# Review of the Railways (Access) Code 2000

## Draft Report

November 2010

Economic Regulation Authority
WESTERN AUSTRALIA

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# EXECUTIVE SUMMARY

1. This review of the *Railways (Access) Code 2000* (**Code**) is being undertaken pursuant to the provisions of section 12 of the *Railways (Access) Act 1998* (**Act**).

2. In October 2009, the Economic Regulation Authority (**Authority**) invited submissions from interested parties on matters in relation to this review and published an issues paper to assist interested parties in making their submissions on the review.

3. The issues paper listed a number of matters on which the Authority sought comment from interested parties. Each of these matters is discussed in this draft report.

4. In addition to the issues relating to each part of the Code, other relevant issues raised by interested parties are also discussed in this draft report.

## List of Recommendations

**Recommendation 1**

Part 2A of the Code should be amended by adding a further requirement that the information required to be provided by a railway owner as described under sections 6(a) and 6(b) of the Code should be published on the railway owner's website. If a railway owner does not have a website, but information relating to the railway is maintained on the website of an associated company, then the required information as described under sections 6(a) and 6(b) should be published on that company's website.

**Recommendation 2**

Section 7 of the Code should be amended by adding a new sub-section noting that any capacity information provided by the railway owner must be compiled on a reasonable basis consistent with the railway owner's obligation under section 16(2) not to unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner.

**Recommendation 3**

Section 25 of the Code should be amended such that the definition of disputes includes all information provision and negotiation obligations on railway owners, which are relevant to access seekers, under Parts 2 and 3 of the Code.

**Recommendation 4**

Part 5 of the Code should be amended as follows:

- Section 42 should be revised to only require public consultation for variations to segregation arrangements considered by the Authority to constitute a material change.
- Section 45 should include the costing principles and over-payment rules in order to ensure consistency in the public consultation process across all Part 5 instruments.
- A new provision should be added to provide for the review of all Part 5 instruments every 5 years or as otherwise determined by the Authority.

**Recommendation 5**

Section 52(1), 52(2), 52(3), 52(4) and 53 of the Code should be deleted as these transitional provisions are no longer relevant.

**Recommendation 6**

Schedule 1 should be amended as follows:

- Item 52 should be amended by replacing the words "... the railway constructed pursuant to the TPI Railway and Port Agreement" with "... the railway constructed pursuant to the TPI Railway and Port Agreement and defined as 'Railway' in that Agreement".

Schedule 2 should be amended as follows:

- Clause 4(g) "the running times of existing trains" should be replaced with "relevant running information for all current scheduled trains or cyclical train movements, as appropriate".

Schedule 4 should be amended as follows:

- Item 50A of Schedule 1 should be added to clause 3(1)(a)(i) of Schedule 4.
- Clause 3(1)(a)(ii) should be amended by replacing the words "in the other items in that schedule" with "in items 1 to 48 in that Schedule".
- Clause 3(2) should be amended to ensure that the public consultation arrangements set out in sections 3(3) to 3(5) of Schedule 4 apply to the initial WACC determination for any new railway which comes under the Code.
- Unless it can be demonstrated that the Building Block approach could cause an inefficient calculation of ceiling costs, clause 2(4) should be amended to prescribe a Buliding Block approach in determining costs, in place of the current GRV-based approach.
- A definition of the land which is considered necessary to build and operate railway infrastructure under the Code should be added to Schedule 4. This definition should be consistent with the land requirements necessary to build and operate the railway infrastructure facilities set out in the definition of 'railway infrastructure' under Part 1 of the Code.
- The definition of operating costs under clause 1 should be amended to include the costs associated with a railway owner acquiring the right to use land owned or controlled by another party for the purpose of building and operating railway infrastructure.
- The definition of capital costs under clause 2 should be amended to include land purchase costs for land acquired for the purpose of building and operating railway infrastructure. The equivalent annual cost, or annuity, for such capital costs should be calculated on the basis of providing a rate of return on such capital but no depreciation.

# INTRODUCTION

## Background

5. The main objective of the Act is to establish a rail access regime that encourages the efficient use of and investment in railway facilities within a contestable market for rail operations.

6. Part 2 of the Act provides for the establishment of the Code as subsidiary legislation. The Code contains provisions as set out under the requirements of Part 2 of the Act, including the process for the negotiation of access agreements between the railway

owner and the entity seeking access, the arbitration of disputes during the course of such negotiations and the Regulator's role in this process.

7. The Authority is the Regulator responsible for administering the Act and the Code.

8. Under Section 12, Part 2 of the Act, the Authority is to undertake a review of the Code on the third anniversary of its commencement and every five years thereafter. The Code commenced on 1 September 2001.

9. The Department of Treasury and Finance identified a need for certain changes to be made to the Code in a Public Consultation Paper in November 2003. At this point, the Code had been in operation for over two years. Included in the amendments proposed by the Department and enacted by the Government on July 2004 were provisions to expand the extent of negotiable access to include expansions/extensions to a route. These amendments were aimed at improving the effectiveness of the Code.

10. In October 2004, the Authority commenced its first review of the Code pursuant to the Act requirements. The Authority's Final Report was provided to the former Treasurer on 23 September 2005 and published by the Authority on 5 December 2005. The Treasurer gazetted amendments to the Code, following consideration of the Final report, on 23 June 2009.

## Legislative Requirements

11. As noted above, under Section 12(1) of the Act, the Authority is required to undertake a review of the Code on the third anniversary of its commencement and every five years thereafter.

12. As the Code commenced in 2001, the second review is required to commence in 2009, five years after the third anniversary of the Code's commencement.

13. Section 12(2) of the Act stipulates that:

> The purpose of the review is to assess the suitability of the provisions of the Code to give effect to the Competition Principles Agreement in respect of railways to which the Code applies.

14. Sections 12(3) to 12(5) of the Act set out the requirements for the public consultation to be undertaken by the Authority as part of its review process.

15. In accordance with section 12(6) of the Act, the Authority is required to prepare a report on the review and give it to the Treasurer.

16. Copies of the Act and the Code are available on the Authority's website (www.erawa.com.au).

## Scope of the Review

17. Part 2 of the Act sets out provisions relating to the establishment of a Code.

18. Section 4(1) of Part 2 of the Act, states that "The Minister is to establish a Code in accordance with this Act to give effect to the Competition Principles Agreement in respect of railways to which the Code applies".

19. The Competition Principles Agreement (**CPA**) is defined in the Act as "the Competition Principles Agreement made on 11 April 1995 by the Commonwealth, the States and the Territories as in force for the time being".

20. The CPA provides a framework to allow third parties to access significant infrastructure facilities which exhibit natural monopoly characteristics and cannot be duplicated economically.

21. The definition under the Act means that the relevant version of the CPA of 11 April 1995, for the purpose of the Code review, is the most recent version of this agreement. The Authority understands that the CPA of 11 April 1995, as amended to 13 April 2007, is the most recent version.

