Western Australia

Economic Regulation Authority

ISSUES PAPER:

REVIEW OF THE WESTERN AUSTRALIAN RAILWAYS (ACCESS) CODE (2000)

Economic Regulation Authority

23 FEBRUARY 2005

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HOW TO MAKE A SUBMISSION

Submissions on any matters raised in this Issues Paper or in response to any matters in the Terms of Reference attached to this Issues Paper should be in written and electronic form and addressed to:

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Submissions must be received by **28 March 2005**.

In general, submissions from interested parties will be treated as in the public domain and placed on the Economic Regulation Authority ("the Authority") website. Where an interested party wishes to make a confidential submission, it should clearly indicate the parts of the submission that are confidential. For more information about the Authority's submissions policy, see the Authority website.

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1 INTRODUCTION

1.1 Requirement for review

The Western Australian Rail Access Regime ("the Regime") came into effect on the 1st September 2001. The Regime is comprised of the *Railways (Access) Act 1998* ("the Act"), and the *Railways (Access) Code 2000* ("the Code"). 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.

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. 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 (CPA) in respect of railways to which the Code applies".

The Authority must submit a report based on the review to the administering Minister (the Treasurer) for consideration.

Under the Act, a requirement of the review of the Code is to seek public comment on the effectiveness of the access regime. This is to be facilitated by this Issues Paper, which briefly discusses the relevant issues to assist stakeholders making submissions. A copy of the Act and the Code is available on the Authority's website .

A list of abbreviations used in this Issues Paper is provided in Attachment 2.

1.2 Scope of review

The primary purpose of this review of the Code is to assess how effectively the provisions of the Code meet the objectives of the CPA.

The CPA is part of the National Competition Policy (NCP) which was formulated and signed by all Australian Governments.[1] The NCP is underpinned by three separate inter-governmental agreements:

(a) the CPA;

(b) the Conduct Code Agreement; and

(c) the Agreement to Implement the National Competition Policy and Related Reforms.

Section 12 of the Act only gives reference to the CPA. Therefore, the scope of this review of the Code is limited to its suitability to give effect to the CPA, and does not include the other agreements which make up the NCP.

A key aim of the CPA is to establish a framework which will enable third party access to significant infrastructure facilities which exhibit natural monopoly characteristics and cannot be duplicated economically.

[1] For further information on the CPA, third party access and state based access regimes is available from the National Competition Council at http://www.ncc.gov.au/articleZone.asp?articleZoneID=64

The relevant provisions of the CPA are the requirements of clauses 6(2) to 6(4). Key issues to be covered by the review, include;

- the Code's effectiveness in terms of its impact upon both the (below-rail) network service providers, and the (above-rail) network users (and potential users);
- the impact of the Code upon activities in downstream industries;
- the impact of the Code upon the efficiency of the operations of and investment in the rail network infrastructure; and
- comparative benchmarking of the effectiveness of the Code against rail access codes applying elsewhere in Australia to take into account developments in regulatory policy and practice.

The Code requires the establishment of five key regulatory instruments (Costing Principles, Segregation Arrangements, the Train Path Policy and Train Management Guidelines, Overpayment Rules) which provide a greater level of detail to enable implementation of specific principles contained within the Code. Most of these instruments established within the Code contained a clause which specifies that a separate review be completed two years after their approval. Consequently, these documents will be reviewed, and where necessary refined following this review of the Code in a separate process with key stakeholders. Comments on issues relating to the five documents are welcome at this stage, however the focus of this review is on the need for refinements to the Code to meet the objectives of the CPA. Consequently, if stakeholders suggest refinements to issues of detail within the five documents, these will be considered, and those with merit implemented in the subsequent reviews.

1.3 Objectives of third party access

The broad objective of third party access under the CPA is to encourage the efficient use of nationally significant network assets to promote competition in related markets.

The application of an efficiency objective in access regulation has the following three broad components:

- first, ensuring the efficient use of natural monopoly infrastructure, especially by limiting the opportunity of infrastructure owners to misuse market power (in either the market for these services or in related markets) by refusing or obstructing reasonable access to infrastructure services;
- second, facilitating efficient investment in natural monopoly infrastructure, especially by ensuring:
    - infrastructure services are maintained and developed appropriately;
    - infrastructure owners (and potential owners) earn sufficient returns to provide incentives for efficient investment;
    - incentives for inefficient development of competitive infrastructure and for inefficient investment in upstream and downstream activities are minimised; and
- third, promoting competition in activities that rely on the use of the infrastructure service where competitive infrastructure services are not economically feasible.

Clause 6 of the Competition Principles Agreement establishes principles which a third party access framework should embody to achieve the above objective.

Whilst this review is focussed on whether the Code meets the CPA objectives, the Authority is also mindful of transport industry perspectives on what makes an effective rail access regime. The Australian Logistics Council (ALC) has nominated the following five key principles that were identified to guide the design of an efficient framework:

- creating a level playing field engendering confidence in the regime certainty and transparency;
- delivering efficient prices;
- allocating risk and reward efficiently;
- ensuring proper integration of the transport chain; and
- avoiding excessive regulation.[2]

Overall, the principles developed by the ALC are broadly consistent and covered by the objectives of the CPA.

1.4 Rail Access reviews in other jurisdictions

Following the NCP agreements, state based rail access arrangements were introduced in the majority of Australian States and Territories. Similar to the Code review, there are concurrent reviews occurring in other jurisdictions such as Victoria, and Queensland.[3] In undertaking the review of the Code, the Authority has the benefit of being able to review the Options Papers, submissions and reports that have been produced for other States reviews. These documents confirm a range of common issues facing rail access regulatory arrangements in their efforts to give effect to the CPA principles. Overall, the Authority will closely monitor approaches utilised and likely reforms from other jurisdictions to ensure better inter-jurisdictional consistency as part of the likely and logical migration toward a national rail access regime.

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[2] Australian Logistics Council, Principles of an Effective Access Regime, available at http://www.ozlogistics.org/sites/org/ozlogistics/media/PaperonAccessRegimes.pdf

[3] For information on the Victorian review of its rail access regime see: http://www.doi.vic.gov.au/DOI/Internet/Freight.nsf/AllDocs/6B33905E20D6D3AECA256E0500058650?OpenDocument
For information on the Queensland review of its rail access undertaking see: http://www.qca.org.au/www/welcome.cfm

2 REVIEW PROCESS

2.1 Summary of Review Stages

Section 12 of the Act requires that a review be undertaken of the Code and that the review include the opportunity for public comment on the effectiveness of the Code. In accordance, with these requirements, the Authority published a public notice on its website,[4] noting that the review was underway, on the 25th October 2004.

The anticipated time schedule of the review is as follows:

Activity	Date
Release Issues Paper	23 February 2005
Submissions close	28 March 2005
Release Draft Report	30 May 2005
Stakeholder workshop	13 June 2005
Submissions close	4 July 2005
Release Final Report	22 August

Each of these activities is discussed briefly in the section below.

2.2 Issues Paper

This Issues Paper is a key component of the public review process. It aims to discuss the relevant issues to be considered, in order to assist interested parties and stakeholders in making submissions and comment to the Authority. The Issues Paper will be publicly available to all stakeholders on the Authority's website. The Issues Paper has:

- reviewed the current operation of the Act and Code;
- raised some of the current issues facing stakeholders; and
- encouraged submissions from the public and relevant stakeholders.

2.3 Submissions to the Issues Paper

In order to facilitate an adequate timeframe for interested parties to respond to the matters raised in this Issues Paper, there will be a 34 day period for submissions following its release. All submissions received during this time will be considered in the public domain, and will be available on the Authority's website at http://www.era.wa.gov.au/

All submissions made in this period will be considered, and where appropriate will be incorporated into the findings of the Draft Report, which is expected to be released on the 30th May 2005.

