

11 April 2005

Mr Lyndon Rowe  
Chairman  
Economic Regulation Authority  
GPO Box 8469  
Perth Business Centre  
PERTH WA 6849

Dear Mr. Rowe

### **Review of the Western Australian Railways (Access) Code 2000**

The Chamber of Commerce and Industry of Western Australia (CCI) is the foremost business organisation in Western Australia and is the second largest organisation of its kind in Australia with membership comprising around 5,000 companies. CCI members operate in all areas of industry including transport, manufacturing, mining, primary industry, building and construction, community services, retailing and finance.

CCI's Transport Committee has considered the discussion paper on the Review of the Western Australian Railways (Access) Code 2000 and provides the following comments. In so doing a number of comments may well be more applicable to consideration of the *Railways (Access) Act 1998* rather than the Code itself.

#### **Vertical Integration**

Before the sale of Westrail freight operations in December 2000 CCI argued strongly that the sale of the freight and track business on a vertically integrated basis should not proceed.

The concerns expressed by industry were that such a sale would limit the implementation of an effective access regime, limit the implementation of an industry structure that delivers open and transparent competition thereby increase freight prices, and limit the opportunity for increased port on port competition.

CCI notes the intent of the Code is that third party access should be encouraged to ensure the efficient use of network assets that promote competition as contemplated by the *Competition Principles Agreement*. However, it is acknowledged that competitive gains for low volume regional railways might not be achieved by the separation of below rail and above rail services when critical mass cannot be obtained to deliver economies of scale.

Australian Railroad Group (ARG) subsidiary WestNet Rail (WNR) is the current network owner for freight rail infrastructure under the rail access regime. Another ARG subsidiary Australian Western Railroad (AWR) is the primary above rail freight intrastate train operator

in WA, this includes ownership of some of the former Westrail terminal facilities, depots and marshalling yards.

The *Act* requires the railway owner to make arrangements to segregate its access-related functions from its other functions and to have appropriate controls and procedures to ensure an effective separation which protects the interests of the parties. CCI understands that WNR has passed two audits by the ERA in this regard.

However addressing issues of vertical integration after the sale of Westrail raises the important consideration of sovereign risk. ARG purchased Westrail under the ownership conditions specified at the time of sale. It is important that investment in rail infrastructure is sustained and not put at risk by changes to the Code that are not supported by demonstrable evidence.

The Economic Regulation Authority should not require greater separation, especially with regard to ownership, than would reasonably have been expected by an interpretation of the *Act* at time of sale. Sovereign risk considerations must take precedence, irrespective of CCI's stance regarding vertical integration in the lead up to the sale.

### **Awareness of the Impact of the Code in the Market**

The Access Agreement allows end users to have a direct relationship with accredited rail operators and agency arrangements can also be established with above rail operators.

CCI is aware of strong concerns expressed by (especially intrastate) end users that do not have a direct relationship with WNR, about their ability to negotiate fair and reasonable access arrangements. WNR on the other hand claims end users do have the choice to have a direct relationship with WNR and that the Train Management Guidelines and Train Path Policy are applied in a non-discriminatory way to all users.

CCI understands that all of WNR's activities are subject to ERA audit and Key Performance Indicator reporting by WNR. The ERA however, should assess whether or not it is obtaining a comprehensive picture of the impact of the Code in the market.

### **Opportunities for New Entrants**

A number of industry participants argue that intrastate competition within the current regime has not been high and that a significant new entrant to the market would only arrive on the back of the renewal of one of the limited number of existing major long term contracts, and more specifically a contract concerned with a resource commodity. On the other hand CCI has also been advised that other major contracts have recently been renewed which were subject to vigorous competition.

By their nature these contracts have large capital requirements including rolling stock and are of long duration. It is only when these contracts expire that both end users and train operators can test the market.

CCI is aware that a potential opportunity for market entry will arise around 2011 and that the contract would again be necessarily of long-term duration. There will however, be a number of other significant contracts that will be negotiated in the interim.

Given the limited number of large contracts that dominate the rail sector in WA and the generally long term nature of such contracts, it is important that Code Reviews are completed on time. This will ensure there is a greater chance that prospective market entrants are informed about the outcome of reviews in time to take advantage of potential business opportunities.

### **Review Period**

CCI recognises that the Act determines when Code reviews should be conducted.

However, it needs to be considered that while the existing Code was put into place in 2000 it was not until ceiling price and floor price determinations were made in September 2003 that the Code came into play.

The ceiling price and floor price determinations will be reviewed again in 2006 and 2009, twice before the next Code Review in 2010.

It is important that the ERA satisfy itself in the period leading up to the next Review that it is obtaining a comprehensive picture of the impact of the Code in the market so that the 2010 Review can be completed expeditiously.

If doubt remains about the ability to complete the forthcoming Code Review in a timely fashion, preliminary work by the ERA such as scoping of work and early appointment of consultants may be able to be initiated in advance of the formal Review commencing.

### **Recommendations**

- The ERA should assess whether or not it is obtaining a comprehensive picture of the impact of the Code in the market and the ability of end users to negotiate fair and reasonable access arrangements.
- The ERA needs to ensure that the next Code review is completed on time.

Our Mr Trevor Lovelle is available to handle any queries on this submission and can be contacted on 9365 7560 or email [lovelle@cciwa.com](mailto:lovelle@cciwa.com).

Yours sincerely

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Director Industry Policy