22. As noted previously, section 12(2) of the Act requires the Authority's review of the Code to assess the suitability of the provisions of the Code to give effect to the CPA in respect of railways to which the Code applies.

23. Therefore, under the scope of this review, the Authority can only give consideration to amendments to the Code which are not inconsistent with the CPA (as amended to 13 April 2007) or with relevant provisions of the Act, including those set out under Part 2 of the Act.

24. Some comments made in the public submissions are outside the scope of this review including some matters which are dealt with under the Act. These comments have consequently not been referred to in the discussion of issues set out in this draft report.

## Consultation

25. The Authority published an issues paper in October 2009 and invited submissions on that Issues Paper.

26. Seven submissions were received, from:

- Association of Mining and Exploration Companies (**AMEC**)
- Australian Rail Track Corporation (**ARTC**)
- Department of Treasury and Finance (**DTF**)
- Fortescue Metals Group (**FMG**)
- North West Iron Ore Alliance (**NWIOA**)
- Oakajee Port and Rail (**OPR**)
- WestNet Rail (**WNR**)

27. All submissions have been published on the Authority's website.

28. Subsequent to receipt of submissions, the Authority's Secretariat held meetings with some of the parties who had made submissions in order to clarify particular issues raised in those submissions.

# KEY ISSUES

29. For the purpose of the Code, the Draft Report has been divided into the following sections, which reflect the contents of the Code, as below:

- Parts 1 and 2A – Preliminary and Publication of information
- Part 2 – Proposals for access
- Part 3 – Negotiations (Divisions 1 and 2)
- Part 3 – Negotiations (Division 3)
- Part 4 – Access agreements
- Part 5 – Certain approval functions of the Regulator
- Part 6 – General
- Schedules

## Parts 1 and 2A – Preliminary and Publication of information

### Code Provisions

30. Part 1 of the Code deals principally with the definitions of terms used in the Code. Most of these definitions are derived from the Act which does not form part of this review.

31. Part 2A of the Code deals with the publication of information by the railway owner. The purpose of this section is to provide entities interested in seeking access to the railway with preliminary information (required information) on the railway network. In particular, Schedule 2 specifies the level of information required to be provided to prospective access seekers by the railway owner for each route section. The railway owner must make this required information available, in a publication, to prospective access seekers at a reasonable price.

### Issues

32. The Issues Paper invited submissions on Parts 1 and 2A of the Code in relation to:

1. Whether the required information specified under sections 6(a) and 6(b) is sufficient for prospective access seekers to gain a preliminary understanding of the railway network characteristics and relevant route section infrastructure capability and traffic loads.

2. Whether the required information specified under sections 6(a) and 6(b) should be provided on the railway owner's website, in circumstances where a railway owner has a website, as well as in published hard copy format.

3. Any other matters relating to these parts of the Code.

The above issues are discussed below.

Issue 1

*Whether the required information specified under sections 6(a) and 6(b) is sufficient for prospective access seekers to gain a preliminary understanding of the railway network characteristics and relevant route section infrastructure capability and traffic loads.*

### Public Submissions

33. WNR commented that the information currently required to be provided under sections 6(a) and 6(b) is sufficient for access seekers to gain a preliminary understanding of the sections of the railway network that they propose to use.

34. ARTC commented that the information required in sections 6(a) and 6(b) of the Code should include pricing information (for existing users) and performance indicators, in order to make this information requirement consistent with the information provided in interstate jurisdictions.

### Authority's Assessment

35. The Authority does not agree with ARTC that the information requirements associated with interstate jurisdictions should necessarily coincide with those stipulated under the Western Australian legislation. In particular, the non-homogenous nature of haulage on the WNR network does not make the publication of standard prices practical, unlike the interstate network operated by ARTC, which provides access for largely standardised container traffic. The Authority also notes that confidentiality requirements would prevent railway owners from providing pricing information relating to existing contracts to other access seekers.

36. In relation to key performance indicators, the Authority has previously determined that it does not have the power to require railway owners to publish this information and that the availability of performance measures is a matter between the railway owner and the access holder/seeker.

37. The Authority considers that the information requirements on railway owners under sections 6(a) and 6(b) of the Code are appropriate.

Issue 2

*Whether the required information specified under sections 6(a) and 6(b) should be provided on the railway owner's website, in circumstances where a railway owner has a website, as well as in published hard copy format.*

### Public Submissions

38. ARTC commented that this information should be published on railway owners' websites.

39. NWIOA noted that all section 6(a) and 6(b) information should be published and regularly updated on railway owners' websites, as it is critical, in their view, for modelling mining feasibility scenarios both within and between networks without the onerous need on both parties to seek such information under an access application.

40. DTF commented that railway owners should be 'encouraged' to publish this information on their websites, rather than be 'required' to. DTF notes that in section 7(2) of the Code, railway owners are obliged to provide this information to access

seekers on request, and may recover any costs associated with this. DTF argues that a mandatory requirement to publish this information would adversely impact on railway owners' ability to recover costs.

### Authority's Assessment

41. The Authority notes that modern information technology has minimised the cost of maintaining and providing technical information and therefore a mandatory requirement to publish this information on a website would not have a major impact on costs.

42. The Authority notes that WNR already publishes, on its website, the majority of the information required as set out under sections 6(a) and 6(b) of the Code.

43. The Authority agrees with submissions that this information should be published on a railway owner's website, where the railway owner has a website.

44. If a railway owner does not have a website, but information relating to the railway is maintained on the website of an associated company, the Authority considers that the required information set out under sections 6(a) and 6(b) should be available on that company's website.

Issue 3

*Any other matters relating to these parts of the Code*.

45. No other matters were raised in submissions relating to Parts 1 and 2A of the Code.

### Draft Recommendation

**Recommendation 1**

Part 2A of the Code should be amended by adding a further requirement that the information required to be provided by a railway owner as described under sections 6(a) and 6(b) of the Code should be published on the railway owner's website. If a railway owner does not have a website, but information relating to the railway is maintained on the website of an associated company, then the required information as described under sections 6(a) and 6(b) should be published on that company's website.

## Part 2 – Proposals for access

### Code Provisions

46. Part 2 of the Code deals with proposals made to the railway owner for access to the railway owner's network.

47. Section 7 sets out details of the preliminary information which an entity seeking access can request from the railway owner.

48. Sections 8 and 9A set out the requirements which an entity making a proposal for access (proponent) must meet in terms of the proposal and any subsequent withdrawal of the proposal.

49. The railway owner's obligations on receipt of a proposal from a proponent are set out in section 9.

50. Sections 10 and 11 deal with the railway owner's obligation to seek the Authority's approval should a proposal, under section 10(1)(b), be likely to preclude other entities from access to that infrastructure.

51. Section 10, in particular, requires that if a railway owner considers that providing access will preclude other entities from access, negotiations on the proposal must not be entered into without the approval of the Regulator, who must approve allocation of the last available capacity. Section 11 relates to time limits applicable to section 10.

