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BR Submission to publication of "Review of the Railways (Access) Code 2000 Draft Report" issued on 23 September 2015 by the Economic Regulation Authority

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1. ERA Overview of Findings

1.1 Objects of the Railways Access Regime

1.1.1 At para.15, the Economic Regulation Authority (**ERA**) has found that the objects clause of the Regime is adequate, citing the National Competition Council (**NCC**) as having found that the objects clause in the *Railways (Access) Act 1998* (**Act**) was sufficient to meet the requirement that the regime include an appropriate objects clause.

1.1.2 BR agrees with the ERA's assessment on this issue.

1.2 Scope of Railway Regulation

1.2.1 At para.20, the ERA has considered that the scope of the Act and the Railways (Access) Code 2000 (**Code**) should not be expanded to infrastructure other than that which is currently prescribed.

1.2.2 BR agrees with the ERA's assessment on this issue.

1.3 Prescriptiveness of the Regime and Recommendation 1

1.3.1 At para.27, the ERA notes that a light handed negotiate-arbitrate approach is most appropriate when the condition of the infrastructure is not at replacement standard. At para. 28 the ERA identifies a number of criteria in which a more prescriptive approach, including reference tariffs, would be preferred, including:

- where there is a significant number of access proposals in relation to a particular service type (that is, homogenous freight tasks);
- when the infrastructure condition is close to replacement condition, owing to the reduced possibility for regulatory error, given the assumption that prices would be negotiated close to the ceiling;
- where there is less incentive for the infrastructure provider to negotiate for access to its network.

On the back of these criteria, further conclusions are made in subsequent paragraphs.

1.3.2 BR disagrees with this assessment. The ERA's presumption that a segment of infrastructure is sufficiently homogeneous (in terms of its condition) to be classified in its entirety as being 'close to replacement condition' is problematic. For example, considering a situation where new rail has been installed while sleepers that still retain some useful life (but are not of replacement standard) may have been left in situ: how would the infrastructure be classified? Furthermore, this delineation poses problems through time – in the event that infrastructure departs from replacement condition through use or by virtue of maintenance cycles, would the classification of the

infrastructure change such that the ERA's recommendation for prescriptive pricing should also change? If not, why not?

1.3.3 BR submits that the classification 'close to replacement condition' is sufficiently unclear and variable over time as well as within different portions of a route section as to call into question the validity of the ERA's subsequent conclusions.

1.3.4 On the basis of its assessment of the WA railway networks against its proposed criteria, the ERA has recommended that the Government implement the Competition and Infrastructure Reform Agreement (**CIRA**) in respect of the interstate freight route from Kalgoorlie to Kwinana (the eastern goldfields route, or EGR).

1.3.5 However, the ERA has based this recommendation on the view that there is a reasonably homogenous freight task and that price outcomes are more likely to be negotiated closer to the ceiling. BR has some concerns with both of these conclusions.

1.3.6 BR agrees with the ERA's view that interstate freight services are quite homogenous. For these services, BR provides access to multiple rail operators, who operate in direct competition in the transport of general freight and who utilise reasonably homogenous services in terms of both origin-destination, train characteristics and nature of product carried. However, there is also a significant number of other, intrastate, services that also operate on the route from Kalgoorlie to Kwinana. The nature of these services is far more variable including:

- Origin-destination – a number of these services originate elsewhere on BR's network and use the EGR for a portion of their journey and many of the services only use a portion of the EGR (whether they originate on the EGR or elsewhere on BR's network);
- Train characteristics – the characteristics of the trains operated for these intrastate services can be quite variable, even to the extent that both narrow gauge and standard gauge services operate on some parts of the EGR;
- Products carried – a broad range of products are carried on intrastate services using the EGR, including iron ore, grain, and various other bulk products and general freight.

1.3.7 The access charges paid by interstate freight services on this route remain well below the ceiling price, and are set taking into account a range of factors, including that the access charges for these interstate services using the EGR are required to be consistent with the terms of a wholesale access agreement between BR and ARTC.

1.3.8 The recommendation to implement the 2006 CIRA in respect of the interstate route west of Kalgoorlie had not been foreshadowed by the ERA in its issues paper for the current review, and was not communicated to BR prior to the publication of the draft report. Nonetheless, BR is open to undertaking discussions with the Government as to a potential change in access regulation in relation to services provided on this portion of BR's network.