[4] Notice regarding the review of the Railways (Access) Code 2000 25/10/2004 http://www.railaccess.wa.gov.au/html/new00.php?id=69

2.4 Draft Report

The Draft Report of the review will generate the initial findings of the review. This will assess issues covered in the Issues Paper, and any submissions received in response to the Issues Paper. The Draft Report will also be placed on the Authority's website in order to initiate a second round of submissions. Following the release of the Draft Report there will be a second public submission period of 35 days, during which interested parties can make submissions to the findings of the Draft Report.

2.5 Stakeholder workshop

It is proposed that a workshop will be held after release of the Draft Report and prior to submissions on it being due, in order for the issues to be discussed in an open forum. The views raised from the submissions to the Draft Report and from the workshop will then be evaluated in developing the Final Report.

2.6 Final Report to Minister

The Final Report will be submitted to the Minister by the Authority. A copy of the Final Report will also be placed on the Authority's website.

3 BACKGROUND

3.1 Change in regulatory environment

The first State-owned rail line was established in 1879, linking Geraldton and Northampton to support the State's growing copper and lead industries. Western Australian Government Railways (WAGR) was formally established as a separate, Government-owned entity in the same year.

This regulatory environment prevailed until a series of economic reforms in the mid 1990s. In 1995 the Commonwealth, State and Territory Governments signed the National Competition Policy Agreement. Under this agreement, the Governments committed to implement reforms which included provision for third party access to nationally significant infrastructure.

In 1995, all Australian governments agreed to Part IIIA of the *Trade Practices Act 1974* (TPA). This established a national regime for seeking access to infrastructure (eg rail networks, electricity grids and gas pipelines) which cannot be economically duplicated. The national regime gives legal rights to access seekers to reasonable terms and conditions, and a fair price for the use of the services of the infrastructure.

In collaboration with this national reform process, the Western Australian (WA) Government established the Regime which aims to ensure effective, fair and transparent competition in WA's railway network. Consequently, the WA Government needed to institute legislative reforms in order to develop an appropriate framework and organisational structure to support the Regime.

3.2 Legislative reforms and privatisation

The first phase of reform by the WA Government was the enactment of the *Government Railways (Access) Act 1998*, which established the legislative framework for the Regime. The Act paved the way for the privatisation of the freight operations of the WAGR in order to establish a vertically integrated organisation which would promote a contestable market for rail operations within the State.

In December 2000, the WA Government announced that the freight business of WAGR, trading as Westrail, had been sold to the Australian Railroad Group Pty Ltd (ARG). ARG is a 50:50 joint venture between Wesfarmers Ltd and international rail operator Genesee & Wyoming Inc. As part of the sale, WestNet Rail (WNR), a subsidiary of ARG, has been granted a 49 year lease of the rail freight network infrastructure. While the WA Government is still the legal owner of the railway infrastructure, WNR is the lessee of the network under the sale agreement. Accordingly, for the purposes of access agreements under the Regime, WNR is the network owner for the freight railway infrastructure.

To more accurately reflect the circumstances that have prevailed following the privatisation of Westrail, the *Government Railways (Access) Act 1998* was amended and renamed the *Railways (Access) Act 1998.*

The Act was further amended by the *Government Railways (Access) Amendment Act 2000* which provided for the establishment of the Office of the Rail Access Regulator to oversee, monitor and enforce compliance by the railway owners with the provisions of the Regime.

The final reform required for the Regime was the development of the *Railways (Access) Code 2000* in September 2000. The Code is subsidiary legislation which was required by the Act. The Regime is comprised of the Code and the Act, both became fully effective on the 1st September 2001 when the Regime commenced.

3.3 Certification

Under the CPA the National Competition Commission (NCC) can certify state access regimes as "effective". Once a Regime is certified as effective, a third party cannot seek to have the infrastructure declared under the TPA. Declaration under the TPA enables the national access regime to apply. In February 1999, the WA Government made application to the NCC to certify the Regime.

The NCC worked with the WA Government to refine the Draft Code to resolve a variety of issues. However, there was one particular matter which remained unresolved. The NCC's main concern was to try to ensure efficient interface between the Regime and the Australian Rail Track Corporation (ARTC) Undertaking which is likely to form the basis of a future National Rail Access Regime. As the NCC viewed a single National Rail Access Regime as the best way to resolve interface issues, they suggested the Regime be amended to require the track owner, in the event that a National Rail Access Regime is developed, to submit an undertaking to the Australian Competition and Consumer Commission (ACCC) to also adopt any new national framework. The WA Government decided against this approach, as it was concerned about automatically committing to a National Rail Access Regime without knowing the details of such a regime.

Consequently, the WA Government withdrew its application, so the current Regime remains uncertified. However, the NCC provided a letter of assurance which states that aside from the National Rail Access Regime adoption issue, it is broadly 'effective'.

3.4 Performance of railway owners since 1999-2000

The objective of the Regime as specified in the Act is to encourage the efficient use of, and investment in, railway facilities by facilitating a contestable market. Hence, as part of this review, the Authority will assess the general performance and efficiency of the railway owners.

From 1 July 2003 within the Costing Principles, the Authority established a requirement for the two railway owners, the Public Transport Authority (PTA) and WNR, to provide detailed key performance indicator (KPI) results against a range of defined indicators focusing on service quality performance as railway owners. The KPI reports examine railway owner performance in relation to service quality, track quality, segregation, train management etc.[5] However, as this KPI reporting only began from July 2003 a time series matching the life of the Code is not available.

[5] for KPI reports see: http://www.railaccess.wa.gov.au/html/pub00.php?type=cat&id=34

The sections below provide a brief snapshot of the performance of the PTA and WNR since 1999-2000.

3.4.1 Public Transport Authority

The PTA was given the opportunity to provide information to the Authority to demonstrate efficient below rail performance. The table below has used annual report data to provide some basic or (above and below rail) summary level KPI's for the metropolitan rail component of the PTA since 1999/00.

TransPerth Metro Trains	1999/00	2000/01	2001/02	2002/03	2003/04	Change
% of trains arriving within 3 mins of timetable	97	98	98	96	89	-8%
% customers satisfied or very satisfied	86	91	91	92	90	5%
Metro rail pax journeys (m)	29.5	31.1	31.0	31.4	31.1	5%
Network & Infrastructure Staff	na	77	95	121	146	90%

Source: PTA Annual Reports at http://www.pta.wa.gov.au/scripts/viewurllist.asp?NID=1059

The above results indicate:

- Following four years of sound reliability performance, a decline in on-time running occurred in 2003/04.
- Relatively stable levels for PTA estimates of customer satisfaction.
- Large growth in below rail staff reflecting the substantial increase in the capital works program (eg new Mandurah line).
- Despite significant capital expenditure, TransPerth has had a mature passenger journey growth profile which is slightly below the rate of Perth population growth. Population growth rates provide a common yet conservative proxy for forecasting metro train passenger growth rates.