52. Section 12 deals with the requirement for the railway owner to maintain a register of all proposals.

## Issues

53. The Issues Paper invited submissions on Part 2 of the Code in relation to:

1. Whether the extent of information, which entities seeking access can request from the railway owner under section 7, is sufficient to allow such entities to properly prepare a proposal for access pursuant to section 8.

2. Whether it may be of benefit, under section 7(1)(a)(i), for entities seeking access to also be provided with forecasts of available capacity over future years (up to three years ahead for example) in order to have a more complete indication of available capacity.

3. Whether a further sub-section should be added to section 7 noting that any capacity information provided by the railway owner must be compiled on a reasonable basis consistent with the railway owner's obligation not to unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner (consistent with the requirements under section 16(2)).

4. Whether section 9 should allow for the railway owner to also provide floor and ceiling prices to a proponent for future upgrading to rail infrastructure to meet that proponent's proposed traffic requirements. This would require the GRV methodology under Schedule 4 to be amended to provide for forecast rail infrastructure upgrading expenditure to be taken into account.

5. Any other matters relating to this part of the Code.

The above issues are discussed below:

### Issue 1

*Whether the extent of information, which entities seeking access can request from the railway owner under section 7, is sufficient to allow such entities to properly prepare a proposal for access pursuant to section 8.*

## Public Submissions

54. WNR commented that the information requirements under Section 7 of the Code are sufficient to allow access seekers to properly prepare a proposal for access. However, WNR submitted that proponents are not required to provide the level of information to enable the railway owner to assess capacity constraints bearing on any resulting proposal. In particular, WNR contended that a railway owner cannot provide capacity information required under 7(1)(a)(i) unless an access seeker voluntarily provides the information required under section 8(3).

55. NWIOA commented that the June 2009 changes to the Code removed the requirement at 7(1)(c) for "working timetables for the route" to be provided to the Access Seeker, and that this has resulted in the railway owner not being obliged to provide information on departure and arrival times. The NWIOA also commented that:

> In relation to the TPI regime, the Regime is not yet operational and the ERA is yet to make a Final Determination with regard to the Costing Principles. However, from the Final Determinations made so far, NWIOA submits that the information provided would not provide sufficient detail for access seekers to prepare an access proposal unless it included information similar to that provided under the WNR regime. Estimates of future available capacity and likely costs are essential for the development of successful negotiations.

56. ARTC commented that aligning the type and timing of information required to be provided to access seekers under the Code to that provided by ARTC would improve the Code in relation to requests for access to the interstate network. ARTC provided a summary of the information that it provides on request to an "applicant for access", which includes certain capacity-related and train operations-related information.

## Authority's Assessment

57. With regard to the NWIOA submission relating to removal of the requirement for railway owners to provide "working timetables for the route" to access seekers, the Authority notes that this has resulted in the railway owner not being obliged to provide information on departure and arrival times and information with respect to all trains (operating both inside and outside the Code) using the relevant route. The Authority's assessment of this issue is dealt with under the discussion of Schedule 2 issues later in this draft report.

58. The comment by the NWIOA in relation to the adequacy of information provided under the TPI and WNR regimes appears not to recognise that all railway owners come under the same regime. NWIOA has noted that the information provided by WNR is sufficient for an access seeker to prepare an access proposal. The Authority notes that all railway owners are required to provide access seekers with a similar level of information pursuant to Part 2A and Section 7 of the Code.

59. The Authority accepts that the information provision required under section 7 is adequate for this purpose.

Issue 2

*Whether it may be of benefit, under section 7(1)(a)(i), for entities seeking access to also be provided with forecasts of available capacity over future years (up to three years ahead for example) in order to have a more complete indication of available capacity.*

### Public Submissions

60. In relation to the provision of capacity information to access seekers under section 7(1)(a)(i), WNR commented that a railway owner cannot provide forecast capacity, due to confidentiality issues around other (possibly out-of-Code) proposals competing for capacity on a first-come first-served basis.

61. As noted in the previous section, the NWIOA expressed concerns about the availability of estimates for future available capacity.

62. ARTC submitted that provision of forecast capacity information to access seekers under section 7(1)(a)(i) would be qualified by a range of assumptions which would be better made once firm details in relation to the access being sought are provided in the access request, and so better dealt with under section 9.

### Authority's Assessment

63. The Authority notes that the concerns expressed by the NWIOA in relation to available capacity were not specific about whether the current provisions under section 7(1)(a)(i) are adequate or not. In the absence of any specific concerns expressed in submissions about section 7(1)(a)(i), the Authority considers that the views expressed by WNR and ARTC, to the effect that the current provisions under this section are appropriate, should be accepted.

Issue 3

*Whether a further clause should be added to section 7 noting that any capacity information provided by the railway owner must be compiled on a reasonable basis consistent with the railway owner's obligation not to unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner (consistent with the requirements under section 16(2)).*

### Public Submissions

64. ARTC agreed with the proposition that any capacity information provided by the railway owner must be compiled on a basis consistent with the railway owners obligation to not unfairly discriminate between the proposed rail operations of a proponent and any above-rail operations of the railway owner (consistent with the requirements of section 16(2)) if such an obligation is not covered by any broader anti-discrimination provision in the Code.

### Authority's Assessment

65. The Authority notes ARTC's view and considers that it would be appropriate for a sub-section to be added to section 7 noting that any capacity information provided by the railway owner must be compiled on a reasonable basis consistent with the railway owner's obligations, under section 16(2), not to unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner.

Issue 4

*Whether section 9 should allow for the railway owner to also provide floor and ceiling prices to a proponent for future upgrading to rail infrastructure to meet that proponent's proposed traffic requirements. This would require the GRV methodology under Schedule*

*4 to be amended to provide for forecast rail infrastructure upgrading expenditure to be taken into account.*

### Public Submissions

66. WNR commented that it does not support any changes to section 9 of the Code, and that Section 12 of the Code allows the Regulator to carry out a review of the determined floor and ceiling costs where there is a material change in circumstances. WNR argued that the capital expenditure program of a railway owner cannot be forecast to a level of detail for reliable floor and ceiling costs to be calculated, and that in the context of negotiations, it is not feasible for a railway owner to negotiate on hypothetical prices based on hypothetical floor and ceiling costs.

67. ARTC noted that the "interstate access undertaking" requires both floor and ceiling indicative pricing to be made available (on a non-binding basis), and that provision of pricing limits is not likely to be particularly helpful to the access seeker without some indication of where acceptable pricing may lie in that band.

68. NWIOA commented that it is of the view that the GRV method should be amended to provide for forecast rail infrastructure upgrading expenditure to be taken into account. NWIOA submitted that the amended GRV methodology should provide only an estimate of the expenditure associated with planned upgrades, and that this estimate would be subject to consideration of capacity upgrades planned by the railway owners or other third parties.

69. OPR commented that it supports an amendment to section 9 to allow floor and ceiling prices to be determined based on forecast expenditure on future rail upgradings and that the Code amendments should go further and allow the railway owner to later amend floor and ceiling prices which were based on future upgrading costs to reflect actual upgrading costs once these are incurred.

