COOPERATIVE BULK HANDLING LTD
ABN 29 256 604 947

Gayfer House, 30 Delhi Street
West Perth, Western Australia 6005

GPO Box L886
Perth, Western Australia 6842

Grower Service Centre
1800 199 083

T + 61 8 9237 9600
F + 61 8 9322 3942

info@cbh.com.au
cbh.com.au

Submission to the Economic Regulation Authority

2014 Review of the *Railways (Access) Code 2000*

Submission on the Economic Regulation Authority's Draft Report

23 October 2015

[WOR\JDJ\09 3001 2328]

CONTENTS

CLAUSE **PAGE**

1. INTRODUCTION

Co-operative Bulk Handling Limited (**CBH**) welcomes the opportunity to respond to the Economic Regulation Authority's report (the **Draft Report**) setting out its draft findings from its review of the *Railways (Access) Code 2000* (WA) (the **Code**[1]), which assesses the suitability of the provisions of the Code to give effect to the Competition Principles Agreement (**CPA**).

CBH is disappointed with the draft findings. The draft findings suggest that the Authority has decided to place little or no weight on the criticisms raised by CBH and other access seekers, and has instead maintained the view that the Code has been effective in giving effect to the CPA.

CBH's principal criticisms are as follows.

(a) The Draft Report makes no recommendations that would materially address the problem of delay under the Code. The Authority's only two recommendations relevant to timing are to impose a time limit on access seekers to provide financial, managerial and capacity information to satisfy a railway owner, and to change the timing under the Code from "days" to "business days". CBH submits that these recommendations will not make the Code process any quicker, and do not make it harder for a railway owner to delay progress. The slow speed of the Code significantly undermines its effectiveness as an access regime.

(b) The Draft Report makes no recommendations that would improve the highly uncertain access pricing outcomes under the Code, except in relation to the TPI Railway and the interstate route between Kalgoorlie and Kwinana. Instead, the Authority has emphasised the importance of "negotiations", without addressing the fundamental problem that, if a negotiated outcome cannot be reached, then the arbitrator has little clear guidance about where, and how, the price should be set.

(c) The Draft Report makes two recommendations about information provided under the Code: one to increase the frequency by which "required information" is updated from once every two years, to once every six months (which CBH supports), and one to clarify the meaning of "available capacity" and what should be provided in relation to it. The Authority has not proposed anything that would address the information asymmetry between a railway owner and access seeker, which CBH maintains is fundamental to a railway owner's ability to take advantage of its natural monopoly over rail infrastructure access. Instead, the Authority has suggested "light touch" regulation is appropriate (except for the TPI Railway and the route between Kalgoorlie and Kwinana) and, with it, very few information requirements.

(d) The Draft Report makes no recommendations that would improve the enforcement of (or compliance with) the Code. Instead, the Authority has effectively stated that it will not proactively enforce the Code, and will only seek injunctions as a "last resort". It states that this will somehow allow it to remain "impartial". Further, the Authority has made no proposal to improve the remedies available to access seekers, or it, in the event the Code is breached.

This is in circumstances where the Australian Competition and Consumer Commission (**ACCC**) found that market feedback has "strongly indicated" that the requirements of the Western Australian access regime are "inadequate to protect against the competition issues arising from the vertical integration that would result from the proposed acquisition" of Asciano Limited by the Brookfield consortium (which owns Brookfield Rail

---

[1] A reference to a section or schedule is a reference to a section or schedule of the Code, unless context requires otherwise.

Pty Ltd (**BR**)).[2] While the competition issues from vertical integration do not yet apply to the freight network managed and controlled by BR (the **BR Network**), CBH submits that if the Code is inadequate to protect against a vertically integrated railway owner behaving in an anti-competitive manner, it is equally inadequate to protect against a non-vertically integrated railway owner from using its monopoly power to undermine the objectives of the Code, *Railways (Access) Act 1998* (WA) (**RAA**), and the CPA.

Status of recommendations made by the Legislative Assembly's Freight Inquiry

CBH is also concerned that the Draft Report does not appear to address the recommendations made by the Economics and Industry Standing Committee, set out in "The Management of Western Australia's Freight Rail Network" (Report No. 3, October 2014) (**Freight Inquiry**).[3]

This recommendations relevant to the Code review are as follows:

(a) Recommendation 5 of the Freight Inquiry is that the review should "include a critical evaluation of why so few access seekers have sought to use the Code".[4] The only comment made by the Draft Report is that the Authority "does not consider the absence of Code access agreements, per se, as evidence of a Code failure given the nature of the regime is light handed and intended to be available to parties who are otherwise unable to negotiate access", and concludes it is "too early to objectively assess the effectiveness of the Code".[5] CBH submits that the Authority should have sufficient information to prosecute this recommendation. The Authority's position is in stark contrast with both the Freight Inquiry, and that of the ACCC's, which stated that it:

> considers it significant that no access agreements have been entered into under the Code. This may mean that access seekers consider that the Code's mechanisms do not offer sufficient benefits to merit their use.[6]

(b) Recommendation 5 of the Freight Inquiry is that the review "needs to include a review of its effectiveness in third party access requiring capital upgrades". The Draft Report does not appear to address this issue, and makes no recommendations about it.

(c) Recommendation 6 of the Freight Inquiry is that "Part 4A of the [Code] be amended to make it clear that while parties are free to negotiate outside the Code, they are not able to expressly prohibit the future operation of the Code under an access agreement". CBH supports this recommendation, and submits that the Authority should address it as part of the Code review.

CBH submits that the Authority should consider and address the recommendations of the Freight Inquiry, and the report more generally, in the context of this Code review.

---

2 Statement of Issues - Brookfield consortium – proposed acquisition of Asciano Limited (15 October 2015) at [123] available at: http://registers.accc.gov.au/content/index.phtml/itemId/1188346/fromItemId/750991.

3 Legislative Assembly, "The Management of Western Australia's Freight Rail Network" (Report No. 3, October 2014).

4 Legislative Assembly, "The Management of Western Australia's Freight Rail Network" (Report No. 3, October 2014), Recommendation 4 at pages xi and96.

5 Draft Report, [1].

6 Statement of Issues - Brookfield consortium – proposed acquisition of Asciano Limited (15 October 2015) available at: http://registers.accc.gov.au/content/index.phtml/itemId/1188346/fromItemId/750991.

About these submissions

CBH has structured these submissions in the following way:

(a) this Part 1 provides an introduction and summary of the submissions;

(b) Part 2 sets out CBH's submissions on each of the Authority's six recommendations;

(c) Part 3 sets out CBH's submissions on the "general matters", "matters raised in the issues paper" and "further section-specific matters" addressed by the Authority (largely adopting, for convenience, the order set out in the Draft Report); and

(d) Part 4 sets out matters raised in CBH's initial submission that the Authority did not directly address in its Draft Report.