3.4.2 WestNet Rail

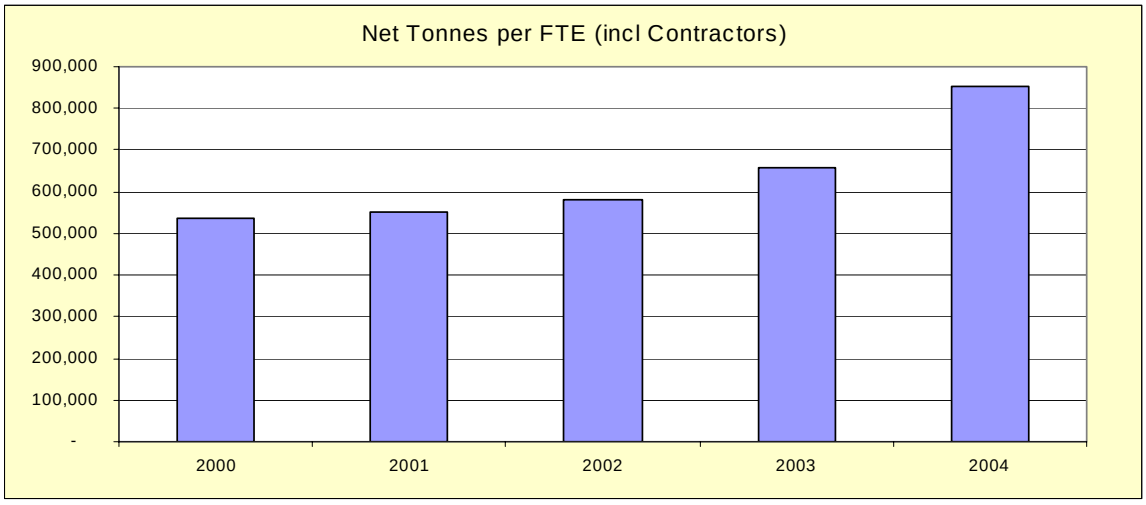
Due to the lack of time series data for the recently established detailed KPI reports, to assist in evaluating WNR performance under the Regime since 1999/00, WNR has provided the following time series information for a few of the KPI's required by the detailed KPI reports.

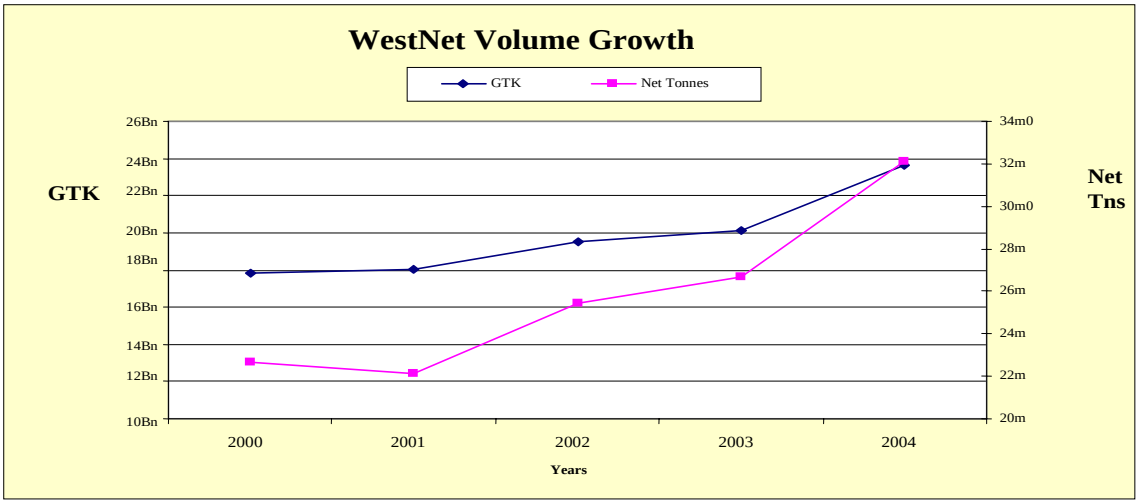
The graphs below illustrate trends in:

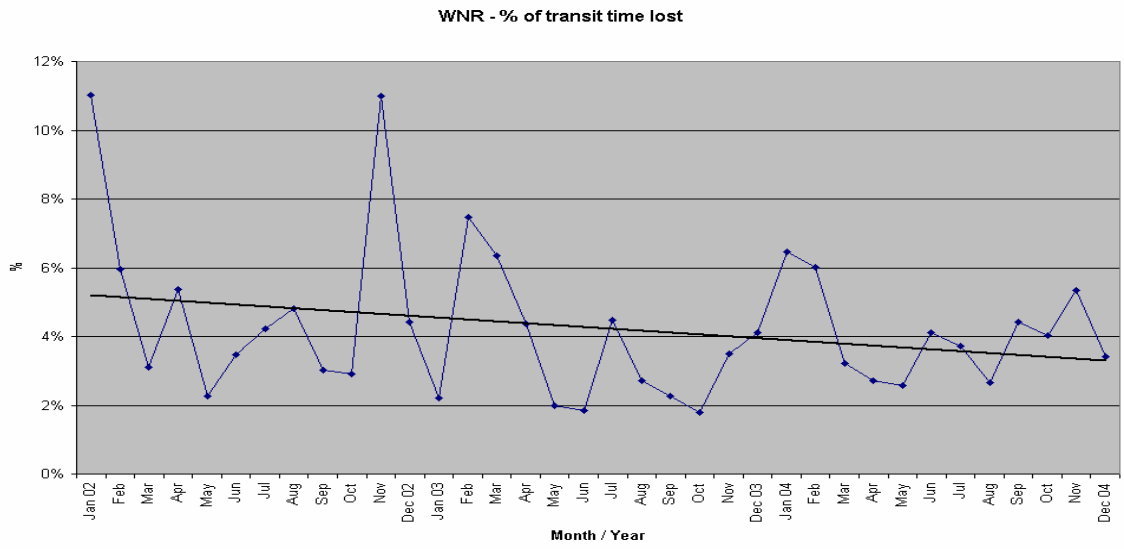
- Freight volumes: gross tonne kilometres (GTKs) and net tonnes from 2000 to 2004. WNR also provided information indicating the land transport rail market share of inter-state freight rose from 75% in 1999 to 81% in 2004.[6]
- Labour productivity: as measured by a partial productivity indicator being net tonnes per full time equivalent (FTE) staff including contractors.
- Proportion of transit time lost due to track or signal failures: each route has a target transit time and this statistic compares actual transit times to this target and then reports the extent of the transit time delay due to track or signal failures. Hence other delays occurring due to above rail issues (eg locomotive breakdowns) are not related to railway owner performance and are not reflected in this statistic.

[6] For the total East Coast - Perth interstate freight movement (ie including local shipping volumes), rail has approximately 65% of the total task.

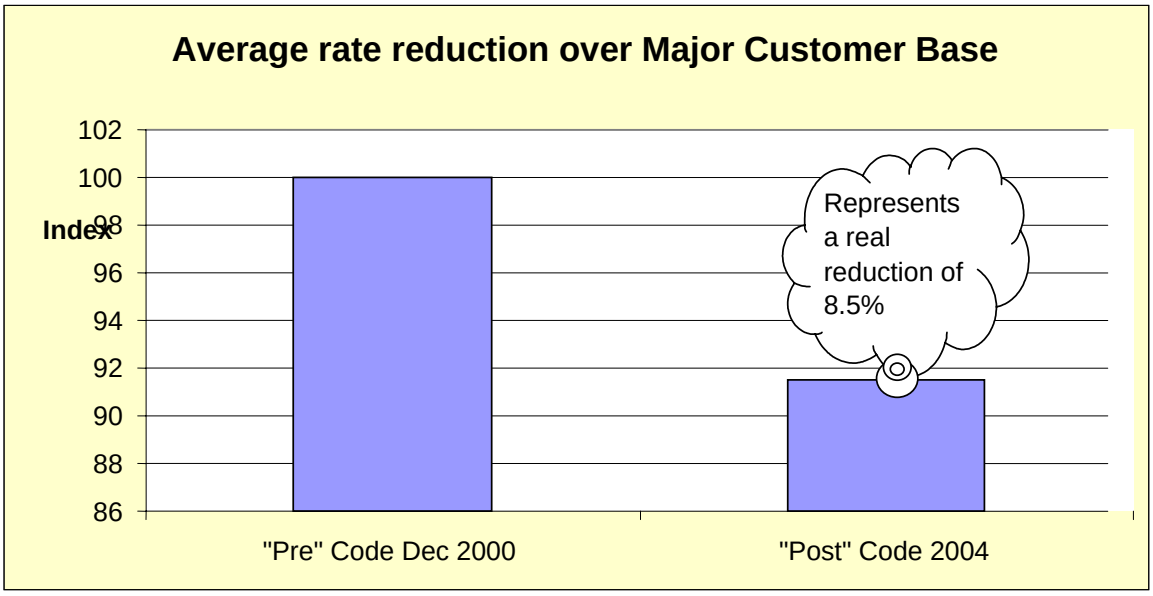
- Access price trends: WNR calculated an access price index from December 2000 to December 2004 for its six largest customers weighted by revenue.