### Authority's Assessment

70. The Authority is aware that changes were made to the Code in 2003 which were aimed at requiring railway owners to negotiate expansions or extensions of a given route or associated railway infrastructure with an access seeker as long as it is economic for the owner to do so.

71. The Authority also notes that a railway owner may request a floor and ceiling costs reset between the reset periods, under clause 12 of Schedule 4, provided the Regulator is satisfied that there has been a material change in the circumstances that existed at the time of the previous reset.

72. The Authority's assessment on this matter is outlined under the Schedules section of this draft report.

Issue 5

*Any other matters relating to this part of the Code.*

73. No other matters were raised in submissions relating to Part 2 of the Code.

**Draft Recommendation**

**Recommendation 2**

Section 7 of the Code should be amended by adding a new sub-section noting that any capacity information provided by the railway owner must be compiled on a reasonable basis consistent with the railway owner's obligations under section 16(2) not to unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner.

# Part 3 – Negotiations (Divisions 1 and 2)

## Code Provisions

74. Part 3 of the Code deals with the negotiation process for an access agreement between the proponent and the railway owner. Divisions 1 and 2 relate to the negotiation process and the obligations on the railway owner and the proponent under this process.

75. Section 13 sets out the duty on the railway owner to negotiate with a proponent in good faith.

76. Sections 14 and 15 outline the obligations on proponents seeking to negotiate an access agreement with the railway owner. Under section 14, the railway owner is entitled to require a proponent to show that it has sufficient managerial and financial ability to undertake the rail operations set out in its proposal. Section 15 provides the railway owner with an entitlement to require a proponent to show that its proposed operations can be accommodated within the capacity of the relevant route or, if an upgrading of the rail infrastructure on that route is necessary to accommodate the proposed operations, that such an upgrading can be undertaken in a technically and economically feasible manner.

77. Section 16 sets out the general obligations of the railway owner in the negotiation of an access agreement including the requirement that the railway owner must not unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner.

78. Section 17 deals with the provisions which must be taken into account by the railway owner and the proponent when negotiating an access agreement.

79. Section 18 outlines the process for dealing with the information provided by a proponent under section 14 and 15 in the event that the railway owner is not satisfied that the information provided meets the requirements of these sections.

80. Sections 19 and 20 deal with the commencement of negotiations. Section 19 provides for the railway owner to notify the proponent of its readiness to commence negotiations and for the proponent to respond in a similar manner. Under section 20 the railway owner and the proponent are required to set a time for the negotiations to terminate if, by that time, either an access agreement is not in place or if the parties have not agreed to an extension to the negotiation time.

81. Section 21 allows a proponent to apply to the Authority for an opinion on the price sought by the railway owner for access, in relation to whether this price meets the requirements of clause 13(a) of Schedule 4.

## Issues

82. The Issues Paper invited submissions on Part 3 (Divisions 1 and 2) of the Code in relation to:

    1. Whether, under section 15, sufficient information is able to be obtained from the railway owner by a proponent pursuant to sections 6 and 7, to show that its proposed rail operations can be accommodated on the relevant route or that an upgrading, if required, is technically and economically feasible.

    2. Whether, under section 16, there is a need to expand 16(2) to clarify the intended meaning of the term “unfairly discriminate” in this context.

    3. Any other matters relating to this part of the Code.

The above issues are discussed below:

Issue 1

*Whether, under section 15, sufficient information is able to be obtained from the railway owner by a proponent pursuant to sections 6 and 7, to show that its proposed rail operations can be accommodated on the relevant route or that an upgrading, if required, is technically and economically feasible.*

## Public Submissions

83. ARTC commented that the information made available under sections 6 and 7 of the Code may be sufficient for a proponent to undertake its own capacity analysis, but that not all the factors that should be considered would surface under section 6 and 7 disclosure. ARTC submitted that it is better for the responsibility for comprehensive capacity analyses to lie with the railway owner.

84. NWIOA noted that for access seekers to be able to negotiate access and for existing operators to negotiate capacity expansion, certain network information is required in order for access seekers to comply with section 15 of the Code. In particular, details of the available capacity pursuant to section 4(o) of Schedule 2 of the Code is required to be provided by the railway owner.

## Authority’s Assessment

85. While the Authority accepts the ARTC comments in relation to the difficulty of an access seeker undertaking the route capacity analyses required under section 15 of the Code, it also notes that submissions have not indicated that this task cannot be completed by access seekers or that the Code requirements for the railway owner to provide information to access seekers pursuant to sections 6 and 7, are insufficient.

86. Based on the above, the Authority considers section 15 of the Code to be appropriate.

Issue 2

*Whether, under section 16, there is a need to expand 16(2) to clarify the intended meaning of the term "unfairly discriminate" in this context.*

### Public Submissions

87. ARTC did not support any changes to section 16(2) and noted that it is preferable to leave the definition 'fairly broad' and so potentially wider in its application, rather than to limit application to certain behaviours.

88. OPR submitted that it did not consider an amendment to the term 'unfairly discriminate' to be necessary.

89. NWIOA commented that the meaning of the term "unfairly discriminate" required clarification. In subsequent discussion on its submission, NWIOA indicated that it believed the meaning of the term "unfair discrimination" was well understood and did not require expansion under the Code.

### Authority's Assessment

90. The Authority notes that the submissions do not support the need for an amendment to section 16(2) to clarify the intended meaning of the term "unfairly discriminate".

91. The Authority considers that section 16(2) is appropriate.

Issue 3

*Any other matters relating to this part of the Code.*

### Public Submissions

92. NWIOA commented that the Code allows railway owners to refuse to negotiate access or an agreement requiring expansion inside the Code, and requested that the implication of this be addressed as part of the Code Review.

### Authority's Assessment

93. The Authority notes that the Code provides access seekers with the right to negotiate an access agreement with a railway owner within the Code if the access seeker chooses this option. In order to achieve an access agreement within the Code, the access seeker is required to follow the process set out under Parts 1 and 2 of the Code. A railway owner is required to use all reasonable endeavours to negotiate, in good faith, an access agreement under the Code if an access seeker seeks such an agreement, pursuant to the obligations set out under sections 13 and 16(1) of the Code.

94. In relation to extensions or expansions which may be required to accommodate an access seeker's requirements, the Code explicitly provides (under section 5(1a)) for an access seeker to include such extensions or expansions as part of any proposal made under the Code.

# Part 3 – Negotiations (Division 3)

## Code Provisions

95. Part 3, Division 3 of the Code deals with the arbitration process for disputes between the railway owner and a proponent in the negotiation of access agreements.

96. Under the arbitration process set out in Part 3, Division 3, the Authority is required to appoint an arbitrator (section 26(2)) to hear the dispute. The arbitrator is required to carry out the arbitration process under the *Commercial Arbitration Act 1985* subject to the provisions set out under sections 28 to 35 of the Code.