This submission does not address any of the issues raised in submissions that the Authority found to be incidental or irrelevant to the review, on the basis that the Authority has only "noted" them without substantive comment. CBH has also sought to avoid repeating any of the submissions made in its initial submission to the Authority (dated 2 April 2015). However, this submission should be read in the light of CBH's initial submission, and the submission made by Frontier Economics enclosed with it.

Submission by Frontier Economics

CBH has also engaged Frontier Economics to respond to the Draft Report. 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. SUBMISSION ON THE AUTHORITY'S RECOMMENDATIONS

2.1 Recommendation 1 – Competition Implementation Reform Agreement (CIRA)

> **Recommendation 1.** That the Government implement [CIRA] in respect of the interstate route west from Kalgoorlie [ie from Kalgoorlie to Kwinana], and the TPI railway.

CBH supports the transfer of regulation of not only the route from Kalgoorlie to Kwinana to the ACCC, but all of the routes on the BR Network, using the Australian Rail Track Corporation Limited undertaking as a model as contemplated by clause 3.3 of CIRA (unless the Code is substantially amended to address the concerns raised by CBH, and other access seekers). This would require BR to submit an undertaking to the ACCC for approval under section 44ZZA of Part IIIA of the CCA.

2.2 Recommendation 2 – deleting section 10 of the Code

> **Recommendation 2.** Section 10 should be removed from the Code.

CBH supports the Authority's recommendation that section 10 be removed from the Code, as it serves no useful purpose and may unnecessarily delay the Code process.

2.3 Recommendation 3 – amending sections 14 and 15 of the Code

> **Recommendation 3.** Sections 14 and 15 of the Code should be clarified to indicate a timeframe for the provision of the information required by the railway owner by those sections.
>
> The Code at section 15 should require the railway owner to provide any required information necessary for the proponent to undertake a capacity assessment, and that the proponent must cover any reasonable costs incurred by the railway owner in providing this.

Timeframes for receiving section 14 and 15 information

The Authority has adopted a proposal, advanced by TPI, that timeframes should be established in the Code for the satisfaction of the railway owner's requirements in sections 14 and 15 (which empowers the railway owner to require the proponent to show that it has managerial and financial ability, and that its operations are within the capacity of the route, respectively as a precondition to negotiations commencing).[7]

The Authority has not given any indication about what that timeline should be.

CBH does not support this recommendation because it submits that sections 14 and 15 should be abolished. If there is any issue about the financial capacity of the operator, or whether a route has sufficient capacity, then this can be addressed through either:

(a) negotiations (for example by requiring an operator to provide security to support its financial position, or for an extension or expansion to be agreed on); or

(b) by the arbitration determination (on a similar basis).

The Code does not provide any guidance about the level or quantity of information that must be provided by the proponent to the railway owner to satisfy sections 14 and 15, and there is no express requirement on the railway owner to act reasonably.

Further, the process for satisfying the railway owner involves a number of steps. First, the railway owner may issue a notice under section 14 or 15 (or both). The proponent

---

[7] Draft Report, [352].

must then respond. If the railway owner is not satisfied with the proponent's response, then it may notify the proponent, in which case the proponent must decide (for itself) what further information should be given to the railway owner, and then provide that information. If the railway owner is still dissatisfied, then the railway owner is under no obligation to negotiate with the proponent.

The only way to resolve the situation is for the proponent to notify the Authority there is a dispute, and have the matter resolved by arbitration. Throughout this period, the railway owner is under no obligation to negotiate.

The prospect of delay is demonstrated by CBH's experience, where the process for dealing with a section 15 dispute took 12 months, formally starting in February 2014 and not formally concluding until 11 February 2015. This delay is unlikely to have been materially reduced by imposing timelines on the proponent to provide the information.

Further, CBH submits that it is manifestly unreasonable for a proponent to be required to satisfy the railway owner that its rail operations are within the capacity of the route under section 15 (at its own cost). In CBH's experience, this is likely to require a proponent to engage an expert to assess the required information and preliminary information provided by the railway owner, particularly where a railway owner makes the bald assertion that a route is closed and not available for any rail operations.

CBH cannot identify any basis in the CPA for the requirements of sections 14 and 15.

Costs of providing information for a capacity assessment

The Authority has also recommended that the proponent must pay for the reasonable costs of any information that the railway owner provides to undertake a capacity assessment. It is again important to recognise that the only reason for undertaking this capacity assessment is because the railway owner has issued a notice to the proponent requiring it to do so—with no obligation to explain why, and no express limits on the circumstance in which it can issue this notice.

The Authority has not indicated what kind of information that might be provided, and therefore it is unclear what "reasonable costs" might entail. However, the Authority has noted a submission that suggests it might cover the cost of "expansion studies".

CBH does not support this recommendation, both as a stand-alone recommendation, and because it considers that section 15 should be abolished entirely. CBH submits that if a proponent is required to comply with a notice under section 15, then it should be able to do so on the information that is already available (particularly the "required information" contained in the publication under section 7A of the Code – for which the railway owner is entitled to impose a "reasonable charge"). CBH cannot identify any basis in the CPA for concluding that the railway owner's cost position should be protected in these circumstances, but yet no protection whatsoever should be given to the cost position of the proponent in having to satisfy the railway owner's demands under section 15.

2.4 Recommendation 4 – timeframes for ERA decisions under the Code

Recommendation 4. The term "days" in the Act and the Code should be defined to mean "business days".

The Authority's recommendation is made in the context of (but is not limited to) the time limit for the Authority to make a floor and ceiling costs determinations under clause 10 of Schedule 4 to the Code. This prescribes a 30 day time limit for making the determination.

The Authority:

> notes that the term "days" is not defined in the Code. By default, therefore, the term "days" must be taken to mean calendar days. The use of calendar days to define timeframes has resulted in inconsistencies and uncertainties in relation to timeframes, especially where these timeframes straddle extended public holidays such as Easter or Christmas.[8]
>
> The Authority supports the proposition that "days" in the Act and the Code should be defined to mean "business days" for consistency with other regimes, and to alleviate irregular time constraints caused by public holidays at particular times of the year.[9]

CBH submits there should be no confusion about the expression "days", or when deadlines fall. Firstly, the reference to "days" must mean calendar days, consistently with ordinary use of that term.

On the question of when deadlines fall, CBH also refers the Authority to section 61(1) of the *Interpretation Act 1984* (WA), which provides that if a deadline falls on an "excluded day" (being a Saturday, Sunday, public service holiday, bank holiday, or public holiday), then the deadline is the next day that is not an excluded day. Consequently, there should be no confusion or uncertainty about timeframes.

There is a separate question about the impact of public holidays on the "available days" for the Authority to complete a task allocated to it. On this point, the Authority has commented that "longer timeframes could result in unnecessary delays in the progress of an access proposal",[10] and pointed to the fact that it already has the power to extend timeframes as necessary (with the proponent's consent, in the case of floor and ceiling costs determinations).

