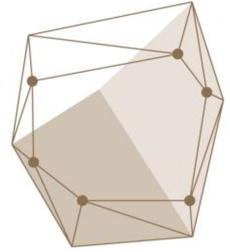
BROCKMAN

BROCKMAN MINING AUSTRALIA PTY LTD



Submission to the Economic Regulation Authority – Draft report on the 2015 Code Review

23 October 2015

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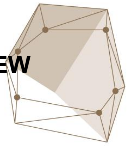


1. INTRODUCTION

One of the central shortcomings of the current form of the *Railways (Access) Code 2000* (WA) (**Code**) is that it is not sufficiently prescriptive. This lack of prescription makes the Code ineffective at providing access to certain below rail infrastructure in Western Australia. The third review of the Code pursuant to section 12(1) of the *Railways (Access) Act 1998* (WA) (**Act**) (**2015 Code Review**) presents the Economic Regulation Authority (**Authority**) with an important opportunity to recommend improvements to the Code and, in so doing, give proper effect to the Competition Principles Agreement.

On 23 September 2015, the Authority released its draft report on the 2015 Code Review (**Draft Report**). Brockman Iron Pty Ltd (**Brockman**) (on behalf of Brockman Mining Australia Pty Ltd and its own behalf):

- supports a number of the Authority's recommendations (most notably Recommendation 1 and the acknowledgement that usefulness the of the negotiate-arbitrate framework of the Code is diminished in relation to The Pilbara Infrastructure's (**TPI**) railway); and
- welcomes the opportunity to comment on the Draft Report and on areas of the Code that, in Brockman's view, must be amended to reduce uncertainty, ambiguity and ultimately unnecessary cost and delay relating to applications for access.

As one of only three access seekers to have ever made an application for access under the Code, Brockman has a unique perspective on the Code, its operation and its deficiencies. This submission is based on Brockman's experience in that regard. For ease of reference, this submission adopts the headings used by the Authority in the Draft Report.

2. COMMENTS ON THE DRAFT REPORT

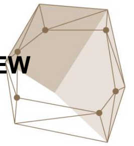
1. Scope of railway regulation

'End effects' and port operations are not relevant to the consideration of capacity in all cases. In Brockman's view, where an access seeker is seeking access to below rail infrastructure between 'ends' (i.e. where the access sought will not extend to the loading or unloading systems of the relevant below rail infrastructure) the 'end effects' will not be relevant to the consideration of capacity for that access.

2. Prescriptiveness of the regime

Brockman supports Recommendation 1.

One of the central shortcomings of the current form of the Code is its lack of prescriptiveness. In Brockman's experience, the Code (and its 'light handed' regulatory approach) does not effectively enable access to TPI's railway. In this way the Code does not achieve its stated purpose. Brockman supports the implementation of an access tariff-based approach regulating the TPI railway (by the ERA or the ACCC) as a regulatory approach that is more appropriate for that particular infrastructure. While Brockman appreciates that the implementation of Recommendation 1 may have its challenges, it considers that these are not insurmountable and that it would result in an access regime that is more certain (both for TPI and access seekers) and ultimately more effective in enabling access to TPI's railway. In this way, the objectives of the TPI's State Agreement would be realised for the benefit of the Western Australian economy.



3. Enforcement of railway owners' obligations

Brockman does not agree that access seekers are as well placed as the Authority to prosecute any failure on the part of the railway owners to meet their obligations under the Code.

While Brockman acknowledges access seekers' right to injunctive relief under the Code, many access seekers (e.g. junior resource developers) do not have the resources to continually monitor and enforce railway owners' compliance with the Code through costly and arduous court proceedings. Pursuant to Part 3 of the Act, the Authority is responsible for monitoring and enforcing compliance by railway owners with the Act and the Code. The powers conferred on the Authority to enable it to discharge that function are much broader than the rights of access seekers, including in relation to access to information and documents and rights of entry. While Brockman is sympathetic to the Authority's desire to use injunctive relief only as a last resort, it is not the only enforcement method available to the Authority.

4. Segregation arrangements

The duty on railway owners, under section 28 of the Act, to segregate access-related functions from other functions is not sufficiently prescriptive. The Code should, at a minimum, prescribe that railway owners' segregation arrangements must include:

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

Brockman's experience to date has highlighted the ineffectiveness of the segregation duty under the Act and specifically the approved segregation arrangements for TPI. Brockman has, on a number of previous occasions, raised these concerns with the Authority.

5. Section 8(4) and 8(5) – when can an extension and expansion be proposed?

While Brockman supports the Authority's view that a failure to specify an extension or expansion in an access proposal cannot invalidate an access proposal, section 8(5) of the Code should be amended to make that clear. Without amendment, scope remains for railway owners to legally challenge and unnecessarily delay access proposals that do not specify whether an extension or expansion will be required.

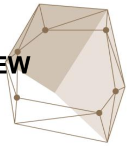
6. Section 10 – when is section 10 relevant

Brockman supports Recommendation 2.

In its current form, the intent and meaning of section 10 of the Code is not clear. In Brockman's view, removing section 10 will remove the uncertainty, and unnecessary cost and delay associated with that section.