[8] For further information see http://www.arg.net.au



In summary, the broad trends in the above WNR information indicates:

- GTK's (gross tonne kilometres) and net tonnes have risen by over 32% and 38% respectively.
- An improvement in net tonnes per staff member of over 50%.
- An average 8.5% real reduction in access fees for larger customers.
- Transit time lost due to track or signal failures has slightly reduced.

3.5 Summary of usage by current train operators

3.5.1 Australian Western Railroad

Australian Western Railroad (AWR) is a subsidiary of ARG which is the primary (above rail) freight intrastate train operator in WA. AWR carries approximately 33 million tonnes of predominantly bulk intrastate rail freight, providing around 40,000 train services.

These services are delivered by 60 narrow and 40 standard gauge locomotives.[8] AWR also moves approximately 1.5 million tonnes by road feeder services annually.

In WA, the main freight commodities include grain, alumina, bauxite, iron ore, nickel ore, mineral sands and woodchips. Almost 95% of the freight carried by ARG in WA is related to exports through the ports of Geraldton, Fremantle, Kwinana, Bunbury, Albany and Esperance.

3.5.2 Pacific National

Pacific National (PN) is Australia's largest private rail freight operator with annual operating revenue of $1.15 billion in 2004.[9]

[9] For more information see: http://www.patrick.com.au/

In WA, PN provides interstate freight train services connecting Perth to major Australian mainland capital cities and regional centres, including links to key ports. PN generally operates a daily return service from the east coast of Australia to Perth.

3.5.2 Public Transport Authority

The PTA brings together the management and delivery of public transport in WA, providing metropolitan and regional passenger rail services[10]. The rail service divisions of the PTA include:

- **Transperth**: is the metropolitan passenger train operating division; and
- **Transwa**: operates three regional passenger train services (the Australind, Prospector and AvonLink) which use both the PTA and WNR networks with subsequent road coach connections to over 275 regional locations in WA.

3.5.3 Specialised Container Transport

Specialised Container Transport (SCT) operates a range of freight train services including a twice weekly return interstate freight train service between Melbourne and Perth. Whilst SCT has an access agreement with WNR it has elected to subcontract provision of rollingstock and crew to PN under a hook and pull agreement.[11]

3.5.4 Great Southern Railway

Great Southern Railway (GSR) operates a range of long distance tourist passenger trains across Australia, including the Indian Pacific passenger tourist service, which travels from Sydney to Perth. There are two return Indian Pacific services per week.

3.5.5 Other

There are also some tourist train operations in WA. For example, the Hotham Valley Tourist Railway which operates steam and diesel passenger haul services. They offer a variety of specialist tourist services throughout the year, on the mainline and regional lines.

South Spur Rail and Midland RailCo also operate on the network, and are smaller private operators which have contracts to haul products for WNR, such as ballast.

[10] For more information see http://www.pta.wa.gov.au
[11] http://www.sct.net.au/

3.6 Extent of rail competition

The overarching aim of recent NCP reforms to infrastructure in Australia is to remove constraints, promote flexibility and to ultimately increase competition within contestable markets. Third party access is based on the notion that the economic welfare of society can be improved where there are voluntary negotiated exchanges of goods and services between willing parties.[12]

The Regime is relatively new, with implementation in September 2001 and the key determinations of the Regime (the floor and ceiling costs decisions) being made in September 2003. The cost determinations provide stakeholders with inputs to enable calculation of likely minimum and maximum access prices between which actual prices can be negotiated. As a result, there remain parts of the Regime which are yet to be fully tested. Consequently, even though this is the third anniversary review of the Code, the time elapsed since the key determinations coupled with the prevalence of long term contracts means that there may have been inadequate time to assess the effectiveness of the Code. Additionally, most of the end customers were subject to long term contracts prior to the sale of Westrail. These end customers have generally had to wait until these contracts expire, before they could market test a range of train operators using the Regime.

Following the implementation of the Regime, there has been no significant new entry into the intra-state freight rail market on the WNR network in competition to AWR. The other main operators using the WNR network, SCT and PN, are focused on interstate operations which have continued with minimal change pre and post the Westrail privatisation in 2001. Although simplistically, it may appear that the Regime has had limited success in boosting competition, this view would not fully consider the customer benefits obtained from market testing via the Regime providing a genuine competitive prospect of third parties being able to enter the market.

Some rail customers (eg manufacturers moving goods in containers) have the ability to market test between different road and rail operators to ensure they receive value for money with acceptable service quality. However, a significant number of the major rail bulk freight customers are captive to the use of rail often due to the development of consent conditions or due to their having substantial bulk volumes which could not practically be serviced by road transport. Some of the bulk intra-state rail freight end customers have tested the market since September 2001, all of which retained AWR with both price and quality improvements. To date there have been no access agreements entered into under the Regime.

Whilst the presence of multiple intrastate rail operators in WA could be indicative of positive and visible competition, the presence of a competitive threat from potential new rail operators entering the market could also ensure that competitive conditions prevail. Some evidence of this competitive threat generating gains for end customers is available from the recent competitive tender outcomes which were submitted when the long-term contracts of the incumbent operators came up for renewal.

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[12] Queensland Rail, "*Towards an Effective Access Regime*" Discussion Paper for Submission to the Australian Logistics Council, August 2003.
Available at http://www.networkaccess.qr.com.au/Images/Effective_Access_Regime_tcm10-2848.pdf

3.7 Non-Code obstacles to entry and incumbent advantages

Due to the nature of rail infrastructure and train operations, the obstacles to entry which potential competitors face are often not limited to obtaining reasonable third party access terms and conditions. There are a number of other important factors which can be a competitive disadvantage for potential new rail operators.

Examples of such obstacles to entry include:

- **Capital costs;** are a substantial cost component for any rail operation, and thus can form a significant impediment. A new train set comprised of 2 locomotives and 80 wagons would cost over $12 million. Hence, prospective operators who are attempting to develop a viable quotation based on using new rollingstock are likely to face a capital cost disadvantage versus the incumbent rail operator with pre-existing rollingstock.
- **Rollingstock availability and gauge issues;** due to high capital costs for new rollingstock, the use of existing (second hand) rollingstock is usually more cost effective. However, there is a current shortage of available rollingstock and a thin second hand market, which can be an obstacle for any new rail operators. Inconsistencies in interstate gauges limits interchange of rollingstock between states, thereby exacerbating shortage issues.
- **Safety accreditation differences;** currently there are multiple different state based rail safety accreditation regimes in Australia, to which intrastate rail operators must adhere. Whilst there is some mutual recognition between the safety regimes, which have generally minor differences this still is a source of increased compliance and administration costs. The Australian Transport Council (ATC)[13] and the Australasian Railway Association (ARA) are leading the initiative to move to a single national rail safety regime which will resolve this issue.
- **Terminal & siding access;** these assets are generally not covered by the Regime as they are excluded from the definition of railway infrastructure in the Act. Therefore, potential rail operators need to negotiate with the above rail operator AWR or construct their own terminals, in order to develop a viable operating plan in conjunction with the railway owner.
- **Access to well sited Rollingstock Maintenance and stabling facilities;** can be limited in sites closer to major centres due to a shortage of contiguous available land adjacent to the rail line. The majority of the available land near rail lines is already being utilised, is inadequate in length, or is too distant from the central locations.
- **Prime train paths;** the prime train paths are determined by customer preferences on their ideal collection or delivery time. The incumbent operator has identified the paths which best meet customer needs and has the rights to retain such paths (unless surrendered due to irregular usage).