CBH agrees there should be no extension of the existing timeframes under the Code, as the effectiveness of the Code as a third party access regime relies on (among other things) access disputes being resolved in a timely way. Consequently, if the Code is clarified to mean "business days", then the time periods should be significantly shortened. For example, the requirement to make a floor and ceiling costs determination in 30 [calendar] days should be reduced to 20 business days.

2.5 Recommendation 5 – changes to timeframes for updating required information

Recommendation 5. The prescribed time limit set out in section 7C(2)(b) for the amendment or replacement of Required Information (information described in section 7A) be reduced from two years to six months.

CBH supports the Authority's recommendations the required information be updated every six months, and that it be published on the railway owner's website (in addition to being available in hard copy). CBH further submits that the Authority should properly scrutinise the required information to ensure that it complies with the requirements of the Code.

On this point, the Authority stated that it:

> does not agree with CBH's assertion that railway owners are currently enabled to not provide information for routes that are in Schedule 1 to the Code but which the railway owner claims have no capacity. The Authority acknowledges that this has occurred, but does not agree that the Code allows it.

---

8 Draft Report, [125].

9 Draft Report, [126].

10 Draft Report, [479].

> In the recent past, the Authority has provided determinations of costs for routes that the railway owner - on the basis of a claim that a route has no capacity - has declined to determine costs for.[11]

CBH appreciates the Authority's comment that railway owners are required to provide information for routes in schedule 1, even if the railway owner claims there is no available capacity on that route. However, while the Authority's floor and ceiling costs determination may have resolved the issue in one particular case, unless the obligation to publish proper required information is enforced, then the utility of the Code is materially diminished. Otherwise, proponents are not able to properly assess whether or not to make a proposal, and railway owners are practically entitled to ignore the Code (particularly in circumstances where the only relevant remedy is an injunction).

CBH submits that the Authority's general position that it is a matter for proponents to enforce the Code themselves (which CBH strongly disagrees with) is not applicable here, as it is entirely unreasonable to expect proponent contemplating access to take Supreme Court proceedings to simply require the railway owner to comply with the Code so that it can decide whether or not it is worth submitting a proposal.

CBH also submits that it is important for there to be a permanent record of the required information that is published from time-to-time. One of the problems with information being available on-line only, is that it can be changed quickly and without notice. This may lead to evidential issues—for example, in the event of an arbitration under the Code about capacity on a route, CBH submits that the required information published at the time the proposal was made is relevant (as contemplated by section 15(1)). This is most simply resolved by requiring the railway owner to actually provide the required information publication, and preliminary information, to the proponent in hard copy (as required by the Code), rather than simply referring the proponent to the website. This should be taken into account if the Code is amended.

2.6 Recommendation 6 – clarify preliminary information requirements

Recommendation 6. That Schedule 2 Preliminary Information be amended to clarify the meaning of "available capacity" and specify the information which must be provided under item 4(o) of that schedule.

As a point of clarification, CBH does not understand the reference to "Schedule 2 Preliminary Information". Schedule 2 sets out the "required information" (as defined in section 6). The "preliminary information" provided by a railway owner under section 7 must include (among other things) any update to the required information (section 7(1)(b)) (so that the proponent has current information).

In any case, CBH supports the recommendation that the meaning of "available capacity" be clarified (for the purposes of section 7(1)(a)(i)) and item 4(o) of schedule 2), and submits that that the definition of "capacity" should also be clarified.

CBH submits the following clarifications should be made:

(a) "capacity" should be clarified to make it clear that it refers to the underlying infrastructure capacity of the particular route, and not its current state of repair (consistent with the Authority's view in its determination of costs relevant to CBH's access proposal dated 10 December 2013 (dated 30 June 2014) at [71]); and

(b) "available capacity" should be clarified to make it clear that it refers to the amount of capacity (as defined above) of the particular route that is not committed to another operator.

---

[11] Draft Report, [506] – [507].

Relevantly, the Authority has also foreshadowed a consultative process to examine the appropriateness of the information requirements set out in schedule 2 to the Code. The Authority:

> agrees with BR's suggestion that a consultative process be undertaken to re-examine the appropriateness of inclusions in Schedule 2 as Preliminary Information. The Authority agrees with Brockman's view that a definition of "available capacity" should be made clear in Schedule 2, and that the prescribed time for the amendment or replacement of this information should be reduced from two years to six months. The Authority re-iterates its recommendation from the second review that this information should be freely available on the railway owner's website.[12]

CBH is keen to participate in any consultative process about what should be included in schedule 2 to the Code. CBH considers the required information to be very important to potential access seekers, as it provides them with important information about the network, its operations, planned works, and total freight carried, which is necessary to make decisions about whether or not to seek access (both under, and outside, the Code).

[12] Draft Report, [508].

3. SUBMISSION ON THE AUTHORITY'S OTHER FINDINGS

GENERAL MATTERS

3.1 Negotiate-arbitrate approach is appropriate where condition of the track is not at replacement standard or capital investment cannot be justified by the railway owner or access seeker

One of the key conclusions made by the Authority is that a "light-handed", less prescriptive approach is appropriate in Western Australia, except for the interstate route from Kalgoorlie to Kwinana, and the TPI railway. The Draft Report states:

> This is because the negotiate-arbitrate approach allows the parties to establish an agreed price on the basis of the condition of the track, and the economic value the proponent expects to obtain from use of the track in that condition.[13]

This means that a "light-handed" approach would continue to apply to the BR Network (except for the route between Kalgoorlie and Kwinana).

CBH agrees that it is appropriate for parties to be able to negotiate and, where possible, reach a commercial agreement about the terms of access. However, ultimately, if the parties are unable to agree, then an arbitrator is called on to set the terms of access (including price). As the Code is currently drafted, the arbitrator is given extremely wide discretion, with very little guidance. This uncertainty (combined with the long process) significantly undermines the effectiveness of the Code as a third party access instrument that is intended to give effect to the CPA.

CBH is concerned that the Authority's conclusion is heavily influenced by its view that negotiation should be favoured over regulation, and that proponents should protect their own rights without assistance from the Authority. CBH submits that this indicates the Authority's view is that the business interests of a railway owner should be given the greatest weighting, at the expense of the other principles in the CPA.

CBH submits that the Authority has not given due weight to submissions by proponents (and the findings of the Economics and Industry Standing Committee[14]) about the problems presented by the Code, and has instead placed weight on railway owner's submissions about the impact of regulation on their business.

The cumulative effect of this approach is that railway owners are placed at a significant advantage over proponents, and they are relatively free to exercise their monopoly control of access to the networks. A railway owner is able to "hold out" from agreeing to access, knowing that a proponent's ongoing need for access may mean it cannot justify undertaking the lengthy, resource-intensive and expensive arbitration process to secure terms of access. CBH submits that the "threat" of arbitration operates more strongly against a proponent than a railway owner, given the time the process takes, and the uncertainty about outcome. By way of illustration, CBH is in a position where it must periodically re-negotiate access outside the Code in order to continue to use the network while the Code process plays out.