7. Sections 14 & 15 – can a railway owner challenge the validity of a proposal prior to receiving the required information from the proponent?

Brockman supports Recommendation 3. However, further clarification and amendment to sections 14 and 15 of the Code is required. This is discussed below.



Timing

Brockman supports the view that sections 14 and 15 of the Code should be clarified to include a timeframe for the provision of the information required by the railway owner under those sections. However, 30 business days is not a sufficient timeframe. For example, in Brockman's experience the time taken to obtain expert reports in relation to capacity has been measured in months, not days, and has been hampered by the wholly insufficient and unclear information provided by TPI on which such an assessment can be made. The timeframe would need to recognise and make allowance for delays outside of the access seeker's control, particularly when the delay is actually caused by the railway owner. In the case of Brockman, court action had to be commenced before the required capacity information was provided by TPI. This was in addition to court action initiated by TPI in relation to the validity of Brockman's proposal.

In Brockman's experience, significant delay has occurred in relation to its ability to satisfy the requirements of sections 14 and 15 of the Code as a direct result of:

- TPI refusing and failing to provide information required by Brockman in order to meet those requirements until court action was initiated by Brockman; and
- significant and protracted court challenges initiated by TPI in relation to the validity of its access proposal.

Threshold issues

Brockman accepts that sections 14 and 15 of the Code are 'threshold issues'. In saying that, such thresholds must be clear and prescriptive, which require further amendment to those sections. The lack of prescription in those sections, specifically in relation to what must be shown to demonstrate 'necessary financial resources' and how capacity is assessed, greatly limits the Code's capacity to achieve its purpose and to accord with the Competition Principles Agreement. The specific amendments that, in Brockman's view, are necessary are set out in part 3(6) of Brockman's April submission to the Authority on the 2015 Code Review.

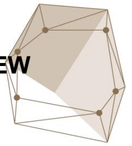
Brockman also notes that there is a discrepancy in the Draft Report in relation to the costs incurred by a railway owner in undertaking a capacity assessment. This discrepancy is between paragraph 78 which notes that a 'proponent should cover any costs incurred by the railway owner' and Recommendation 3 which notes that a 'proponent must cover any reasonable costs incurred by the railway owner'. Brockman is of the view that an access seeker should only be required to cover *reasonable costs incurred by a railway owner* undertaking a capacity assessment.

8. Section 16 – what does the term 'unfairly discriminate' mean?

The Code should provide guidance as to the objective meaning of 'unfair discrimination'. Brockman supports the view that a non-exhaustive list of 'unfair discriminations' would not reduce the flexibility of the Code and may, depending on the list, provide useful guidance.

9. Clause 2 Schedule 4 – is there any better means of estimating capital costs than the GRV method?

The DORC versus GRV approach to valuation is an issue that is becoming increasingly important. Noting that any proposed DORC method of valuation should need to be carefully considered. Brockman's broad view is that the DORC valuation for the determination of floor and ceiling prices is more appropriate.



The adoption of DORC valuation would not only align the Western Australia rail access regime with other rail access regimes in Australia, it would provide more certainty and clarity in floor and ceiling prices over time. In contrast, GRV valuation can change substantially over time resulting in significant movements in the access charges. Those movements may have adverse impacts on project financing.

10. Part 2A & 2 [sections 6, 7, 7A-E] – required and preliminary information

Brockman supports Recommendation 5, Recommendation 6 and the Authority's recommendation that required information should be made available free of charge on the railway owner's website.

In Brockman's view, item 6 in Schedule 2 (Information to be made available) to the Code should also be clarified so it is clear what level of detail is required to be provided.

11. Part 2 [sections 8] – proposals for access

The information which must be included by an access seeker in an access proposal should not be expanded.

In Brockman's view it is more appropriate for an access seeker to provide additional information to a railway owner in the course of negotiation (including pursuant to sections 14 and 15 of the Code) and arbitration (pursuant to Division 3 of the Code). Imposing a requirement on access seekers to provide additional information at the proposal stage may have the effect of discriminating against access seekers who may not be in a position to provide such additional information at that early stage (e.g. junior resource developers).

In this regard, Brockman notes that there is a stark difference between a project development company (with a complete feasibility study subject to an appropriate infrastructure solution) such as Brockman and a proponent seeking access for a task that it already undertakes on a railways network (albeit outside of the Code). The level of information known to the first kind of proponent is necessarily limited to projections and estimates of proposed rail operations potentially some years in the future. The second kind of proponent would already have a detailed working knowledge of their proposed rail operations, in some cases such knowledge would extend back decades. The Code needs to accommodate both kinds of access seekers.

Brockman also notes that:

- section 8 of the Code does not currently limit an access seeker from providing additional information if it chooses to do so; and
- railway owners have broad discretion to request information pursuant to sections 14 and 15 of the Code (which, in Brockman's view, and as previously submitted should be constrained).

12. Part 3 [Division 3] – arbitration of disputes – other matters

Brockman has some difficulty understanding the views of the ERA as expressed in this section. In paragraph 156, the ERA states that certain disputes should be decided by a court and not an arbitrator, but does not suggest any amendments to the Code to ensure that this is in fact what would occur. How does the ERA intend to address this?