1.3.9 However, BR strongly believes that any consideration of a change in access regulation on this route to an alternate form based on the ARTC interstate freight access undertaking should only relate to **interstate freight services**. Simply transferring access regulation for the route would cause significant disruption to the regulation currently applicable to portions of many intrastate servicesby potentially subjecting them to an alternate method of access regulation, as indicated in 1.3.6. It does not appear that this is the ERA's intention, but assuming continued applicability of the Code as the WA rail access regime, two regulators, two contracts and two regimes would exist for numerous individual tasks. This would represent an increased regulatory burden for both the railway owner and users alike and something which needs to be taken into account in the ERA's decision.

1.3.10 Importantly, the characteristics of these intrastate services do not meet the criteria that the ERA has established in para. 28 of its draft report as warranting a more prescriptive form of regulation.

1.3.11 It is a common misconception that access to infrastructure (or facilities) is regulated – this is not the case. It is in fact access to the services provided by such infrastructure which is regulated. If the Government were to adopt the ERA's recommendation it must be on the basis that interstate freight **services** (emphasis added) on the interstate freight route be regulated on the basis of the ARTC interstate freight access undertaking, not the infrastructure itself.

1.3.12 Given these concerns, BR submits that the ERA's recommendation could not be implemented by simply removing the interstate route from Schedule 1 of the Code with the effect that both interstate and intrastate freight services were affected. Further amendments to the Code would in fact be required to clarify the interaction of the two regimes, assuming the continued certification of the WA regime.

1.4 Merits Review

1.4.1 At para.36, the ERA states that the regulator only determines the broad parameters for negotiation, and that the ERA believes that the arbitrator effectively assumes the role of merits review in a less prescriptive regime. However, the broad parameters set by the ERA frame the negotiations between a proponent and railway owner and any subsequent arbitration. It is for this reason that the accuracy of such determinations is so important.

1.4.2 BR notes that as per s.29 of the Code, an arbitrator must take into account and give effect to matters determined by the Regulator. In this way, an arbitrator has no capacity to perform a merits review of the findings of the Regulator, including those that constitute the 'broad parameters for negotiation'.

1.4.3 Given the significance of the parameters in question for both the railway owner and access seekers, BR submits that merits review of the Regulator's independent determination of those parameters is warranted. In the event that the desired review

relates to technical aspects rather than process aspects, judicial review is insufficient security to stakeholders.

1.4.4 BR reiterates its support for the inclusion in the Code of clauses providing for merits review of the Regulator's determinations.

1.5 Enforcement of Railway Owner's obligations

1.5.1 At para.41 and 42, the ERA considers that the ability of the Regulator to enforce compliance of the railway owner is sufficient, and that access seekers are as well-placed to prosecute any failure on the part of railway owners to meet their obligations under the Code.

1.5.2 BR agrees with the ERA's assessment on this issue.

1.6 Segregation Arrangements

1.6.1 BR notes the ERA's comments at para.46 and the definition of "access-related functions" in s 24 of the Act, which refer "railway infrastructure under the Code".

1.6.2 Hansard records give context that makes it clear that the aim of segregation was to separate the above rail operations from the below rail operations, in the context of the government creating a vertically integrated private entity when it privatised the Western Australian Government Railways:

> *The rail access Bill states that the number one obligation of an operator is to segregate access functions from its other functions. If a company is to be a track manager and a rail operator, to use the terminology of the task force and the Government in discussions with users, it will have to ring fence its operations and put up Chinese walls. It will have to completely separate out the costing and the accounting and every aspect of the business relating to rail management from that which relates to the operation as an above-line rail provider.*[1]

1.6.3 The aim of the segregation arrangements is to prevent the combination of functions that are present in a vertically integrated business, because preventing this behaviour prevents anti-competitive outcomes.

1.6.4 BR agrees with the ERA that the scope of the segregation arrangements (as provided for in the Act) adequately provide for a duty of fairness which extends to train management and capacity allocation.