CBH submits that the Authority should take into account the "case studies" conducted by the Economics and Industry Standing Committee and set out in its report on "The Management of Western Australia's Freight Rail Network".[15]

---

[13] Draft Report, [27].

[14] As set out in: Legislative Assembly, "The Management of Western Australia's Freight Rail Network" (Report No. 3, October 2014).

[15] Legislative Assembly, "The Management of Western Australia's Freight Rail Network" (Report No. 3, October 2014).

For example, in that report, the committee observed:

> The first case study in Chapter 6 relates to CBH Group's 2013 formal access proposal under the Code. In June 2014 the ERA, rather than approving Brookfield Rail's floor and ceiling costs, determined those costs in relation to CBH Group's access proposal. This, in itself, indicates the need for government regulation of access to the freight rail network, not least because the determination of costs made by the ERA demonstrated the costs proposed by Brookfield Rail to be excessive. Furthermore, rather than lend certainty to the negotiation process, the lengthy and largely non-transparent process of assessing access applications makes it easier to understand why more applications have not been made through the Code.
>
> The second case study in Chapter 6 outlines the process through which Karara Mining gained access to the freight rail network. The Code proved to be of no assistance to Karara Mining in seeking access to the freight rail network, and in different circumstances, this may have actually jeopardised the deal that was struck. Ultimately, Karara Mining was left carrying all the risk of the $450 million upgrade to the Geraldton line. If there had been a more effective regulatory regime in place, that risk could have been shared. Furthermore, not only was the deal negotiated outside the Code, the Code is expressly excluded from the agreement that was reached. That is, Karara Mining has ceded its right to engage the provisions of the Code for the duration of their 15-year agreement with Brookfield.[16]

CBH urges the Authority to re-consider its position on the regulatory approach to the BR Network in the light of those findings, and the submissions of proponents.

Tariff setting approach

CBH also refers to, and endorses, the independent further submission of Frontier Economics, which is provided with this submission. In that submission, Frontier Economics briefly explains why:

(a) the Code should facilitate economically efficient prices, not simply avoid bypass;

(b) greater prescription is required in all circumstances, not just in the circumstances where there is a homogenous freight task, the track condition is close to replacement condition, and there is vertical integration (as suggested by the Authority); and

(c) fixing a regulatory asset base (the line in the sand) is important.

Improved pricing guidelines

If the Authority is not prepared to move to a prescriptive pricing model, CBH submits there is still considerable scope for improving the Code to ensure that it complies with the CPA. In particular, CBH submits that primacy should be placed on assessing the efficient costs that would be incurred by a prudent railway owner.

At a minimum, CBH submits that the Code requires amendment to reflect clause 6(5) of the CPA. This relevantly provides that:

> A State … access regime … should incorporate the following principles: …
>
> (b) Regulated access prices should be set so as to:
>
> (i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;

---

[16] Legislative Assembly, "The Management of Western Australia's Freight Rail Network" (Report No. 3, October 2014) at iii. See Chapter 6 generally.

(ii) allow multi-part pricing and price discrimination when it aids efficiency;

(iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other third parties is higher; and

(iv) provide incentives to reduce costs or otherwise improve productivity.

Clause 6(5) was inserted into the CPA after the Coalition of Australian Governments agreed to amend it under CIRA. It was not part of the CPA when the Code was originally made, and it has not been expressly incorporated into the Code in subsequent amendments. This opens the door for railway owners to argue for inefficient costs.

In particular, section 29(1) of the Code sets out what the arbitrator must do in hearing and determining an dispute. It relevantly provides that the arbitrator must "take into account the matters set out in clause 6(4)(i), (j) and (l) of the [CPA]". CBH submits that it should be amended to expressly require the arbitrator to also take into account the matters set out in section 6(5)(b) of the CPA.

CBH expects that railway owners will object to this approach on the basis that placing primacy on "efficient costs" places too much weight on "technical / productive" efficiency, and insufficient weight on "allocative efficiency" and "dynamic efficiency".[17] CBH submits there is still scope for an arbitrator to account for those matters in pricing and, in particular, other terms of access , while still placing primacy on efficient costs.

Availability of information

The Authority has also expressed the view that the availability of information and prescriptiveness of the regime are linked. The Authority:

> considers that the appropriate level of disclosure of railway owners' costs is related to the level of prescription, and that as the level of prescription increases, so does a requirement for transparency of railway owners' costs. That is, that a requirement to disclose railway owners' cost information should increase as the scope for determining an outcome by balanced negotiation decreases.[18]

CBH does not agree with this general statement. The level of a railway owner's costs is critically important to setting prices, especially in circumstances where the condition of the track is considerably lower than one using "modern equivalent assets". In those circumstances, particularly where the railway owner has little incentive to voluntarily invest in the network (and so "allocative efficiency" is not served by higher prices), it is appropriate for prices to be set by reference to the railway owner's actual costs.

CBH submits that the Code should be amended to ensure the railway owner's actual costs are transparent, and the calculation of those costs is properly tested against the standard of a prudent railway owner adopting efficient practices. While this is the case for determining floor and ceiling costs, CBH submits that this should expressly extend to the process for setting access prices.

Appropriating an operator's efficiency gains

One of the reasons why transparency is important is because, if a railway owner is not required to disclose its costs and negotiates on the basis of the economic value to the operator (as suggested by BR), then the operator's efficiency gains will be open to appropriation by the railway owner.

---

[17] The "Hilmer Report" provides a helpful discussion about the concept of efficiency: see National Competition Policy Review (25 August 1993) at page 4.

[18] Draft Report, [271].

The Draft Report recognises this risk, but suggests this can be dealt with "in negotiations". The Authority:

> notes Aurizon's submission that operators' efficiency gains should not be open to appropriation by the railway owner via the pricing process. The Authority considers that consideration of efficiency gains made by operators is able to be appropriately considered in the negotiation of an agreement between the parties.[19]

CBH strongly disagrees with the Authority's comment that this issue is simply a matter for negotiation. This is because:

(a) unless there is an applicable pricing guideline or principle directing the railway owner to behave in this way, the railway owner will simply seek to set the highest price it can extract from the operator, taking advantage of its monopoly position; and

(b) if the parties are unable to agree on the terms of access, then an arbitrator must set the terms of access. There needs to be clear guidance to the arbitrator about how to approach that issue.

CBH submits that the pricing guidelines in the Code should be supplemented accordingly.

Authority should properly have regard to the railway owner's monopoly power

As a general observation, CBH is concerned that the Authority's draft findings indicate that it does not appreciate the railway owner's monopoly power in respect of railway infrastructure. Railway networks are vitally important to the efficient transport of products for (among other industries) export-facing businesses.

