of information provided by the subsequent access seeker.

Aurizon considers that there are sufficient provisions under the Code to allow the Authority to make periodic floor and ceiling cost determinations which are established through a public consultation process under clause 9 of Schedule 4. Given the increasing likelihood of a proposal will being made to the railway owner in respect of a route under the Code the Authority should re-establish published floor and ceiling costs under clause 9 based on the foreseeable demand for those routes.

Increased level of stakeholder participation in the review process would substantially improve the quality and reliability of the information the regulator would be able to have regard to. It has been demonstrated through other regulatory models that this can significantly improve the quality of regulatory determinations.

The Draft Report also notes that the price negotiated between the floor and ceiling price should take into account the asset condition rather than making adjustments to the valuation used for the ceiling price. The Authority states:

> *... the Code clearly lists the actual condition of the track as a determinant of price in negotiation, and the replacement specification of the track as a determinant of the upper cost bound for negotiation.*

This envisages that prices should fall well below the ceiling levels where the asset condition is substantially below that assumed in the asset valuation. However, this represents a significant source of leverage to the access provider in the negotiation given the extensive information asymmetry between the access provider and the access seeker regarding the condition of the asset. The access provider can overstate the quality of its asset condition and then later rely on rail safety standards to degrade the service quality through imposition of temporary speed restrictions and other impositions/restrictions. This occurs largely because a maintenance deficit would not necessarily be reflected in current performance data and therefore may not be representative of the standard of infrastructure which might prevail over the duration of the access agreement. These ex-post changes in service quality increase the rail operator's costs

of transport through lower asset utilisation of performance which were not factored into the operator's haulage pricing.

Aurizon reiterates its previous statements that the Code should include the requirement for mandatory asset condition and performance reporting in order to overcome the information asymmetry on a matter which is highly pertinent to the negotiated price outcome. It is also circumspect how an independent arbitrator would be able to make a determination on the standard of infrastructure without access to appropriate levels of information on the asset condition.

Pricing Guidelines to Improve the Predictability of the Arbitrated Outcome

Aurizon has recommended that the Authority could prepare non-binding price guidelines which would assist the arbitrator in applying the matters outlined in clause 13 of Schedule 4 in exercising its functions and may also assist parties reach agreement on price without reliance on dispute resolution.

The primary purpose of the non-binding guidelines is to fill the void associated with a lack of regulatory precedent in the determination of prices between floor and ceiling costs. In particular, Aurizon considers that independent commercial arbitrators may not possess the expertise necessary to make a determination which achieves the objects of the Act having regard to those matters in clause 13. Similarly, the use of alternate arbitrators could also lead to disparity and inconsistency between arbitrated outcomes.

Aurizon notes that the Authority does not agree with all matters included in Aurizon's supplementary submission to the Issues Paper that should be relevant to a price determination between the floor and ceiling cost band. A significant omission from the matters included within clause 13 is the requirement to have regard to facilitating a contestable market for rail operations or other broader competition objectives. Aurizon recommends clause 13 be amended to include a requirement that the railway owner have regard to:

> *Below rail access charges should allow for the entry of an efficient rail operator to trade profitably in a downstream market on a sustainable basis*

The inclusion of this clause would therefore require the access provider to consider when proposing an access charges, replacement charges or revisions to access charges whether that rate would exceed a level which would squeeze a rail operator's margins such that it would not be able to profitably trade where prices are subject to market constrained pricing from potential substitutes.

Improving the Productivity of Rail Operations

Of significant concern to rail operators when negotiating long term access rights with structurally separated access providers is the lack of flexibility and commercial implications of seeking to improve the productivity and efficiency of their operations.

In negotiating an access agreement the access provider is seeking to obtain long term revenue certainty and a price is negotiated having regard to the costs and risks of providing the service. This price will also have regard to the proposed operating plan and rollingstock configurations initially proposed by the access seeker.

It is not practical to foresee all prospective changes in operations and rollingstock that might be contemplated over the duration of the access agreement and to ascribe an alternate access charge to each of those changes. This can result in a conflict between certainty and technical/dynamic efficiency. In the absence of an alternate demand for capacity which may

be realised from an improvement in the productivity of the access holder's rail operations the access provider has weak incentives to negotiate variations to an existing access agreement.

The efforts of the rail operator to improve the productivity and competitiveness of its operations can also provide opportunities for the access provider to expropriate those efficiency gains by seeking to vary the price substantially more than necessary to reflect any changes in cost or risk or to offset any loss of revenue associated with the proposed changes in operations and rollingstock.

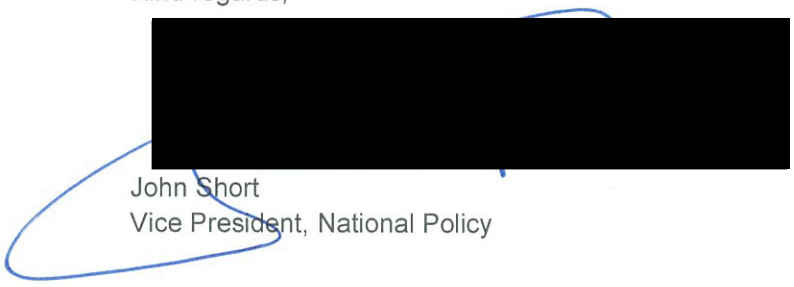
Aurizon considers amendments can be made to the Code which are similar to those in section 101 of the *Queensland Competition Authority Act 1997* regarding the obligation of the access provider to satisfy the access seeker's requirements as follows:

> *In negotiations between an access provider and access seeker for an access agreement, the access provider must make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker.*

Furthermore the Code could also include a requirement that where a rail operator seeks to vary the terms of an access agreement to improve the efficient use of railway facilities then the access provider must make all reasonable efforts to satisfy those requirements and limit any variations in the access charge to the direct change in cost or risks associated with the changes proposed by the access holder. Alternatively, this obligation could be included within the guidelines in clause 13 as this would permit the access seeker to include appropriate productivity review provisions in an access agreement which the access provider would be required to accept.

Aurizon welcomes the opportunity to discuss the matters raised in this submission with the Authority directly. Should you have any questions in relation to this submission please contact Dean Gannaway, Principal Regulatory Economist by phone on (07) 3019 2055 or via email at dean.gannaway@aurizon.com.au.

Kind regards,



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