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1 http://www.parliament.wa.gov.au/hansard/hans35.nsf/16ab30a0303e54f448256bf7002049e8/17b1fa3328400e324825679b00251b53?OpenDocument

1.7 Prohibitions on hindering or preventing access

1.7.1 At para.53, the ERA considers that no expansion of the 'prohibition of hindrance' is necessary, and that the Code already includes adequate terminology to contemplate circumstances mentioned by submissions.

1.7.2 BR agrees with the ERA's assessment on this issue.

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

1.8.1 At para.59, the ERA has considered that s.8(5) of the Code adequately provides for the possibility of an extension/expansion being proposed during the course of negotiations, should it be necessary.

1.8.2 BR agrees with the ERA's assessment on this issue.

1.9 Section 10 and Recommendation 2 – when is section 10 relevant?

1.9.1 At para.60, the ERA has recommended that s.10 should be removed from the Code, citing at para.67 the fact that s.10 existed before the Code was amended in 2003 to include provisions for extensions and expansions.

1.9.2 Consistent with its original comments on this point, BR agrees with the ERA's assessment on this issue.

1.10 Sections 14 & 15 and Recommendation 3 – Can a railway owner challenge the validity of a proposal prior to receiving the required information from the proponent?

1.10.1 At para.78, the ERA considers that the Code should require the railway owner to provide any information that is necessary for the proponent to undertake a capacity assessment and that the proponent should cover any costs incurred by the railway owner in doing so.

1.10.2 BR agrees with this assessment, as such an amendment would facilitate the access seeker's ability to satisfy s.15, while ensuring that unfeasible or frivolous applications are discouraged.

1.10.3 BR submits that the information required to be supplied by the railway owner should be specified in the Code to include only information directly relevant to the proposed operations, and only information relating to operational characteristics and capacity information, and specifically exclude any commercially confidential information such as confidential contractual information relating to existing usage of the railway infrastructure by other entities.

1.10.4 At para.79, the ERA considers that timeframes should be established in the Code to indicate when the information required by the railway owner should be provided by the proponent. The ERA has suggested 30 business days as a timeframe.

1.10.5 BR partially agrees with this assessment, as it introduces an additional timing event into the Code process which serves to carry the process along without undue delays.

1.10.6 However, BR does not agree with an inflexible 30 business day timeframe. In the event of a complicated access proposal, the gathering, transmission, analysis and assessment of the information relating to s.15 of the Code may take a substantial amount of time, depending on complexity. BR submits that at the least, the parties should be allowed to agree on a timeframe, but that in the absence of such agreement, a default period should apply. This would be similar to s.20 in the Code, which stipulates the default negotiation period of 90 days.

1.11 Section 16 – What does the term "unfairly discriminate" mean?

1.11.1 At para.85, the ERA has considered that examples of 'unfair discrimination' do not need to be included in the Code, because the access seeker has recourse to legal means to determine whether this has occurred, citing the relevance of the particular circumstances of any case.

1.11.2 Notwithstanding its previous comments on this matter, BR agrees with the ERA's finding. Significant confidence can be had in the legal process as a means to resolve conflict relating to unfair discrimination, and BR believes that if ultimately such an accusation were to be heard in the courts in any case, then leaving the Code capable of entertaining a variety of circumstances by virtue of its general definition of 'unfairly discriminate' is preferable to all parties.

1.12 Part 3 – Should Part 3 prescribe a time limit for the conclusion of arbitration?

1.12.1 At para.92, the ERA has considered that time limits for arbitration do not need to be added to the Code, noting that a preliminary conference must be held as a first step in any case, and that parties can establish timeframes at this point.

1.12.2 Reiterating its position in earlier submissions, BR submits that time limits are not appropriate for arbitration owing to the potential complexity of all matters and evidence to be considered in any particular arbitration. BR therefore agrees with the ERA's assessment on this issue.

1.13 Section 50 – should a railway owner be able to declare any information confidential?

1.13.1 At para.95, the ERA notes that the provision by the railway owner to the Regulator of more detailed or additional information underpinning the calculations of costs (in excess of the cost information required by the Code) is at the railway owner's discretion.

1.13.2 At para.102, the ERA speaks of the process of determinations (including the costing information provided by the railway owner) being provided in unredacted form to the access seeker. Presumably, and from BR's own recent experience, the ERA includes in the definition here of 'costing information', any 'detailed or additional information underpinning the calculations'.