This has been recognised by Brookfield Infrastructure, which states in its Annual Report that:

> Our Australian rail operations are comprised of a below rail access provider, which operates over 5,100 kilometres of track and related infrastructure in the southwest region of Western Australia (''WA'') under a long-term lease with the government. There are approximately 35 years remaining on this lease and this rail system is a crucial transport link in the region. Our Australian rail operation's revenue is derived from access charges paid by rail operators or underlying customers. Stability of revenue is underpinned by rail transport being a small yet essential component of the overall value of the commodities and freight transported and the contractual framework that exists with a significant proportion of our customers.[20]

In the case of grain, transport is more than a small yet essential component of the overall value of the commodities. It is a significant cost component.

The Code is not effective if, as the Draft Report appears to suggest, it simply results in price outcomes that are less than the ceiling costs. CBH refers to the Authority's comment that it:

> agrees with BR that the negotiate-arbitrate approach is less likely to result in outcomes approaching the 'ceiling' price, especially where above- and below-rail operations are not integrated and track condition may be variable. The Authority considers these conditions exist especially on the non-interstate routes of the freight network where freight tasks are less homogenous, and where the condition of the rail track on some routes gives more scope for negotiation between parties.[21]

---

[19] Draft Report, [274].

[20] Brookfield Infrastructure, Annual Report.

[21] Draft Report, [279].

It is true that prices, in those circumstances, should not approach the ceiling costs. This is because, in the case of the BR Network (which contains all of the routes to which the Authority's comments apply):

(a) the BR Network has not just been built—it was built before BR acquired management and control of it, and subsequent upgrades have been either paid for by the State or Commonwealth, or supported by long-term take-or-pay contracts[22];

(b) the condition of many parts of the network is, and the services provided by them are, considerably worse than an optimised network built using modern equivalent assets; and

(c) the ceiling price represents the **maximum** level of revenue from all users of a route, not an indication of what the price might be.

Consequently, there is no reason for costs to be set at (or anywhere near) that level. The fact that costs are not approaching ceiling costs does not mean a railway owner is not extracting monopoly rent. The railway owner may still set a price considerably higher than what would be payable in a competitive market, or what is economically efficient.

It is also implicit in the Authority's reasoning that a railway owner has the same interest in supplying services to a route as an operator has in acquiring services from it. A railway owner may not have that incentive (even if the railway owner is not vertically integrated[23]). For example, if the railway owner:

(a) did not build the network, but rather leased an already built network;

(b) paid considerably less than the ceiling costs; and

(c) is required to return the network to the State, then

the railway owner may have an incentive to place routes in "care and maintenance" and focus on the busier, more profitable, parts of the network. It might only be tempted to change that position if an operator is willing to pay considerably more than the costs of opening it, such that the level of return reflects positively on the railway owner's entire investment.

Further a railway owner will have a strong incentive to extract the highest costs possible. In circumstances where the Authority administers the Code on the basis that over-payments do not apply to access agreements outside the Code, the railway owner has considerable incentive to ensure access agreements are kept outside the Code. This may be done by making the Code process as difficult as possible. That approach is considerably assisted where the regulator states that it will only enforce the Code as a "last resort".

Frequency of cost determinations

The Authority also commented it:

> does not agree that a lack of recent costings is the reason that the BR/CBH determination took over six months to make. The Authority notes that the number of route sections subject to CBH's recent proposal were far greater than the number of route sections for which

---

[22] The use of take-or-pay contracts to underpin capital expansions is referred to Brookfield Infrastructure's Annual Reports, and Legislative Assembly, "The Management of Western Australia's Freight Rail Network" (Report No. 3, October 2014)

[23] Relevantly, while BR is not currently vertically integrated, its owners are part of a consortium that proposes to acquire Asciano Limited. The successful conclusion of that acquisition will mean that BR becomes vertically integrated with Pacific National, a rail haulage operator owned by Asciano Limited.

> previous 'clause 9' determinations were provided. The Authority notes that there were other significant factors impacting on the progress of CBH's access proposal.[24]

CBH submits that the time required to complete floor and ceiling cost determinations would have been reduced if previous clause 9 determinations were made because there would already be established costings for inputs used across the network (including labour, and materials such as sleepers and rail). Further, if existing floor and ceiling costs determinations were in place, then BR would have had less scope to "re-argue" the costs of every route.

3.2 Merits review is not appropriate for light-handed regime

The Authority:

> considers that, if the regime were more prescriptive, and if the role of the regulator was to determine the efficient price, then merits review processes may be warranted.[25]

CBH submits that there is scope for limited merits review of arbitration decisions, particularly in respect of the way prices are set by the arbitrator, given the significant room for flexibility in interpreting and applying these principles and necessarily very wide gap between the floor price and ceiling price. 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. Merits review of arbitration determinations is provided for under Part IIIA of the CCA, which is a "light-handed" negotiate-arbitrate regulatory regime.

CBH also observes that the Part 5 Instruments and Segregation Arrangements (as the Authority observed at paragraph 275 of the Draft Report) "reflect the sorts of conditions written into access arrangements in more prescriptive regimes", and they must be "given effect to" (at least in respect of Code processes, and arguably more generally). Consequently, there may be scope for merits review of the Authority's decisions about the Part 5 Instruments.

3.3 Authority's enforcement role is to seek injunction as a last resort

The Authority:

> considers that access seekers are as well-placed as the regulator to prosecute any failure on the part of railway owners to meet their obligations under the Code. The Code explicitly gives access seekers their own rights to access injunctive relief, which enables the regulator to remain impartial in inter-party disputes.[26]
>
> …
>
> The Authority considers that its own power of injunctive relief is a last resort, when the railway owner may be in default of its obligations in some respect and when there is no access proposal in the course of resolution.[27]

CBH is disappointed that the Authority considers that its role is limited to "enforcement as last result", and is unwilling to take a proactive role. CBH is concerned that it sends a message to railway owners that the Code will not be vigorously enforced, which gives greater scope for railway owners to seek to "push" proponents outside the Code by making the Code process as unattractive and difficult as possible.

---

[24] Draft Report, [289].

[25] Draft Report, [298].

[26] Draft Report, [303].

[27] Draft Report, [41].

CBH is concerned about the Authority's statement that it is acting in an "impartial" way by declining to take action in the fact of a railway owner's breach of the Code. A decision not to take enforcement action is necessarily partial, as it is, in effect, a presumption that the Code has not been breached. This amounts to excusing the breach, and means there is no "deterrence" factor to dissuade railway owners from future breaches of the Code.

CBH submits that it is not appropriate for a public regulator to take the position that private parties must enforce their own rights. There are a range of resource constraints on a private operator, which may mean it cannot justifiably seek to enforce the Code in every instance a breach occurs. However, repeated minor breaches may have a significant cumulative effect on a process, including by causing delay (which will, as a general rule, favour the railway owner who can withhold access to a service that, in many cases, has no substitutes and, generally, has no competitive substitutes).