97. Section 25 sets out the circumstances which constitute "disputes" under the Code in relation to the negotiation of access agreements. Proponents are able to refer these disputes to arbitration through notification to the Authority under section 16(1).

## Issues

98. The Issues Paper invited submissions on Part 3 (Division 3) of the Code in relation to:

    1. Whether, under section 25, the circumstances which constitute "disputes" under the Code (and which can therefore be arbitrated under the Code) are appropriate or should be expanded to include disputes which may arise between the railway owner and an entity seeking access under other relevant parts of the Code.

    2. Any other matters relating to this part of the Code.

The above issues are discussed below:

Issue 1

*Whether, under section 25, the circumstances which constitute "disputes" under the Code (and which can therefore be arbitrated under the Code) are appropriate or should be expanded to include disputes which may arise between the railway owner and an entity seeking access under other relevant parts of the Code.*

## Public Submissions

99. WNR commented that section 25 should be expanded to clearly define the specific circumstances under which disputes can be triggered. WNR indicated that it supports the ability of access seekers to trigger a dispute if the requirements of section 7, 8 and 9 are not complied with.

100. NWIOA noted that widening the definition of disputes will avoid unnecessary and expensive Supreme Court proceedings. NWIOA proposed that the current definition of disputes be expanded to include disputes relating to provision of information prior to the access seeker making a proposal and disputes in relation to an access seeker's proposal – or a railway owner's response to a proposal - under Part 2 of the Code.

101. DTF commented that it supports an expansion of the circumstances which constitute a dispute under the Code, provided that the definition of disputes is expanded to include disputes that arise at any time after a route has been included in Schedule 1. DTF argued that this would require amendment of the Code such that it comes into force before the Part 5 instruments have been approved, and contends that this would expedite the process of negotiating an access agreement under the Code and would provide greater certainty.

### Authority's Assessment

102. The Authority notes that the submissions all support a widening of the range of circumstances which constitute 'disputes' under the Code and can therefore be taken to arbitration by an access seeker.

103. The Authority considers that circumstances which may be appropriate for an expanded 'disputes' scope should be restricted to the processes set out under Parts 2 and 3 of the Code, which outline the information provision and negotiation obligations on railway owners, rather than encompassing any disputes that arise after a route has been included in Schedule 1 of the Code, as suggested by DTF.

104. As a point of clarification, in relation to the DTF submission, the Authority notes that the Code applies to any railway route section from the time it is included under Schedule 1. In the case of a new railway network coming under the Code, such as in the case of TPI, the approval processes for the relevant regulatory instruments and determinations required under the Act and the Code occur subsequent to the railway route sections being included under Schedule 1 and facilitate the ability of access seekers to complete an access agreement under the Code.

Issue 2

*Any other matters relating to this part of the Code.*

105. No other matters were raised in submissions relating to Part 3 of the Code.

### Draft Recommendation

**Recommendation 3**

Section 25 of the Code should be amended such that the definition of disputes includes all the information provision and negotiation obligations on railway owners, which are relevant to access seekers, under Parts 2 and 3 of the Code.

## Part 4 – Access Agreements

### Code Provisions

106. Part 4 of the Code deals with general matters relating to access agreements including the registration of such agreements.

### Issues Paper

107. The Issues Paper invited submissions on any matters covered in the provisions under Part 4 of the Code.

### Public Submissions

108. There were no submissions on this part of the Code.

### Authority's Assessment

109. Part 4 of the Code is considered to be appropriate.

## Part 5 – Certain approval functions of the Regulator

### Code Provisions

110. Part 5 of the Code sets out the approval functions of the Authority in relation to the Part 5 instruments. The provisions under Part 5 require a railway owner to submit these instruments to the Authority for approval, consisting of the train management guidelines, the train path policy, the costing principles and the over-payment rules.

111. Part 5 also contains provisions relating to the public comment process which must be undertaken by the Authority on the railway owner's train management guidelines, train path policy (section 45) and segregation arrangements (section 42) before the Authority can approve these documents.

### Issues

112. The Issues Paper invited submissions on Part 5 of the Code in relation to:

1. Whether section 45 should include the costing principles and over-payment rules in order to ensure consistency in the public consultation process across all four Part 5 instruments.

2. Whether a provision should be included providing for reviews of the Part 5 instruments after a specific period (for example 5 years or as otherwise determined by the Authority).

3. Whether in the case of section 42, relating to public consultation of segregation arrangements or variations to segregation arrangements, provision should be made to only require such consultation for variations to segregation arrangements considered by the Authority to constitute material changes.

4. Any other matters relating to this part of the Code.

The above issues are discussed below:

Issue 1

*Whether section 45 should include the costing principles and over-payment rules in order to ensure consistency in the public consultation process across all four Part 5 instruments.*

### Public Submissions

113. ARTC supported consistency in the treatment of the Part 5 instruments in relation to public consultation and noted that this would mirror current practice.

114. NWIOA also indicated that it was in agreement with the inclusion of costing principles and over-payment rules in the public consultation process.

### Authority's Assessment

115. The Authority notes support in submissions for consistency across all four Part 5 instruments with respect to public consultation provisions.

116. The Authority considers that section 45 of the Code should be amended to ensure that the same public consultation provisions relate to all the Part 5 instruments.

Issue 2

*Whether a provision should be included providing for reviews of the Part 5 instruments after a specific period (for example 5 years or as otherwise determined by the Authority).*

### Public Submissions

117. ARTC supported the inclusion of a review period for the Part 5 instruments, and noted that this would mirror current practice.

118. NWIOA indicated that it supported specific review periods for Part 5 instruments.

### Authority's Assessment

119. The Authority notes the support in submissions for the inclusion of a review period for the Part 5 instruments.

120. The Authority considers that a provision providing for the review of s after a specific period should be included under Part 5 of the Code.

Issue 3

*Whether in the case of section 42, relating to public consultation of segregation arrangements or variations to segregation arrangements, provision should be made to only require such consultation for variations to segregation arrangements considered by the Authority to constitute material changes.*

### Public Submissions

121. The ARTC did not support any change to section 42, on the basis of uncertainty as to what constitutes a material change.

122. The NWIOA indicated that it supported a change to section 42 to allow the Authority discretion to decide whether minor changes to segregation arrangements constitute a material change for the purpose of public consultation.

123. OPR expressed a similar view to NWIOA on this matter.

## Authority's Assessment

124. The Authority notes that it has the discretion under certain provisions of other access regimes to decide whether changes constitute material changes for the purpose of public consultation.

125. The Authority considers that section 42 of the Code should be amended to require public consultation on variations to segregation arrangements only where the Authority considers such variations to be material.

Issue 4

*Any other matters relating to this part of the Code.*

## Public Submissions

126. OPR made reference to the Code provisions at 47(2)(b) for establishment of over-payment rules providing for a maximum three year carry-over period before any over-recovery must be returned to railway operators. OPR submitted that there is greater risk of over- or under-recovery of costs in the early period of a greenfields railway operation, and that the Code should be amended to allow for a period of more than three years for carry-over of over-payments for a greenfields railway.