1.13.3 BR disagrees that this is the appropriate position for the ERA to take with regard to information the railway owner deems to be confidential. BR submits that it is counterproductive for the ERA to put the railway owner's confidential information at risk this way, and provides a disincentive for the railway owner to provide contextual and detailed information that assists the ERA in making its determination and facilitates the process.

1.13.4 Although it agrees with the ERA's finding that no changes to the Code are necessary in relation to this issue, BR strongly recommends that the ERA adopt an internal policy of clearly ascertaining, on receipt of information from a railway owner, whether the information is provided on a confidential basis at the railway owner's discretion. If so, the ERA should have a policy of refusing to receive that information if the ERA does not agree to comply with the confidentiality with which it is provided.

1.14 Clause 2 Schedule 4 – is there a better means of estimating capital costs than the GRV method?

1.14.1 At para.115, the ERA has considered that the DORC approach to establishing capital costs is not broadly compatible with a light handed negotiate-arbitrate approach, on the grounds that DORC reflects asset condition, and that condition is better allowed for in negotiations rather than in the ceiling price.

1.14.2 BR agrees with the ERA's assessment on this issue and reiterates its support of the GRV method for cost valuation as straightforward and effective in the context of its intended use.

1.15 Clause 10 Schedule 4 and Recommendation 4 – is the prescribed 30 day time limit for the making of the regulator's determination sufficient?

1.15.1 At para.123, the ERA has declared that it is the proponent's interests that are primarily affected when considering whether delaying an access determination is appropriate. BR submits that this is not true, and that the railway owner may have engaged significant resources to comply with and prepare for processes related to an access proposal under the Code within the Code timeframes, which would not otherwise have been required if the railway owner had been consulted about extending such timeframes; similarly, such delays can necessitate the work having to be redone if it the work initially done becomes stale.

1.15.2 Furthermore, even if it is the access seeker's interest that is best served by a rapid determination, then there is only a benefit to the access seeker from having the railway owner act as a further protection against delays to determinations. In the event that either the access seeker or the railway owner did not consent to an extension of time, then the Regulator would be required to proceed according to the original timeframe.

1.15.3 BR disagrees with the ERA's assertion that it would not be practical to solicit the railway owner's approval also; this could be done at short notice. Reflecting on recent experience where BR received no notification at all until the decisions were made to delay the determination, BR urges the ERA to review its position on this issue, or at the very least change its internal policy to ensure the railway owner becomes aware of a delay to determination as early as possible.

1.15.4 At para.126, the ERA has recommended that the term 'days' should be defined to mean 'business days'. BR agrees with this recommendation, but also reiterates suggestions in its submission to the issues paper, where a further change to some timeframes was detailed on the grounds of them aligning with typical commercial timeframes.

1.16 Part 1 [section 4A] – Parties have the option to negotiate agreements outside this Code.

1.16.1 At para.131, the ERA has considered that it is not necessary for the Regulator to maintain information on out-of-Code agreements in order to properly audit over-payment accounts, and at para.132 that there is no basis on which to establish or audit the ceiling price test if there are no agreements under the Code.

1.16.2 BR agrees with this sentiment, and continues to express its support for the strength of the Code in allowing parties to come to agreement by normal commercial processes without needing to engage the machinery of the Code.

1.17 Part 2A & 2 and Recommendations 5 & 6 [sections 6, 7, 7A-E] – Required and Preliminary Information

1.17.1 At para.137, the ERA considers that the required information should be updated every six months. BR agrees that this is not unreasonable.

1.17.2 At para.140, the ERA has agreed with BR's suggestion that a consultative process be undertaken to re-examine the appropriateness of the inclusions in the required information and invites further comment (BR notes that both this paragraph and recommendation 6 seem to have a typo that incorrectly refers to the 'preliminary' information as being Sch.2).

1.17.3 At para.140 the ERA also makes the suggestion that Sch.2 would be improved with a clear definition of the term 'available capacity'. Capacity is a metric whose definition is different depending on the demands of the audience. For example, a line that is running many different trains might have limited capacity for an additional train but have a high capacity for accommodating different train configurations, while another unutilised line might have a limited capacity to accommodate different train configurations but have ample capacity to accommodate a particular train configuration through space and time.