[13] The ATC is a Ministerial forum for Commonwealth, State and Territory consultations and provides advice to governments on the coordination and integration of all transport and road policy issues at a national level. For further information on the ATC see: http://www.atcouncil.gov.au/

- **Hiring skilled staff;** there is currently a shortage of skilled commercial rail staff, there is a key shortage of train drivers. The costs of training new staff are relatively high. Existing skilled staff can be reluctant to leave the employment of the larger incumbent operator.
- **Key freight flows locked into long term contracts;** around 90% of bulk freight volume originates from a few large customers who are largely subject to long term contracts.
- **Large freight volumes;** are needed to achieve good staff and rollingstock utilisation and to defray set-up costs. Ideally an initial volume of over 0.5m to 1m tonnes per annum is required for base load to enable an operator new to WA to approach viability. There are less than ten customers in WA with such volumes which are amenable for movement by rail. Road transport is often more competitive for smaller volumes.
- **Customer confidence issues;** can be a problem for prospective train operator competitors as the incumbent is often a more 'known quantity' with on the ground rollingstock and staff. Furthermore, there is usually a delay between signing with a new operator and the new operator commencing services which creates the need for a transition period which is often viewed as undesirable by end customers.

3.8 Tradeoffs between regulatory costs and third parties seeking greater rights

The goal of infrastructure access is to enable a contestable market to emerge that promotes genuine negotiations between parties. This is founded on the notion that operations will be more efficient with a minimum level of regulation, and outside involvement from government. However, a sufficient regulatory framework is required to provide third parties with a set of minimum rights to attempt to achieve more flexibility to reach more efficient outcomes. Consequently, there needs to be a balance between the amount of prescriptive detail in the regulatory framework and the flexibility to achieve commercially negotiated outcomes.

The Regime has balanced these costs by instituting more of a principles based Regime, which is comparatively less detailed and prescriptive than other regimes (e.g. Queensland). Greater detail and prescription in a regime can give some clarity for the access seeker, but it can also potentially increase compliance and administration costs. The WA approach was originally designed to promote effective negotiations within an effective framework and this Review will assess whether the Regime needs refinement to enable a more effective fulfilment of the CPA objectives. Recent experience suggests that third party access is more likely to be encouraged where the infrastructure provider has strong incentives for this to occur. In other circumstances, the regulatory framework may need to be more detailed in order to prevent ambiguities arising that could provide an avenue for the infrastructure owner to delay third party entry to the network.

4 CURRENT RAIL ACCESS REGULATORY APPROACH

4.1 Overview of WA regime

The objective of the Regime as specified in the Act is to encourage "*the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations.*"[14]

The mechanism available to achieve this aim is through negotiation of access agreements between the railway owners and access seekers, with negotiations able to proceed with full commercial flexibility 'outside the Code' or based on regulatory policies and practices established under the Act and Code (at the choice of the access seeker). The Regime provides a form of 'safety net' which access seekers can elect to utilise to initiate and, potentially, finalise their negotiated purchase of rail access.

Under the Regime, any person who can meet certain commercial and operational requirements is legally entitled to negotiate with WNR and PTA for access on the rail infrastructure under their control[15]. The Regime provides a framework for initiating and conducting negotiations and for resolution of disputes.

The Regime seeks to ensure that businesses seeking rail access under the Code are treated fairly, and provides for disputes between the railway owner and the access seeker to be resolved by arbitrators and mediators operating under the *Commercial Arbitration Act 1985*.

An access seeker can be anyone wishing to enter into a commercial access agreement with the railway owner in respect of a particular route. However, once access has been provided under an access agreement, the access seeker must obtain safety accreditation under the *Rail Safety Act 1998* to operate a service or engage the services of an accredited rail operator to carry on the proposed rail operations.

Coverage of the Regime

The rail network and types of infrastructure subject to the Regime are defined in the Code. As specified in Schedule 1 of the Code, the railway network covered by the Regime comprises about 5,000 route kilometres of track in the southwest of Western Australia. This generally comprises all standard and narrow gauge track (and associated infrastructure) west of Kalgoorlie. Not included in the Regime's coverage are:

- the Pilbara region railway lines owned by mining companies and primarily used for the haulage of iron ore to ports for export;
- the track east of Kalgoorlie which is owned by the Commonwealth Government and controlled by the ARTC;
- other privately operated tracks; and
- sidings and tracks within terminals.

The balance of the rail network subject to the Regime is controlled by the PTA for the provision of urban passenger services. The PTA will continue to operate this service as part of the Transperth system.

[14] section 2A of the Act
[15] Clauses 13 - 15 of the Code

Pilbara Rail Lines

WA has over 1,700 kilometres of rail lines servicing the iron-ore mines of the Pilbara Region. These rail lines are predominately owned by Rio Tinto and BHP Billiton. The lines are not listed in Schedule 1 of the Code. The lines remain subject to the National Rail Access Regime and are the subject of some access disputes.[16]

Access outside the Code

End customers can elect to enter a Rail Transport Agreement with ARG (encompassing both above and below rail services) or establish a separate access agreement with WNR and a train operating agreement with a train operator. Where agreement is established outside the Code the Authority does not have a role, and customers forego a variety of rights. However under current WNR policy, the TPP and TMG apply equally to all users subject to access agreements and train operators' agreements, inside and outside the Code.

4.2 Key WA Rail Access Regime framework components

4.2.1 Railways (Access) Act 1998

The Act, together with the Code is the legal basis for the Regime. It establishes the powers and the authority of the independent Rail Access Regulator, which is the Authority.

Section 28 of the Act sets out the requirement for the railway owner to "ring fence," which refers to the segregation arrangements which separate its access related (below rail) functions from other functions. The sale agreement more specifically required the use of two separate subsidiary companies for above and below rail operation. In effect, this requires a separation of the non-competitive (below-rail) functions from the competitive functions. Consequently, the ARG established WNR and AWR as separate subsidiaries. WNR then developed and complied with the Authority approved Segregation Arrangements (for further details see section 4.3.2 below).

The Act also contains enforcement mechanisms which can bring penalties of up to $100,000 against the railway owner for non-compliance with key parts of the Regime. It is also possible under s37 of Act for the Supreme Court to grant an injunction if it is satisfied that the railway owner has engaged or is proposing to engage in conduct that amounts to a breach of the Code other than conduct for which a remedy by way of arbitration is available under the Code.[17]

[16] For more information see http://www.ncc.gov.au/
[17] For more information on enforcement and the WA Regime see: http://www.railaccess.wa.gov.au/files/publications/Infosheet%238.pdf

4.2.2 Railways (Access) Code 2000

The Code is subsidiary legislation, and its development was a requirement of the Act. The purpose of the Code is to provide a set of guidelines that dictate how the provisions of the Act are to be applied. Where the Act covers the broad policy principles of the Regime, the Code covers the practical implementation of the Regime. The Code makes provision for railway infrastructure to be available for use by a third party through either a contract with the railway owner or a determination made through arbitration.