In this regard, the Draft Report states that the Authority:

> considers that "repeated failure to comply with obligations to provide information" or "'any conduct that has the effect of repeatedly and unnecessarily delaying an access proposal" is clearly conduct that hinders the making of an agreement… .[28]

Significantly, a breach of the prohibition against preventing or hindering access is an offence, and therefore only enforceable by the Authority. However, if the Authority's position is that it will not seek injunctions to restrain repeated or minor breaches of the Code (on the basis the operator can enforce them), then there is arguably insufficient regard paid to the fact that such conduct may cumulatively amount to an offence under section 34A of the RAA. CBH urges the Authority to re-consider its position in respect of the enforcement of the Code and the RAA.

3.4 Segregation Arrangements

The Authority made the following comment, in response to Aurizon's, Brockman's and Roy Hill's submissions on segregation arrangements:

> The Authority notes, in relation to the Aurizon submission, that railway owners are required to segregate their access functions from their non-access functions. "Access-related functions" is defined at section 24 of the Act to mean "the functions involved in arranging the provision of access to railway infrastructure under the Code". "Non-access functions" therefore includes all other functions, including arranging the provision of access to infrastructure outside of the Code.[29]

CBH agrees with the Authority's statement, but observes that no such segregation appears in any of the segregation arrangements that have been approved by the Authority. Instead, they appear to purport to segregate functions related to providing access agreements both inside and outside the Code, from other functions of the railway owners. CBH submits that the Authority should enforce the segregation arrangements under the RAA. The Authority is the only entity that is able to do so, as the power to obtain injunctions to enforce the Code do not apply to the segregation arrangements contained in the RAA.

---

[28] Draft Report, [52].

[29] Draft Report, [308].

3.5 Extension or expansion – failure to specify cannot invalidate an access proposal

In its initial submission, CBH submitted that sections 8(4) and 8(5) should be clarified to make it clear that a proponent can propose an extension or expansion at any time. The Authority responded by saying that it:

> is of the view that the Code does not require amendment to clarify section 8(5), which clearly states that:
>
> > The fact that an extension or expansion is not specified in a proposal as mentioned in subsection 4 does not prevent the proposal of such an extension or expansion being made in the course of negotiations under Part 3 on the grounds that such an extension or expansion would be necessary to accommodate the proposed rail operations.[30]

CBH respectfully submits that this does not address the issue raised by CBH. Section 8(5) arguably only allows an extension or expansion to be proposed **in the course of negotiations**, that is, once the duty to negotiate in good faith begins. It arguably does **not** allow, for example, a proponent to respond to a section 15 request by a railway owner with an extension or expansion proposal.

CBH submits that it would be helpful for the Code to be amended to make it clear that a proponent can propose an extension or expansion at **any** time.

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

The Draft Report invites "comment from stakeholders on whether the Code should further define unfair discrimination or provide a list of examples of unfair discrimination".

CBH submits that it is not necessary for the Code to be amended to define unfair discrimination, or provide examples. However, it would be helpful for the Authority to publish non-binding, and non-exhaustive, regulatory guidelines about what may constitute "unfair discrimination".

CBH does not agree with Aurizon's proposal that to limit "unfair discrimination" to where "(a) it has a material adverse effect on an access seeker; and (b) it has a substantial impact on competition in the relevant market".[31] CBH considers that unnecessarily limits the scope of the prohibition, and that there are no grounds for concluding the existing prohibition (which has never been enforced by court action) requires such a limit.

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

The Authority has not agreed with CBH's submission that there should be a prescribed time limit for the arbitration process. The Authority:

> notes that there is currently provision in the Code at section 28 for a preliminary conference to be held as a first step in arbitration, the purpose of which is to establish timeframes for the conduct of the arbitration and the making of the arbitrator's determination.
>
> The Authority considers that this is consistent with the view that a timeframe should be established for each arbitration according to the circumstances of each dispute. The Authority does not consider that a blanket timeframe for conclusion of arbitration should be included in the Code.

---

[30] Draft Report, [325].

[31] Draft Report, [355].

> The Authority does not consider that further clarification in this part of the Code is required.[32]

CBH respectfully submits that an arbitration, whether subject to a time limit or not, will necessary involve some form of "preliminary conference" to "program" the matter to hearing. CBH submits that this does not replace the benefits that an overall time limit would provide, which would require the arbitrator and the parties to "program" the matter to conclusion within that time limit.

CBH repeats its submission that, consistently with clause 2.6 of CIRA and the other regimes identified at section 6.3 of its initial submission (including Part IIIA of the CCA), a time limit should be introduced on the basis that it would promote the overall objective of promoting economically efficient outcomes. This is because, without a time limit, an arbitrator may not be prepared to impose (or adhere to) a strict time limit, particularly in circumstances where one party agitates for more time.

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

There has been extensive criticism by operators, and others, about the extent to which railway owners have relied on confidentiality to prevent the disclosure of information to operators and others. CBH pointed to a range of issues associated with the use of confidentiality in section 8.2 of its initial submission.

Disappointingly, the Authority has not made any recommendations or amendments in relation to this issue, but did make the following statement:

> However, in the course of finalising its most recent two cost determinations, the Authority has subsequently established a process that meets the requirements of the access seeker for adequate transparency as well as the railway owner's requirements to protect its confidential information.
>
> This process has resulted in the access seeker being provided with an unredacted copy of the Authority's determination, including the costing information provided by the railway owner, on a confidential basis, and the Authority publishing a redacted version of the determination, which obscures the railway owner's confidential information.[33]

CBH submits that, while it is helpful that the Authority sought a solution in that particular case, an ad-hoc, confidential regulatory process does not sufficiently address the serious concerns raised by CBH and other submissions to the Code review, or the serious concerns outlined in Economics and Industry Standing Committee's report on the Management of Western Australia's Rail Freight Network.

CBH submits that the "presumption of disclosure" implied by the Code should be clearly specified, and the railway owner's ability to "declare" information confidential should be expressly constrained.

Further, the Draft Report notes that "the information provided by railway owners in support of their cost determinations has generally been in excess of that required to be provided by the Code".[34] CBH submits that this does not establish that confidentiality is appropriate. It is a matter for the railway owner to decide what arguments to put forward, and those arguments should be exposed to scrutiny (both by the operator, and interested third parties) in accordance with the public consultation process under the Code. It is not appropriate for a railway owner to take the cover of confidentiality to avoid scrutiny, by volunteering more information than necessary, and then make an ambit claim over all of that information.

---

[32] Draft Report, [376] – [378].

[33] Draft Report, [101] - [102].

[34] Draft Report, [396].

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

Estimating costs

CBH endorses the comments by Frontier Economics in its further submission in response to the Authority's draft findings about the use of the GRV Method, and criticism of the use of depreciated optimised replacement costs.

The Authority:

> considers, in relation to CBH's submission that 'build or buy' signals are irrelevant, that the GRV valuation provides an important 'bypass' cost that would inform negotiations, regardless of the practicality of replicating monopoly infrastructure. The GRV for a route would also in the same way inform negotiations around the re-building of a route to restore it to MEA standard.[35]

CBH submits that the ceiling cost is so high that it provides no meaningful signal at all, particularly in circumstances where the condition is significantly worse than the MEA standard, and where there are few (or no) other prospective operators. This is because if an operator were required to pay an amount that is even a small percentage of the ceiling price, it would not be able to operate profitably and would either switch to other services (where possible), even if those other services are not competitive substitutes, or simply stop operations. As a consequence, the significant time and costs taken by the Authority, railway owner, and proponent in determining ceiling costs is, essentially, wasted.