1.17.4 The railway owner has an innate understanding of the qualities of the track (where it goes, the topography it encompasses, the nature of the infrastructure); this information is largely conveyed to the access seeker by virtue of the other elements of Sch.2. When assessing the next important component of available capacity – existing utilisation – BR considers that existing scheduled train paths are the most useful indicator of utilised capacity. Further analysis on available capacity is largely dependent on the specific qualities of the operation to be accommodated (e.g. train configuration, terminal limitations etc.), and therefore cannot be assessed in advance.

1.17.5 In consideration of this, BR submits that a clear and useful means of specifying 'available capacity' at 4(o) of Sch.2 would be for the railway owner to provide 'scheduling diagrams' of the network. These are a common feature of railway planning, and are described by:

- geography (i.e. locations in order and the rail distances between them) on the vertical axis;
- time (i.e. the hours and minutes of the day) on the horizontal axis; and
- diagonal lines across the chart where each point on a line represents the presence of a train at a particular location at a particular time, such that the entire line represents the transit of a train across the network through time.

Scheduling diagrams of this form can be provided without reference to confidential information and, being long term in nature, are not subject to frequent change. (Day-to-day scheduling decisions are not reflected on these diagrams.)

1.17.6 BR submits that the provision of these scheduling diagrams, in combination with the other information in Sch.2, and the access seeker's awareness of its own proposed operating characteristics, provides the access seeker with all the information required to

make a functional assessment of the capacity of the route to accommodate the proposed operation.

1.17.7 With regard to volume information ('gross tonnages' and 'tonnages of freight'), BR submits that these are not significantly useful to an access seeker as it relates to the assessment of whether a route can accommodate a task, given that those factors are significantly affected by the train configurations of the traffic on the network.

1.17.8 BR submits that the requirement for railway owners to provide this information be removed from Sch.2 of the Code. To the extent that any volume measure need be included, BR submits that a more functional measure is gross tonne kilometres, where one gross tonne kilometre is counted as one gross tonne that has travelled one kilometre.

1.17.9 BR suggests that Sch.2, cl.3 of the Code should be amended to read:

> 3. A map or maps of the routes listed in Schedule 1 showing the following characteristics of the prevailing railway infrastructure on each route:
>   a) operating gauge;
>   b) rail weight;
>   c) sleeper configuration/type;
>   d) track axle load; and
>   e) communications systems.

1.17.10 BR suggests that Sch.2, cl.4 of the Code should be amended to read:

> 4. For each route section, details of the following:
>   a) the section length;
>   b) the location and length of passing loops;
>   c) the curve and gradients;
>   d) the maximum axle loads, train speeds and train lengths;
>   e) indicative section transit times;
>   f) rolling stock dimension limits;
>   g) local instructions where such instructions impose operating restrictions; and
>   h) scheduling diagrams indicating existing patterns of utilisation.

1.17.11 BR suggests that Sch.2, cl.4 of the Code should be amended to read:

> 6. A summary of capital works whose completion is expected to materially alter the nature or quantity of traffic that of the railway infrastructure can accommodate, where the anticipated completion date of those works is during a period provided for by section 7E.

1.17.12 BR submits that the general purpose of the required information is to provide the potential access seeker with sufficient information for the access seeker to make an assessment of whether their proposed task can (or could) be accommodated on the relevant railway infrastructure, prior to the access seeker going to the trouble of

submitting an access proposal. BR's proposed amendments to Sch.2 of the Code are in pursuit of this goal.

1.18 Part 2 [section 8] – Proposals for Access

1.18.1 At para.144, the ERA has noted that additional information from an access seeker (at the time of lodging an access proposal) may assist the railway owner in responding to the access seeker. BR notes that by the time of submission of an access proposal, an access seeker ought to have utilised the required information to make a reasonable assessment as to whether the access seeker's particular operation can be accommodated on the network.