The Code defines what is open to access by outlining which parts of the network and infrastructure are covered by the Regime. The other main provisions covered by the Code are:

- negotiation process;
- dispute resolution process;
- information to be made available to and by access seekers;
- Regulator functions including matters to be approved such as the Costing Principles, TMG and TPP; and
- contents of access agreements.

4.2.3 Role of Regulator

Initially the administration of the Regime was the responsibility of the Office of the Rail Access Regulator (ORAR). However, this function was transferred to the Authority on 1 January 2004. In this Issues Paper, any reference to the Authority relates to the Rail Access Regulator as the Regulators functions have been subsumed into the Authority. The Authority oversees, monitors and regulates access to significant monopoly infrastructure, issues licences, and monitors performance in key utility industries including gas, rail, water and electricity.

The governing body of the Authority is appointed by the Governor and, in regard to regulatory duties, is independent of direction or control by any Minister, public servant or industry.

The main role of the Authority in regulating rail activities is to oversee, monitor and enforce the provisions of the Act and the Code. One of the main responsibilities of the Authority is to review, approve and/or determine the following principles and arrangements as submitted by the railway owner:

- Costing Principles and Over-payment Rules that underpin third party access charges (Section 46 and 47 and Schedule 4 of the Code);
- Floor and ceiling costs that apply to certain routes, on a segment by segment basis as specified by the railway owner (Clause 9, Schedule 4 of the Code);
- "Ring fencing" or segregation arrangements that apply to the railway owners (Section 28 - 34 of the Act); and
- Train Management Guidelines (TMG) (Section 43 of the Code) and a Train Path Policy (TPP) (Section 44 of the Code) that apply to the railway owners.

Other associated tasks of the Authority relate to reviewing and collecting information on railway owner performance (eg KPI reports) and enforcing the Regime. The Authority is also required to periodically review the Code, in addition to the negotiation of access agreements that may preclude other entities from access. The Authority also maintains a register of access agreements, and information on the railway owners. The Authority has many uses for this information, which can be released if it will benefit negotiations, or used to provide advice to access seekers on access prices. Finally, the Authority also has some enforcement powers, and is responsible for applying penalties for breaches of the Act. The Authority can make referral to arbitration and appoint appropriate persons to conduct the arbitration under the Code, however, they are not directly involved in the arbitration process.

4.2.4 Rights and obligations of railway owners

The railway owners are under an obligation to negotiate in good faith with prospective access seekers who meet the necessary financial and managerial requirements. The railway owners must supply the access seeker with relevant information on capacity, price, and terms and conditions of the access agreement.

The railway owners must supply the access seeker and the Authority with floor and ceiling prices, costs of each route, and Costing Principles within seven days of receiving a proposal. All proposals must be kept in a register by the railway owners. When considering the proposals, the railway owners must endeavour to avoid unnecessary delays, and must not unfairly discriminate between proponents.

When a third party has obtained access, the railway owner must not hinder or prevent that access, and must not discriminate between itself and other access seekers with respect to the allocation of train paths, management of train control and operating standards.

Under the Regime the railway owner is also obligated to prepare and make available the following information for purchase:

- the form of the standard access agreement;
- a map of the routes listed in Schedule 1 of the Code showing the configuration of the tracks on each route;
- detailed information on each route section; and
- the permissible gauge outlines.

The railway owner also needs to prepare and submit to the Authority information on Segregation Arrangements, Train Management Guidelines, Statements of Policy, Costing Principles and Over-payment Rules as soon as practicable. The railway owner has a duty to produce documents requested by the Authority, and permit entry and inspection by the Authority. In all dealings with the Authority, the railway owner must not hinder, obstruct, or knowingly give false or misleading information.

Rights of the railway owner include the right to be consulted if the Code is to be amended or replaced.

4.2.5 Rights and obligations of Access Seekers

The majority of the rights and obligations of the access seeker under the Code relate to dealings with the railway owner. In order to enter into negotiations, the access seeker must establish that it has the financial and managerial capabilities to operate on the network. The proposal to the railway owner must specify the route, including the railway infrastructure to which access is sought, indicate the times when the access is required, and set out the nature of the proposed rail operations.

The access seeker is able to seek information from the railway owner as outlined above, and can also seek advice from the Authority on whether the price offered by the railway owner is consistent with the tariffs it is being charged.

The access seeker must negotiate with the railway owner on matters listed in Schedule 3 of the Code, and the negotiation period must be jointly agreed with the railway owner no later than 90 days after the access seeker is ready to negotiate.

Under the Code, the access seeker must not hinder or prevent access by other persons to any part of the network. If any disputes arise with the railway owner, the access seeker may by notice in writing to the Authority, refer the dispute to arbitration.

4.3 Subsidiary framework components

The Code requires the establishment of five key regulatory instruments which are summarised in the sections below. As stated in Section 1 of this Issues Paper, there will be a separate review with key stakeholders of some of these documents following this review of the Code. Comments on issues relating to the five documents are welcome at this stage, however the focus of this review is on the need for refinements to the Code to meet the objectives of the CPA. Suggested refinements to the documents will be held over for consideration as part of the subsequent review.

4.3.1 Costing Principles

The need to establish the Authority's approved Costing Principles is a requirement specified in section 46 of the Code. In WA the negotiation of access prices under the Regime would typically commence with consideration of Authority approved floor and ceiling costs. The floor cost is the incremental cost[18] resulting from the access seekers operations on that route and use of that infrastructure. The ceiling cost is defined as a ceiling cost not more than the total costs[19] attributable to that route and that infrastructure utilised for an access seekers proposed operation. The floor and ceiling costs are then divided by the forecast route volumes to derive the floor and ceiling price boundaries.

Subject to the floor and ceiling costs derived based on the Costing Principles, the actual prices to be paid to the railway owner for the provision of access to railway operators are to be determined by negotiation under the provisions of clauses 6 and 13 of Schedule 4 of the Code which state there should be:

[18] Incremental costs are defined as operating costs and capital costs and overheads (where applicable) that the Owner would be able to avoid in respect of the 12 months following the proposed access.
[19] Total costs = operating costs + capital costs + overheads

- consistency in the application of pricing principles;
- differences in price only reflected by differences in costs or risks;
- prices to reflect as far as is reasonably practicable
    - standard of infrastructure and operations ;
    - relevant market conditions; and
    - identified preferences of the proponent.
- fair and reasonable apportionment of costs; and
- prices which encourage optimum use of facilities.

The value of an asset is determined by the market based on expected returns. However, for infrastructure assets market values are not readily estimated due to factors such as uniqueness and relatively infrequent asset sales. Whilst stock exchange listed infrastructure companies have a market value evident from their share price, this price generally reflects the combined values of a range of different assets.

The Code prescribes the use of the Gross Replacement Value (GRV) annuity approach to determine the revenue ceiling. GRV is the gross replacement value of the railway infrastructure, calculated as the lowest current cost to replace existing assets with assets that have the capacity to provide the level of service that meet the actual and reasonably projected demand and are, if appropriate, modern equivalent assets.

If the railway owner receives government subsidies to support their operations, (eg Main Roads Western Australia generally funds 50% of the cost of new or upgraded level crossings), the Costing Principles do not require a reduction in ceiling costs to reflect this government contribution. However, in evaluating whether revenues obtained by the railway owner exceed ceiling costs using the Over Payment Rules, these subsidies are recognised as a form of customer revenue. A recent submission by ARG (parent company of railway owner WNR) to the review of the Victorian Rail Access Regime stated that "*To the extent that there is external contributions to these costs, such as the State Government providing contributions to upgrades, the ceiling should be adjusted downwards to the extent of that contribution*."[20] The basis of the current approach within the Code is that the ceiling cost reflects the full economic cost using modern equivalent value of the assets and any capital subsidies obtained by the railway owner are viewed as a financing arrangement. However, in respect of WA Government subsidies, the Authority, in ensuring railway owners obtain access revenue up to the ceiling cost, treats such capital subsidies as a form of access revenue in the application of the Over Payment Rules.