127. OPR also commented that at least nine months post-operation should be permitted before greenfields railway operators are required to submit costing principles for approval by the regulator.

128. OPR noted that regulatory arrangements should allow supply chain issues to be explicitly recognised in an access provider's capacity management policies, including imposing obligations on third party access seekers in relation to the system operating mode.

## Authority's Assessment

129. The Authority does not support the OPR suggestion that the Code should be amended to allow for a period of more than three years for carry-over of over-payments for a greenfields railway. The Authority considers that it is important that any over-payments are returned to access seekers at the end of each successive three year period as specified under the Code.

130. The Authority also does not support the OPR suggestion that at least nine months post-operation should be permitted before greenfields railway operators are required to submit costing principles for approval by the Regulator.

131. The Authority acknowledges the commercial imperatives in operating a logistics chain and the potential for operational efficiency gains resulting from coordination of its various elements. However, the Authority does not support the OPR suggestion that supply chain issues be explicitly recognised in an access provider's capacity management policies. It is not appropriate under the current WA rail access legislation for any considerations outside of rail network priorities to guide the application of the rail access Code. This is particularly relevant if a third party user wishes to gain access to TPI's rail or port facilities, but not both.

132. In the case of TPI's Train Path Policy, the Authority has recognised the need for unscheduled use of the railway in order for operators to take advantage of

opportunities to utilise the port, by allowing the use of cyclic traffic train paths in an operator's service entitlements, in addition to timetabled train paths.

### Draft Recommendation

**Recommendation 4**

Part 5 of the Code should be amended as follows:

- Section 42 should be revised to only require public consultation for variations to segregation arrangements considered by the Authority to constitute a material change.
- Section 45 should include the costing principles and over-payment rules in order to ensure consistency in the public consultation process across all Part 5 instruments.
- A new provision should be added to provide for the review of all Part 5 instruments every five years or as otherwise determined by the Authority.

## Part 6 – General

### Code Provisions

133. Part 6 of the Code deals with general matters including the issue of inquiries and reports by the Authority, obligations on the Authority with respect to confidential information and transitional provisions.

### Issues

134. The Issues Paper invited submissions on any of the matters covered in the provisions under Part 6 of the Code.

135. The Authority noted in the Issues Paper that some of the transitional provisions under sections 52 and 53 are no longer relevant and should therefore be deleted from the Code. The transitional provisions which should be deleted are sections 52(1), 52(2), 52(3), 52(4) and section 53.

### Public Submissions

136. There were no submissions on Part 6 of the Code.

### Authority's Assessment

137. The Authority considers that the transitional provisions under sections 52 and 53 which are no longer relevant should be removed from the Code.

**Draft Recommendation**

**Recommendation 5**

Sections 52(1), 52(2), 52(3), 52(4) and 53 of the Code should be deleted as these transitional provisions are no longer relevant.

# Schedules

## Code Provisions

138. The Code contains five schedules, as follows:

- Schedule 1 – Routes to which the Code applies
- Schedule 2 – Information to be made available
- Schedule 3 – Matters for which provision is to be made in an access agreement
- Schedule 4 – Provisions relating to prices to be paid for access
- Schedule 5 – Relevant provisions of Competition Principles Agreement

## Issues

139. The Authority notes that item 50A of Schedule 1 has not been captured under clause 3(1)(a)(i) of Schedule 4.

140. The Authority notes that there is an error which should be corrected under clause 3(1)(a)(ii) of Schedule 4. The words “in the other items in that schedule” should be changed to “in items 1 to 48 in that Schedule”.

141. The Issues Paper invited submissions on the Schedules in the Code in relation to:

1. Whether the definition under section 52 of Schedule 1 needs to be more clearly defined with respect to the term ‘railway’.

2. Whether under Schedule 2: (a) any clarification of any of the items listed under this schedule is required; or (b) there is a need for any further information to be made available by the railway owner under this schedule.

3. Whether section 3(2) of Schedule 4 should include the requirement that for a new railway under the Code, the public consultation arrangements set out under sections 3(3) to 3(5) of Schedule 4 should apply to the initial WACC determination under the Code for this railway.

4. Whether Schedule 4 should include provisions setting out a review period for floor and ceiling determinations, along similar lines to that suggested for the Part 5 instruments and segregation arrangements (i.e. five years or as otherwise determined by the Authority).

5. Whether the GRV methodology under section 2 of Schedule 4 should be amended to include the provision for floor and ceiling cost calculations to take into account forecast expenditure by the railway owner on the upgrading of rail routes.

6. Any other matters relating to the schedules in the Code.

The above issues are discussed below:

Issue 1

*Whether the definition under section 52 of Schedule 1 needs to be more clearly defined with respect to the term 'railway'.*

### Public Submissions

142. NWIOA commented that the definition of 'Railway' should be consistent with the definition of "Railway" in the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* (**TPI State Agreement**) and that the definition should relate to the entire railway.

### Authority's Assessment

143. In relation to the NWIOA submission, the Authority notes that there are a number of definitions of "Railway" in the TPI State Agreement, including "Railway", "Pilbara Iron Ore Railways", "SRL Railway", and "Port Railway".

144. The Authority considers that in order to make section 52 of Schedule 1 clear, the words "...the railway constructed pursuant to the TPI Railway and Port Agreement" should be replaced with "...the railway constructed pursuant to the TPI Railway and Port Agreement and defined as 'Railway' in that Agreement".

145. The Authority also notes, in relation to Schedule 1, that item 50A of Schedule 1 should be added to the other items set out under clause 3(1)(a)(i) of Schedule 4.

Issue 2

*Whether under Schedule 2: (a) any clarification of any of the items listed under this schedule is required; or (b) there is a need for any further information to be made available by the railway owner under this schedule.*

### Public Submissions

146. ARTC commented that pricing information and performance indicators should be added to the information required to be made available under Schedule 2 of the Code, in order to provide consistent disclosure on the interstate network.

147. OPR noted that the current level of information is appropriate as the amendments to the Code resulting from the previous review are sufficient.

148. NWIOA commented that the information set out in 4(g) of Schedule 2 of the Code should be amended to clarify whether the definition of "running times of existing trains" is intended to include train paths negotiated outside of the Code. NWIOA has noted that the Code, as amended in June 2009, obliges the railway owner to provide only the "running times of existing trains" whereas the previous version of

the Code required that "working timetables for the route" be provided. NWIOA considered that the amended terminology does not appear to provide the access seeker with specific departure and arrival times but only the duration of the journeys undertaken by existing trains.

### Authority's Assessment

149. The Authority notes the NWIOA submission, and agrees that the wording of Schedule 2, 4(g) requires clarification. In the June 2009 amendments to the Code, Clause 7 was amended by deleting 7(1)(c) "the working timetables for the route". The removal of 7(1)(c) means that the access seeker must develop its application based on the "running times of existing trains" under Schedule 2 (referred to in Section 6(b)). This may not be adequate if it does not also provide information for trains operating outside the Code or does not provide departure and arrival times.