"Mining" rail infrastructure

CBH wishes to address the following statement by the Authority:

> The Authority acknowledges the comments of BR and TPI to the effect that the GRV method promotes effective competition by exposing access seekers to the full cost of providing the service. The Authority agrees with BR that the GRV method provides relevant "buy or build" signals.
>
> The Authority considers that this argument is also relevant in the context of infrastructure that is not at MEA standard. The Authority agrees that the 'mining' of existing infrastructure that is not economic to rebuild, results in an economic price which reflects an efficient outcome if the access seeker also considers the infrastructure is not economic to rebuild or duplicate, and therefore cannot justify committing funds to an expansion.[36]

CBH is concerned that this finding is premised on the assumption that the railway owner has historically not received enough funds to properly maintain the railway infrastructure. CBH submits there is little evidence to suggest that this is the case in Western Australia.

CBH's strong view is that railway owners have received sufficient access fees to properly maintain rail infrastructure (before additional State and Commonwealth funding), but have elected not to do so. As the Code process is "forward-looking", the Code does not remedy a situation where a railway owner has successfully "mined" infrastructure, even though the railway owner received sufficient funds to maintain it (for example, to retain as profit, or to fund other maintenance or capital projects servicing more profitable or higher revenue parts of the network).

---

[35] Draft Report, [463].

[36] Draft Report, [458] - [459].

FURTHER SECTION-SPECIFIC MATTERS

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

CBH agrees with Aurizon's submission that parties that have been negotiating outside the Code should be allowed to bring that negotiation to an arbitration under the Code,[37] particularly in circumstances where the Authority has not enforced segregation arrangements on any railway owners, allowing those railway owners to combine access "under" the Code with access "outside" the Code.

CBH submits that the "dual track" system established by the Code is highly inefficient, and directly undermines the effectiveness of the regime. It provides significant opportunity and incentive for a railway owner to make a Code process as difficult as possible, so that it can enter into an unregulated agreement outside the Code.

It is also inconsistent with other access regimes, including Part IIIA of the CCA.

Cooling effect on offers under and outside the Code

The "dual track" system may also mean that, once a proposal is made, the offers made by a railway owner to an access seeker both under and outside the Code are worse. This is because a railway owner may take the view that if it makes an offer "outside" the Code, then that might be taken into account in a subsequent arbitration (notwithstanding such a practice is arguably inconsistent with its duty to negotiate in good faith). As a result, a railway owner may make its "best" offer either "under" or "outside" the Code in the interests of preserving its position in an arbitration.

Arbitration outside the Code?

The Draft Report states that "parties negotiating outside the Code have access to arbitration processes through the Commercial Arbitration Act 2012, that is, on the same basis as provided for in the Code". CBH respectfully submits that this is unhelpful, as commercial arbitration outside the Code is only by agreement, and there is little reason for a railway owner to voluntarily submit itself to arbitration. If an access seeker is not satisfied it can obtain a better outcome under the Code (particularly given the prospect for significant delays), then there is no reason why a railway owner would choose arbitration over simply withholding access until the access seeker agrees.

CBH submits that the Code should be amended so that the "dual track" system established by the Code is eliminated, and supports Aurizon's proposal for mandatory access arbitrations to be available if commercial negotiations fail, whether those negotiations are conducted under or outside the Code.

3.11 Part 2 [section 8] – Proposals for Access

The Draft Report states that:

> The Authority received two submissions, both from railway owners, addressing the information obligations of an access seeker when lodging an access proposal.
>
> It was submitted that the information which must be included by a proponent in an access proposal should be expanded to assist railway owners in assessing costs, expansion requirements and negotiable terms.[38]

The Authority has asked for further views about this suggestion.

---

[37] Draft Report, [485].

[38] Draft Report, [142, 143].

CBH submits that there is little to be gained by increasing the formal requirements for a valid proposal, and therefore providing additional scope for delays to the parties reaching negotiation. CBH submits there is no reason why a railway owner is not able to use the information in a proposal to provide a complete draft access agreement for negotiation, and for the parties to have meaningful negotiations. Proponents have no incentive to avoid participating in negotiations in order to "force" an arbitration, given the significant uncertainty over the arbitration process, and the fact that delay will generally work in favour of a railway owner who can afford to "wait" for a better deal, as opposed to a proponent who will generally need access in order to conduct rail operations.

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

Notice to the railway owner and mediation

CBH agrees with the following draft findings by the Authority in response to the submissions by railway owners about the commencement of disputes and mediation:

> The Authority does not consider that the Code should be amended to require the entity in dispute with the railway owner to also provide notice to the railway owner, in addition to the regulator. The regulator is not prevented from notifying the railway owner, when it is notified by the entity in dispute.
>
> The Authority does not consider that additional mediation should be stipulated in the Code. Recent experience has indicated that parties are able to undertake contract mediation services in order to assist negotiations if both parties agree this is warranted.[39]

Scope of matters for arbitration

CBH agrees with the following draft findings by the Authority about the matters that should be referred to arbitration:

> The Authority agrees with submissions that contend that matters which can be referred to arbitration should be technical matters only and not statutory (legal) matters, for which the courts offer adequate recourse in the event of a dispute.[40]

However, practically, arbitrators must necessarily make decisions about points of law in order to make a final determination. For example, if an arbitrator is called on to resolve a capacity dispute, the arbitrator must form and express a view about how "capacity" is defined under the Code. This is a relevant consideration when deciding whether or not arbitration determinations should be confidential or not.

Whether arbitration determinations should bind operators

CBH agrees with the following draft findings by the Authority in response to railway owners submissions that access determinations should bind both parties:

> The railway owner also submitted that the arbitrator's determination should be binding on both parties (not just the railway owner) and that this would accord with the objective of the CPA that arbitration should not be used as a substitute for negotiation, and that decisions of an arbitrator should bind the parties (subject to appeal rights).
>
> The Authority does not consider that arbitration should be binding on both parties. This is because an arbitrated outcome may not be commercially feasible for an access seeker, in which case the access seeker would be disadvantaged, if it were required to pay the

---

[39] Draft Report, [158] – [159].

[40] Draft Report, [156].

> arbitrated price. The Authority considers that arbitrators have the power to dismiss vexatious disputes or disputes which seek to usurp proper negotiations.[41]

Arbitration panel

CBH wishes to address the following comments by the Authority about the selection of arbitrators:

> The Authority considers that the Code does not prevent the regulator from consulting with parties in the selection of an arbitrator from the panel established under section 24 of the Code. The Authority has noted BR and CBH comments supporting the involvement of parties in selection of an arbitrator.[42]

CBH wishes to clarify its concern: the parties should be able to recommend a person be appointed to the panel, and then be appointed to the arbitration. CBH does not consider it appropriate for there to be a "closed" panel, particularly in circumstances where the railway owner and access seeker agree on a particular person (or persons) being appointed as arbitrator, but where that person cannot be appointed because he or she is not on the closed panel. CBH submits that a railway owner and operator should be able to have input about who should be placed on the panel.