1.18.2 Given this, BR asserts that the suggestions it made in relation to this issue in its submission to the issues paper (para.4.5.3) are reasonable and not onerous. BR accepts that the information provided on this basis by the access seeker would be indicative and non-binding. Even the most basic outline of the proposed operation, at this stage in the access process, is of enormous value to the railway owner as it relates to planning and resourcing the subsequent steps in the access process.

1.18.3 Despite the ERA's comment at para.145 that some of the additional information may only be determined in the course of negotiations, it is BR's experience that at least these basic parameters have been determined by the access seeker at this stage, even if it is only a 'blue sky', ideal outcome.

1.18.4 The railway owner's response to the access seeker can only be enhanced by the access seeker's provision of this information. For this reason, BR reaffirms its suggestion that the Code should be amended to reasonably require the access seeker to provide operation-specific information to the railway owner when the access seeker makes an access proposal.

1.19 Part 3 [Division 3] Arbitration of disputes – other matters

1.19.1 At para.154, the ERA considers that Part 3 of the Code provides an adequate list of circumstances that must exist for the proponent to be considered in dispute with the railway owner, and that this list does not need to be expanded.

1.19.2 At para.156, the ERA has considered that matters which can be referred to arbitration should be technical matters only and not statutory (legal) matters, for which the courts offer adequate resource in the event of a dispute.

1.19.3 BR agrees with the ERA's assessment on this issue.

1.19.4 At para. 158, the ERA has considered that the Code should not be amended to require the entity in dispute with the railway owner to also provide notice to the railway owner, citing the Regulator's ability to notify the railway owner.

1.19.5 Notifications provided to BR by the ERA during the recent determination process have at times been provided at (or with) very short notice. BR submits that, in the absence of a clear policy confirming that the ERA will indeed notify the railway owner when the ERA becomes aware of a dispute, the Code should be amended to require notification by the proponent to the railway owner within 1 business day.

1.19.6 At para.164, the ERA has considered that information and outcomes of an arbitration should remain confidential, citing the possibility of disclosure of confidential information. The ERA also notes that it would not be appropriate to publish arbitration outcomes if that outcome is not subsequently reflected in an agreement.

1.19.7 BR agrees with the ERA's assessment on this issue. BR additionally submits that even if an arbitration outcome is reflected in an agreement, the issue of disclosure of confidential information remains, and the agreement reached (as opposed to the outcome of the arbitration that an outcome was reached) should not be published in any case.

1.19.8 At para.533 the ERA has not agreed with BR's suggested replacement of s.26(2) of the Code, being changes to the method of appointing arbitrators. The ERA has apparently not considered the benefits to disputing parties in an arbitration of mutual selection of arbitrators. BR reiterates its suggestions in relation to this topic, and believes that the arbitration process can proceed much more effectively where the disputing parties have agreed on the selection of an appropriately experienced, skilled and knowledgeable independent arbitrator.

1.20 Part 5 – Certain approval functions of the regulator

1.20.1 At para.171, the ERA has considered that changes to the approval functions of the Regulator as they relate to the Part 5 instruments do not need to be changed in the Code.

1.20.2 BR accepts the ERA's assessment on this issue. BR notes that the existing provisions relating to the Regulator's powers in the Act and the Code adequately provide for the Regulator to exercise its discretion as regards consultation and approval of the Part 5 instruments.

1.21 Section 48 – Railway Owner must supply certain information if requested

1.21.1 At para.175, the ERA considers that the railway owner's ability to protect confidential information is sufficient, as it relates to disclosure of information under Section 48 of the Code, and that no changes to that part of the Code are necessary.

1.21.2 As in its submission to the issues paper, BR disagrees with this assessment. The Code should facilitate engagement by genuine access seekers or potential access seekers, and this can be facilitated by adding criteria to s.48 of the Code which ensure that only entities with a practical need for the information are entitled to receive it.

1.22 Clause 7A Schedule 4 – Apportionment of costs of extension or expansion

1.22.1 At para.178, the ERA has considered that the wording of cl.7A of Sch.4 of the Code is sufficient in its anticipation of standard commercial principles, and that should the railway owner wish to establish a template for the application of such principles, that it can do so via its ERA-approved costing principles.

1.22.2 BR agrees with the ERA's assessment on this issue, and supports the notion of including guidelines and principles relating to the allocation of costs of expansions/extensions in the costing principles.