150. The Authority considers that clause 4(g) of Schedule 2 requires clarification to ensure that adequate information is provided to access seekers.

151. In relation to the ARTC comment that performance indicators should be added to the information requirements under Schedule 2, the Authority notes that the Act does not provide the power for the Authority to require a railway owner to provide such information.

Issue 3

*Whether section 3(2) of Schedule 4 should include the requirement that for a new railway under the Code, the public consultation arrangements set out under sections 3(3) to 3(5) of Schedule 4 should apply to the initial WACC determination under the Code for this railway.*

### Public Submissions

152. ARTC supported the view that public consultation should apply to initial WACC determinations for new railways and noted that this would codify the Authority's current approach.

153. NWIOA expressed a similar view to the ARTC, that a public consultation process should apply to the determination of the initial WACC for a new railway.

### Authority's Assessment

154. The Authority notes the support in submissions for public consultation arrangements to apply to the initial WACC determination for any new railways which come under the Code.

155. The Authority considers that Schedule 4 should be amended to incorporate a requirement for public consultation, as set out under sections 3(3) to 3(5) of Schedule 4, to apply to the initial WACC determination for any new railways which come under the Code.

Issue 4

*Whether Schedule 4 should include provisions setting out a review period for floor and ceiling determinations, along similar lines to that suggested for the Part 5 instruments and segregation arrangements (i.e. five years or as otherwise determined by the Authority).*

## Public Submissions

156. ARTC commented that section 12 of Schedule 4, which provides for the Authority to review floor and ceiling costs whenever a material change occurs, provides sufficient opportunity for review and does not perceive a need to establish a set review period. ARTC noted the Authority's current practise of requiring a review of floor and ceiling costs every three years, and submitted that it would support an increase in this period to five years if required for consistency with the review period for Part 5 instruments.

157. NWIOA expressed the view that floor and ceiling cost reviews should remain at three years rather than being extended to five years. NWIOA submitted that a five year period is too long between reviews for networks that have the potential for new capital works.

158. OPR commented that it supports a consistency in the review periods between floor and ceiling cost determinations and the Part 5 instruments. OPR also submitted that the review periods for the costing principles and the floor and ceiling cost should coincide as the asset valuation methodology outlined in the costing principles is the same as the methodology used to establish the capital cost in the floor and ceiling cost.

## Authority's Assessment

159. The Authority notes that the three year reset period for floor and ceiling cost determinations under the Code is not consistent with the five year reset periods generally allowed for access arrangement reviews in the electricity and gas regulatory regimes that the Authority administers.

160. The Authority notes that the Code's GRV-based valuation scheme does not take into account forecast capital expenditure, unlike the electricity and gas regulatory regimes, thereby preventing a railway owner from achieving a return on the capital (including depreciation) associated with any upgrading of the network in the period between the floor and ceiling cost resets.

161. On the basis that the GRV methodology set out in the Code does not allow railway owners to achieve a return on expenditure associated with forecast upgradings between reset periods, the Authority does not consider an increase in the period between floor and ceiling cost resets from three to five years to be appropriate.

162. The Authority considers there may be merit in a change in the cost determination method from a GRV-based approach. This could be beneficial on two accounts:

- a Building Block approach allows forecast capital expenditure to be incorporated into a cost determination; and
- administrative improvements by unifying the Authority's approach under the Code with that applied to other railway networks in Australia.

163. The Authority notes WNR's comments received in consultation regarding the previous review of the Code (March 2005 submission, published on the Authority's website), where WNR expressed opposition to the use of the Code review mechanism to change the provisions of the Code without evidence that existing arrangements are not effective.

164. However, there may be an argument that the GRV approach may be seen as not effective, as it does not contemplate the inclusion of forecast capital expenditure in the railway owner's asset valuation and therefore the equivalent annuity in the railway owner's ceiling cost.

165. The Authority is not aware of any reason in theory why a Building Block approach would disadvantage any railway owner in comparison to the GRV methodology, but welcomes submissions on this matter.

Issue 5

*Whether the GRV methodology under clause 2 of Schedule 4 should be amended to include the provision for floor and ceiling cost calculations to take into account forecast expenditure by the railway owner on the upgrading of rail routes.*

### Public Submissions

166. ARTC commented that it supported forecast expenditure for upgradings being taken into account in floor and ceiling cost determinations.

167. OPR also indicated that it supported forecast expenditure for upgradings being taken into account in floor and ceiling cost determinations.

168. NWIOA considered that the GRV methodology should be amended, subject to certain qualifications relating to the status of forecasts as cost estimates.

169. WNR did not support a change to the GRV methodology to incorporate forecast capital expenditure on rail upgradings. WNR submitted that capital expenditure programs cannot be forecast to a level of detail required for reliable floor and ceiling costs to be calculated. WNR noted that it does not support any changes to section 9 of the Code.

### Authority's Assessment

170. The Authority notes that changes were made to the Code in 2004 aimed at allowing proposals which require expansions or extensions to the rail network to be included in the Code. This provided the right for an access seeker to negotiate with a railway owner an access agreement within the Code where extensions or expansions to the network were required as part of the proposal.

171. The changes made to the Code in 2004 to facilitate access seekers being able to incorporate extensions or expansions in their proposals for access included the following:

- Section 3 "Definitions", additional definitions for "expansion" and "extension" were inserted, and section 5 "Routes to which this Code applies", sub-sections (1a) and (1b) were inserted to ensure that any proposed expansions or extensions to a route are covered by the Code.
- Section 8 "Proposals for access", sub-sections (4) and (5) were inserted to recognise that any proposal for access may include specification of any expansion or extension required to undertake operation.
- Section 9 "Railway owner's obligations on receipt of proposal", sub-section 1(d) was deleted, sub-sections (2) and (3) were replaced and subsection (3a) was inserted:

- Sub-section 2(b) requires the railway owner to provide a preliminary estimate of the costs associated with any proposed expansion or extension.
- Sub-section (3) specifies that the railway owner is not bound by any access agreement cost estimate or opinion provided to a proponent, and sub-section (3a) increases the timeframe for the drafting of an access agreement by the railway owner.

- Section 14 "Proponent must show it has managerial and financial ability" and Section 15 "Proponent must show that its operations are within the capacity of the route or expanded route" were modified so that an access seeker is not only obliged to provide evidence of financial capacity to undertake any proposed operations but is additionally able to meet a share of costs associated with any proposed expansion or extension.
- Section 33 "Determinations (of disputes) in other cases", sub-section (4) was added to make expansions or extensions conditional on the financial ability of the access seeker to meet their share of the costs associated with the expansion or extension.
- Schedule 4, Clause 6 "Prices to be negotiated", sub-section 2 was introduced to set out the procedure to determine the division of costs between the railway owner and the access seeker for any proposed expansion or extension of the route or associated railway infrastructure.
- Schedule 4, Clause 13 "Guidelines to be applied", sub-section (7) was added to ensure that access price negotiation allows a railway owner to recover the costs in respect to any expansion or extension over the economic life of the railway infrastructure.