4.3.2 Segregation Arrangements

Section 28 of the Act requires the railway owner to make arrangements to segregate its access-related functions from its other functions and to have appropriate controls

[20] ARG Submission, Review of the Victorian Rail Access Regime August 2004, See p3 http://www.doi.vic.gov.au/doi/doielect.nsf/2a6bd98dee287482ca256915001cff0c/2542a9fef168495eca256f3a00145ab0/$FILE/Australian%20Railroad%20Group.pdf

and procedures to ensure an effective separation which protects the interests of the parties.

Under Section 29(1) of the Act, the railway owner is required to obtain the approval of the Authority to the segregation arrangements it is proposing to implement. Obtaining approval involves a process of stakeholder response to the segregation arrangements and the Authority's determination. In 2001, the railway owners submitted their proposed segregation arrangements to the Authority for approval. Public submissions were received, and incorporated into the determination of the Authority. The final determinations for segregation arrangements to apply to the railway owners were released in June 2002, with approval granted in April 2003.

In the case of non-compliance with these segregation requirements, the Act establishes the penalties for the railway owner which could face fines of up to $100,000.[21]

While WNR and AWR are separate subsidiaries of ARG, there have been comments from some stakeholders to the Authority that the separation of WNR access-related functions from ARG and AWR may not be adequate, and that there is a need to ensure effective arrangements are in place to separate contestable and non-contestable activities.

The PTA is also a vertically integrated entity. It has not established a separate below rail subsidiary but has rather placed its key railway owner functions into a separate Network and Infrastructure Division. To date stakeholders have not expressed any significant concerns to the Authority about the effectiveness of the PTA's segregation arrangements.

4.3.3 Train Management Guidelines

The Code requires that the railway owner develops and submits to the Authority, TMG to apply and be followed by the railway owner under the Code. The TMG is a set of principles, rules and practices which apply to the management of train services. The general principle is to ensure operational safety is maintained through compliance with safe working rules, regulations and procedures.

WNR have established an internal company policy that the TMG will apply in a non-discriminatory way to all users of the network, which includes operators inside and outside the Regime.

Under clause 43 of the Code, the TMG needs to be approved by the Authority, subject to public consultation. The railway owners submitted their proposed TMG to the Authority in November and December 2001. This followed with a process of receiving public submissions on the proposed arrangements and the Authority determinations throughout 2002. The Authority approved the TMG (along with TPP, discussed below) for WNR in February 2003 and the PTA in March 2003.

4.3.4 Train Path Policy

Under clause 44(2) of the Code, the railway owner is required to make a statement of policy related to the allocation of train paths and the provision of access to train paths that have ceased to be used. The TPP is designed to ensure the allocation of train

[21] section 29 of the Act

paths undertaken in a manner that ensures fairness of treatment between operators. It also acknowledges existing contractual rights and any new contractual rights created under access agreements entered into under the Code.

Similar to the TMG, the TPP needs to be approved by the Authority. This process was completed, concurrent with the TMG approval process, in February 2003. The TPP and the TMG establish policy and guidelines respectively within which the specific details of train path and management can be negotiated. Since approval, both documents will be attached as an appendix to all access agreements negotiated under the Code.

4.3.5 Overpayment Rules

Section 47(1) of the Code requires each railway owner to prepare and submit to the Authority, Over-payment Rules that apply where breaches of the ceiling revenue test occur on the part of that railway line that could not reasonably be avoided. The Over-payment Rules provides a mechanism in the Regime to:

- Calculate the revenue that exceeds the total costs attributable to the route section and infrastructure; and
- Reimburse operators who are provided with access under the Code to that route section and infrastructure in the event of an excess of revenue above the ceiling cost.

Some stakeholders have expressed concerns to the Authority about the effectiveness of the Over-payment Rules. Most issues relate to the railways owners having the ability to reallocate revenue at different rates within various route sections across the route of a particular train service.

5 RAIL ACCESS REGULATION IN OTHER JURISDICTIONS

5.1 Introduction

In reviewing the Code there is merit in analysing the approach to rail access regulation adopted in other jurisdictions in Australia. This comparative investigation will enable the merit of other arrangements to be considered, and provide a benchmark of standard access provisions.

A key component of an access regime is the way in which the terms and conditions are determined. In general, access regimes utilise three main approaches:

i. ex ante regimes which determine generic terms and conditions of access beforehand;

ii. ex post regimes which determine the terms and conditions in the context of access disputes; and

iii. hybrid regimes which combine aspects of ex ante and ex post regimes.

The ex ante model provides additional details and arguably greater certainty for the access seeker and service provider on agreed terms and conditions. However, this model also means that the railway owner is subjected to a regulatory process even where there may not have been any access disputes.

The ex post model, on the other hand, limits regulatory intervention, to only the point when the access seeker is unable to obtain access on acceptable terms and initiates formal action. However, this has the problem of the access seeker having limited guidance about the terms and conditions until a determination by a regulator is made. The greater uncertainty and delays associated with ex post determinations could arguably deter potential access seekers.

The Regime is a hybrid rail access regime between ex ante and ex post models, because it contains elements of both models. In hybrid models, a regulator is more involved throughout the whole process, instead of having a role that can be limited mainly to formal arbitration.

The Regime enables owners and access seekers to negotiate their own terms and conditions, which may differ from the standard access agreements of the railway owners. However, the standard access agreement is provided to give the access seeker an indication of fair and reasonable terms which have been reviewed by the Authority. As each access seeker negotiates their own agreement, this permits some variation to terms and conditions between users.

A key access or transport agreement contract variation common in WA is for the railway owner and the access seeker to agree that their contract is ‘outside the Code’. In this instance both parties obtain some flexibility to depart from the rights and negotiation steps defined within the Code. However, some users with contracts ‘outside the Code’ have subsequently sought the involvement of the Authority in rail access issues where differences have arisen with the railway owner. The Authority has no legal power to become involved in such cases due to the contracts having been negotiated outside of the Code.

Table 5.1 featured below, briefly summarises the structure and type of regimes in other Australian States and Territories which are further explained below.

Table 5.1 Summary of access arrangements in other jurisdictions

Jurisdiction	Structure	Type of Regime	Intra-state freight train operators (2004)
Western Australia	Vertically integrated (but segregated into subsidiaries - WNR & AWR).	Hybrid regime. Floor/ceiling, negotiate/arbitrate.	AWR.
Victoria	Intra-state network is vertically integrated. (Interstate vertically separated and leased to ARTC)	Largely an ex post intra-state regime with average cost pricing. This intra-state regime is currently subject to a substantial review.	PN.
NSW	Electrified network vertically integrated (RailCorp) and country branchlines (RIC) (Interstate leased to ARTC - new Undertaking & reference Tariffs to be developed)	Hybrid regime Floor/ceiling, negotiate/arbitrate	Several (eg PN, QR, Silverton, GrainCorp, ASR)
Queensland	Vertically integrated (separated through ring fencing)	Hybrid regime Floor/ceiling, negotiate/arbitrate Reference prices	QR[22]
ARTC	Vertically separated (inter-state track in NSW, Victoria, South Australia and west to Kalgoorlie)	Hybrid regime. Floor/ceiling with Indicative Reference prices negotiate/arbitrate	Not applicable – the ARTC network is mainly interstate track but it is servicing several operators.
Tarcoola-Darwin	Vertically integrated	Hybrid regime. Floor and ceiling, plus some definition of how arbitrated prices are to be calculated	FreightLink
South Australia (intra-state)	Vertically integrated (ASR)	Hybrid regime. Floor and ceiling, plus some definition of how arbitrated prices are to be calculated.	ASR

[22] PN is understood to be commencing services on the North Coast Line between Brisbane and Cairns in early 2005.

