

ROY HILL INFRASTRUCTURE PTY LTD
SUBMISSION TO THE ECONOMIC REGULATION AUTHORITY
DRAFT REPORT SEPTEMBER 2015

1 General

Roy Hill is supportive of the continuation of the “light handed” regulatory regime implemented by the Railways (Access) Code 2000, rather than a more prescriptive approach.

Roy Hill notes that the submissions by The Pilbara Infrastructure Pty Ltd (TPI), Brookfield Rail (BR) and Aurizon Holdings Pty Ltd all fully supported the continuation of the negotiate –arbitrate model, and the implementation of a regime which encourages the genuine commercial negotiation.

2 Merits Review

The Authority has concluded that “... recourse to judicial review of an Authority determination by the WA Supreme Court is appropriate in a light handed regime. The Authority has not made any recommendations for amendments in relation to this issue.” (paragraphs 37 and 38).

Roy Hill repeats its submission that a merits based review of all Authority decisions should be introduced to reduce the risk of regulatory error. The introduction of a merits based review was supported by both railway owners and an access seeker - TPI, BR and CBH Group all suggested that it may be appropriate for a merits based review to be available in relation to an arbitration that is concerned with pricing issues or performance standard issues.

3 Segregation Arrangements

The Authority has not made any recommendations for amendments on this issue (paragraph 48).

The review should adopt the submissions of the only two vertically integrated businesses affected by the Code (Roy Hill and TPI), which have vigorously submitted that the Regime should not add a level of complexity and expense to the operation of the business, which would not otherwise exist.

Segregation obligations should not be imposed on a railway owner prior to the owner receiving an access proposal. After an access proposal has been received by a railway owner (who is then obliged to put in place segregation arrangements), the access seeker must be responsible for any additional costs imposed on the railway owner's business flowing from those segregation arrangements.

4 Recommendation 2 - Section 10

The Authority has recommended that section 10 should be deleted from the Code (Recommendation 2).

Roy Hill agrees with that recommendation.

5 Sections 14 and 15 of the Code

The Authority has recommended that 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 Authority has also suggested that section 15 of the Code should require the railway owner to provide any required information necessary for the proponent to undertake a capacity assessment.

The Authority has not adopted the submissions of both Roy Hill and TPI, that an access seeker must first satisfy the reasonable requests and requirements of the railway owner. Roy Hill submits that it should not be required to participate in negotiations with a third party who cannot first establish the financial capacity to complete the transaction. As stated by TPI at page 3 of its initial submission:

- (a) the access seeker owes a duty of good faith to the railway owner in making the access proposal;
- (b) the access seeker must have a genuine intention to enter into an access agreement with the railway owner to actually use the railway infrastructure; and
- (c) the proponent must provide a specific indication of the times when access is required, not merely a time from which access might be required.

If the Authority has recommended that timelines are imposed on the railway owner to provide the information required by those sections, the Authority should also recommend that timelines are imposed on an access seeker to satisfy these threshold issues set out in sections 14 and 15 of the Code.

6 “Unfairly Discriminate”

The Authority has asked for comment from stakeholders on whether the Code should further define “unfair discrimination” or provide a list of examples of unfair discrimination.

Roy Hill has previously submitted that the reasons which give rise to permissible discrimination should be prescribed in the Code. Roy Hill referred to the definition of “discriminate” in regulation 23 of the Gas Transmission Regulations 1994 (WA) (now repealed) for a well constructed and well drafted approach to the issue of permissible discrimination.

Roy Hill agrees with the initial submission by TPI (contained in the paper prepared by Ernst & Young at paragraph 3.1) that “reasonable discrimination” should be construed in light of the commercial risks that an access provider incurred in developing the assets. Roy Hill agrees with the lists contained in paragraph 3.1 of the Ernst & Young paper which detail the circumstances in which discrimination is permissible.

7 Recommendation 4 – “Days”

Roy Hill agrees with the recommendation to define the term “days” to mean “business days”

8 Recommendation 5 – Replacement of Required Information

Roy Hill has no comment on the recommendation that the prescribed time limit set out in section 7C(2)(b) of the Code for the amendment or replacement of Required Information be reduced from two years to six months.

9 Proposals for Access

The Authority has asked (at paragraph 146 of the draft report) to hear further views on whether the information to be provided by a proponent should be expanded to assist railway owners in assessing costs, expansion requirements and negotiable terms.

Roy Hill agrees with the statements in paragraphs 4.5 and 4.6 of the initial submission dated 2 April 2015 by Brookfield Rail. The access seeker should be required to provide the information listed in paragraph 4.5 if it is interested in making a proposal for access and the information listed in paragraph 4.6 should be provided with an access proposal. The information is necessary so that the railway owner can make a useful assessment of costs, prices, extension/expansion details and the so that the railway owner can assess the terms and conditions of its standard form access agreement.

Roy Hill Infrastructure Pty Ltd

30 October 2015