172. In the public consultation paper issued by the Department of Treasury and Finance in November 2003 on proposed amendments to the Code, the purpose of replacing section 9(2) was described as being to:

> provide guidelines to a railway owner as to the method of calculation of floor and ceiling costs where these are required for a proposed expansion or extension

173. The Authority notes that the changes made to the Code in 2004 do not contain specific guidance as to the method of calculation of floor and ceiling costs where these are required for a proposed expansion or extension, but provides only that a railway owner must provide preliminary estimates of the upgrading costs. The Code envisages negotiation between the railway owner and access seeker on the manner in which funding would be provided for extensions or expansions required by the access seeker.

174. The Authority notes that, as the GRV methodology under the Code relates only to 'existing' railway infrastructure, floor and ceiling costs cannot be established which relate to railway infrastructure which is 'forecast' but not yet built.

175. Therefore, the Authority is of the view that any amendments to the Code to allow for the incorporation of the forecast expenditure for extensions or expansions into floor and ceiling costs would require a fundamental change to the GRV methodology set out under Schedule 4.

176. The Authority notes that not all submissions support such a change. In particular, WNR noted in its submission that it does not support such a change.

177. The Authority has discussed this issue in more detail under the previous section.

Issue 6

*Any other matters relating to the schedules in the Code.*

### Public Submissions

178. DTF commented that Schedule 4 of the Code should be amended to include land rental costs as operating costs and land purchase costs as capital costs. DTF submitted that the Code was initially developed to cover the freight railways in the State's south-west, which did not incorporate any 'greenfields' type development. DTF argued that amendment of the Code in this manner is required to properly accommodate 'greenfields' developments such as the TPI railway and the proposed Oakajee project, which incorporate significant land costs. DTF provided draft text for amendment to the Code, and suggested that the regulator determine the means by which land-related capital costs are evaluated, to avoid any inappropriate use of the GRV methodology.

179. OPR commented that the Code allows considerable scope for the regulator to exercise discretion in providing for recognition of the additional risks associated with greenfields infrastructure when determining the WACC and in establishing the prudency of operating and capital costs. OPR argued that the scope for discretion should be clarified/defined to reduce uncertainty.

180. OPR also noted that the Code should be amended such that GRV (Gross Replacement Value) or DORC (Depreciated Optimised Replacement Value) methods could be used as a basis for asset valuation. OPR argued that the GRV method (currently stipulated in the Code) has a less aggressive depreciation profile and does enable depreciation to be brought forward to be compatible with financier's lending requirements, where there is limited life such as reserves for mine developments. OPR acknowledged that in theory GRV provides a more stable revenue stream over time compared with the DORC approach, but argued that a DORC approach can deliver a pricing regime with equivalent predictability to a GRV scheme, if revenue and price smoothing methods commonly used in DORC schemes are employed.

181. FMG commented that Schedule 4 of the Code should be amended to include land rental costs as operating costs and land purchase costs as capital costs.

### Authority's Assessment

182. The Authority notes that Schedule 4 of the Code specifically excludes, under clause 2, land from being part of the railway infrastructure on which a return can be earned by the railway owner. Clause 1 of Schedule 4 also does not include any costs associated with land rental as part of the costs which comprise operating costs under the Code.

183. The Authority also acknowledges that capital costs for land purchase were not relevant to the WNR railway land corridor as the Government, as the lessor, remains the owner of this land. In terms of operating costs, the Authority assumes that the exclusion of land rental costs from the Code implies that such costs probably did not form part of the lease agreement with WNR.

184. Given the recent inclusion of the TPI rail network into the Code and the submissions which have been made by TPI and FMG on the land cost issue to date, the Authority recognises this issue may be a significant matter for new railways coming under the Code. OPR, which is proposing a new railway in the Mid-West, has also expressed concern over this issue.

185. Based on the above, including the comments made by DTF in support of land costs being included in the Code, the Authority considers that it would be appropriate for the Code to be amended to allow railway owners to earn a return on the value of any land purchased for the purpose of building and operating railway infrastructure. However, this return should not include depreciation as land is a non-depreciating asset.

186. The Authority considers that the land value component of the railway costs will be assessed once only at an initial price and thereafter escalated by a measure of CPI at each reset. This will ensure consistency with general regulatory practice.

187. In the case of land costs associated with a railway owner acquiring the right to use land owned or controlled by another party (such as lease or rental costs) for the purpose of building and operating railway infrastructure, the Authority considers that, in principle, such costs should be included as part of an efficient railway owner's operating costs, which would be incurred by any company building a railway in a particular location. The Authority would need to carefully assess proposals put forward by railway owners which require land related costs to be included as operating costs given the complexity of land access issues where the *Native Title Act 1993* is relevant to the ownership and control of land on which railway infrastructure is built and operated.

188. The Authority is also mindful that clause 4 of Schedule 4, which requires the Authority to assess costs submitted by railway owners on the basis of costs which would be incurred by a body building and operating a railway using efficient practices, is relevant to its consideration of any land costs which may be included through future changes to the Code.

### Draft Recommendation

**Recommendation 6**

Schedule 1 should be amended as follows:

- Item 52 should be amended by replacing the words "... the railway constructed pursuant to the TPI Railway and Port Agreement" with "... the railway constructed pursuant to the TPI Railway and Port Agreement and defined as 'Railway' in that Agreement".

Schedule 2 should be amended as follows:

- Clause 4(g) "the running times of existing trains" should be replaced with "relevant running information for all current scheduled trains or cyclical train movements, as appropriate".

Schedule 4 should be amended as follows:

- Item 50A of Schedule 1 should be added to clause 3(1)(a)(i) of Schedule 4.
- Clause 3(1)(a)(ii) should be amended by replacing the words “in the other items in that schedule” with “in items 1 to 48 in that Schedule”.
- Clause 3(2) should be amended to ensure that the public consultation arrangements set out in sections 3(3) to 3(5) of Schedule 4 apply to the initial WACC determinations for any new railways which come under the Code.
- Unless it can be demonstrated that the Building Block approach could cause an inefficient calculation of ceiling costs, clause 2(4) should be amended to prescribe a Building Block approach to determining costs, in place of the current GRV-based approach.
- A definition of the land which is considered necessary to build and operate railway infrastructure under the Code should be added to Schedule 4. This definition should be consistent with the land requirements necessary to build and operate the railway infrastructures facilities set out in the definition of ‘railway infrastructure’ under Part 1 of the Code.
- The definition of operating costs under clause 1 should be amended to include the costs associated with a railway owner acquiring the right to use land owned or controlled by another party for the purpose of building and operating railway infrastructure.
- The definition of capital costs under clause 2 should be amended to include land purchase costs for land acquired for the purpose of building and operating railway infrastructure. The equivalent annual cost, or annuity, for such capital costs should be calculated on the basis of providing a rate of return on such capital but no depreciation.