The Authority also indicate that it:

> considers that the WA branch of IAMA is the most appropriate local body with which the regulator should consult on the matter of appropriate arbitrators. The WA branch of IAMA has recourse to consult with the national branch or other arbitration/mediation bodies.[43]

CBH wishes to clarify that the WA branch of IAMA is **not** the body the recommends the panel to the Authority. It is only the Chairman of the WA branch of IAMA, and that person is **not** required to consult with the branch. (For example, as far as CBH is aware, the Chairman does not consult with the branch, and it is not a decision minuted by the WA branch of IAMA.)

Publication of arbitration decisions

CBH disagrees with the Authority's findings about the publication of arbitration decisions, as set out in the following passages:

> The railway owner indicated that the decision of the arbitrator should be confidential, as each dispute is aimed to resolve specific disagreements under specific circumstances and should remain subject to the confidentiality provisions of the Commercial Arbitration Act 2012. The potential access seeker submitted that the decisions of the arbitrator should be public so that other access seekers do not waste resources on similar disputes and to ensure consistency between decisions.
>
> The Authority agrees that information and outcomes of arbitration should remain confidential, as confidential information belonging to both the railway owner and the access seeker might otherwise be disclosed. Further, the Authority considers that it would not be appropriate to publish arbitration outcomes if that outcome is not subsequently reflected in an agreement.[44]

Arbitration decisions do more than simply resolve specific disagreements under specific circumstances. As explained above, they necessarily include statements about the law, and provide useful guidance (if not binding precedent value) for other access seekers.

---

41 Draft Report, [161] – [162].

42 Draft Report, [535] (and see [160]).

43 Draft Report, [536].

44 Draft Report, [163] – [164].

Any issues about confidentiality can be addressed by the arbitrator, in the same way that issues of confidentiality may be addressed in court judgements. CBH reiterates the points made in its initial submission at section 6.6 about the need for arbitration decisions to be made public.

CBH also wishes to address the Authority's statement about an arbitration being "subsequently reflected" in an agreement. The outcome is final and binding (subject to the operator's right to withdraw), and sets out the terms of access. There is no need for a subsequent separate agreement.

3.13 **Part 5 – Certain approval functions of the regulator**

The Authority states that it:

> considers that access agreements generally would include provisions reflecting the railway owner's Train Path Policy and Train Management Guidelines but not the provisions of Costing Principles and Over-payment rules. The views of stakeholders are therefore taken into account in relation to the approval of those instruments that govern the terms of pathing and capacity management in an access agreement. On this basis, the Authority considers that consultation is appropriately provided for in the Code.[45]

CBH submits that the views of stakeholders are relevant to Costing Principles and Over-payment Rules as they directly impact on the way that floor and ceiling costs are determined (in the case of Costing Principles), and include provisions that are mandatorily included in access agreements under the Code.

For example, the approved Over-payment Rules in relation to the BR Network includes a schedule of provisions that must be included in access agreements. CBH requests that the Authority reconsider its position on that issue.

Similarly, the Authority commented that:

> This submission commented that the Code was not clear on how costs of extensions or expansions should be shared. The railway owner commented that the Code does not indicate (a) how the allocation of economic benefits should translate into a specific tariff apportionment; or (b) whether costs referred to total, incremental, operating or capital costs.
>
> The Authority considers the form of words used in that clause anticipates the application of standard commercial principles and that further prescription in clause 7A of Schedule 4 is not warranted. The Authority considers that if a railway owner wishes to establish a template for the application of these principles then it may propose a method of allocating costs in accordance with clause 7A, by providing details of that method in its costing principles.[46]

If Costing Principles included such a "template", this would plainly be of direct interest to access seekers. This would constitute further grounds for ensuring that the Costing Principles are open to public consultation.

CBH also observes that the Authority has not addressed CBH's submission that a railway owner and access seeker should be able to negotiate variations from the standard instruments where appropriate (particularly given that the Authority's view is that they do not apply at all to access agreements outside the Code) (and, by extension, an arbitrator is not bound to give effect to them). CBH requests the Authority adopt this amendment.

3.14 **Section 48 – Railway Owner must supply certain information if requested**

The Authority commented that it received a submission that:

---

[45] Draft Report, [170].

[46] Draft Report, [177] – [178].

> commented that railway owners should not be required to provide costing information on request to persons who cannot demonstrate that they do conduct, or have a genuine intention to conduct, business that requires access to the portion of the network to which the information relates.[47]

The Authority did not propose to make any recommendations in respect of this matter. CBH submits that section 48 of the Code reinforces CBH's submission that there is a "presumption of disclosure" under the Code, which is appropriate for a regulatory instrument of this kind. This supports CBH submissions about confidentiality (as set out at section 3.8 of this submission).

[47] Draft Report, [173].

4. MATTERS NOT ADDRESSED IN THE DRAFT REPORT

4.1 Standard of access services

In its initial submission, CBH submitted that there is a compelling need for the Code to take a more rigorous approach to regulating the availability, quality and standard of access services. In particular, the Code should consider performance regimes that are similar to those used by the ARTC. These should include:

(a) incorporating minimum service standards that the railway owner must meet;

(b) ensuring the pricing adopted under the Code reflects the level of service standards actually being provided (for instance by requiring the railway owner to provide information on how its price relates to the level of service quality being provided, and developing a performance incentive scheme that has financial consequences for the railway owner if it does not comply with the minimum service standards); and

(c) express obligations 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.

CBH maintains that amendments dealing with these matters would promote the objectives of the Code, and the CPA, and requests the Authority consider them in its final report. CBH requests the Authority consider this submission, and address it in its final report. CBH would be pleased to provide more information to the Authority on this point if the Authority would find it helpful.

4.2 Transition provisions

In it is initial submission, CBH outlined the issues arising from the fact that the Code does not deal with what happens to ongoing access while the Code process "plays out". CBH submits that 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 proposal.

CBH requests the Authority consider this submission, and address it in its final report. CBH would be pleased to provide more information to the Authority on this point if the Authority would find it helpful.

4.3 Consequences of failing to comply with the Code

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

(a) the consequences for failing to comply with the Code should be more significant; and

(b) the ERA's enforcement powers need to be increased, so that it can take a more active role in enforcing the Code.

The Authority's draft findings suggest that it considers "injunctions" to be an adequate remedy, and has indicated that it does not intend to proactively enforce the Code. CBH reiterates that it considers greater consequences (including damages, pecuniary penalties, and an infringement notice regime) are necessary to promote compliance with the Code, and that the Authority should take a greater enforcement role (as explained in section 3.3 of this submission).