5.2 Victoria

An open access regime exists on freight rail lines in Victoria, which came into effect on 1 July 2001. There is a major review of the Victorian regime which is currently underway and an Options Paper (July 2004) and a subsequent paper on the proposed legislative framework reforms (December 2004) released for the review indicates that substantial changes are likely.

Under existing arrangements, transport operator PN holds a lease for most of the intrastate lines used for rail freight in Victoria. Open access allows for other rail operators to apply to the lease-holders (railway owners) to operate services on those rail lines. Other rail operators then pay the railway owner for use of any lines.

Interstate standard gauge track in Victoria is not covered by the Victorian rail access regime. These tracks are leased to and managed by the ARTC for a period of 15 years. Connex leases the Melbourne metropolitan train network in Victoria, and is currently under a franchise contract awarded in 2004 by the Victorian Government. The Melbourne metropolitan train network is not covered by this regime.

In announcing the review of the Victorian regime, the Victorian Government stated that: "*To date, the regime has proved unworkable. No other freight operator has been able to gain access to the tracks leased by Freight Australia to operate competing freight services.*" In completing the review, the Victorian Government is seeking "*to bring about greater competition in rail freight services and improve the effective management of the network with a workable access regime.*" [23] Consequently, the existing Victorian regime is not likely to offer significant ideas on approaches to improve the Code.

In December 2004, the Victorian Department of Infrastructure released a paper on the proposed legislative framework reforms for the Victorian rail access regime. The key recommendations were:

- Coverage should be broadened to include: passenger and freight services (with enshrinement of passenger priority), sidings (including grain sidings), yards and some designated terminals (to which operators will require access, to utilise the network). However coverage should not include provisions facilitating access to rail corridors for the delivery of the State's transport infrastructure projects;
- Access providers should be obliged to do all things reasonably necessary to facilitate the interconnection of new private sidings and terminals, subject to the access seeker paying the reasonable cost of that interconnection;
- Disputes regarding interconnection should be arbitrated by the Essential Services Commission (ESC);
- Adoption of a hybrid between the 'ex ante' (or up front) model and the 'negotiate and arbitrate' (or ex post) model for the determination of terms of access;

[23] See: Options For Reform Of The Victorian Rail Access Regime Victorian Department Of Infrastructure, July 2004, P 3 available at: http://www.doi.vic.gov.au/doi/doielect.nsf/2a6bd98dee287482ca256915001cff0c/9453dd46eef02cb9ca256ede001e8819/$FILE/Options%20for%20Reform%20of%20the%20VRAR%2027-7-04.pdf

- Providing a potential access seeker with all the information it reasonably requires to establish a business case for potential freight operations, including information concerning potential train paths and access costs. In most cases it will allow an access seeker to then gain access, without having to participate in a formal negotiation/arbitration;
- Establishment of pricing rules to be followed by the access provider in calculating access charges. An access provider will be able to recover its efficient costs of service delivery. Regulated prices should reflect no more than the stand alone costs of service delivery and no less than the incremental costs to the access provider in providing the particular access;
- The regime should stipulate that the access provider shall only receive a capital charge on new capital expenditure for expansions of, or the replacement of capacity, which expenditure was funded by the access provider;
- The Act should prohibit discriminatory pricing which is likely to be anti competitive;
- The access provider must comply with Account Keeping Rules published by the ESC and the access provider must create and maintain financial records consistent with those rules. To minimise regulatory cost, structural separation is not proposed;
- The access provider shall comply with Ring Fencing Rules and Confidentiality Rules made by the ESC;
- The regime should confer on the ESC the power to make Capacity Allocation Principles requiring the allocation of rail capacity on a non-discriminatory basis;
- The Capacity Allocation Principles shall include "use it or lose it" rules so that the entitlement to use a train path is lost if it is not used sufficiently during a defined period or with a defined frequency;
- The regime should require the access provider to have network management protocols which are publicly available and which comply with Network Management Principles;
- Long term service planning revert to the State. The framework within which the ESC will arbitrate access disputes should impose time limits within which disputes must be resolved, permit the ESC to make interim decisions, permit class arbitrations and limit the scope of appeals; and
- The ESC should have the power to compel the provision of information to allow it to carry out its investigatory functions. It should also have the power to make orders requiring an access provider to comply with an Access Arrangement, and the power to seek orders from the Supreme Court for the imposition of penalties.

Overall the Authority will monitor the Victorian review process to better understand stakeholder issues and to pursue greater consistency between regimes.

5.3 New South Wales

In New South Wales two separate frameworks are operating:

- Mainline interstate and Hunter Valley corridors: ARTC has leased these lines from the NSW Government in 2004 for sixty years. ARTC is in the process of developing an undertaking (based on its existing ACCC approved undertaking) to cover this additional network. The ARTC regulatory approach is discussed further in Section 5.5.
- The metropolitan electric passenger and rural branchline networks: are owned and operated by the NSW Government with access to these networks being subject to the NSW Access Regime (established under Schedule 6AA of the Transport Administration Act), which is managed by RailCorp and Rail Infrastructure Corporation (RIC) respectively. RIC has an administrative arrangement in place with RailCorp that permits freight operators seeking access to the NSW rail network to deal only with RIC. The NSW Regime was the only State-based regime to be certified by the NCC, however this was only for one year from 1999 to 2000. The NCC did not approve a longer term certification because it wanted to retain incentives for NSW to adopt a National Rail Access Regime when this was developed. NSW has not sought re-certification.

Under the NSW Access Regime the railway owner is obliged to negotiate in good faith with access seekers. The railway owner and access seeker are obliged to agree to milestones and timeframes within the negotiations. An access provider may only permit access through an access agreement. The regime outlines the key components of the access agreement. A "Standard Agreement" has been established by the railway owner which represents an opening point for negotiations. The final agreement will be tailored to suit the access seeker's requirements and the nature of the service. Under the Standard Agreement any dispute that arises must be dealt with in accordance with the dispute resolution procedures in that agreement. These procedures provide that, in the event that negotiations in good faith fail, either party may require that the dispute be mediated. In the event mediation fails, either party may refer the dispute to arbitration to be conducted by IPART who will act as arbitrator (pursuant to Part 4A of the IPART Act) and also the Commercial Arbitration Act 1984 (NSW) which also applies to IPART arbitrations. The award made by IPART, as arbitrator, is final and binding and parties to arbitration are required to give effect to the arbitration determination.

RIC/RailCorp must develop an information package containing key information of interest to access seekers, including capacity availability, allocation and pricing. Accounting, business and financial arrangements should also enable the separation of above and below rail costs.

5.4 Queensland

In November 2001, the Queensland Competition Authority (QCA) approved the Access Undertaking developed by the Network Access Group of Queensland Rail (QR) to apply between 1 March 2002 and 30 June 2005. The QR Undertaking is

known as a mandatory undertaking as QR was required to submit this framework by the QCA Act.

The QR Undertaking provides a detailed set of guidelines for access and operation on the QR network. As the access regime is not certified by the NCC, it is potentially still subject to applications for declaration, however the presence of a detailed state based regime would potentially reduce the likelihood of a successful declaration application. While rail operators are not legally obliged to comply with the Access Undertaking, the QR Network Access Division may refuse access to those who do not follow its processes. The current Undertaking expires on 30 June 2005, and a review and amendment process is currently being managed by the QCA.

5.5 Australian Rail Track Corporation

ARTC was created after the Commonwealth and State Governments agreed in 1997 to the formation of a 'one stop' shop for all operators seeking access to the national interstate rail network.[24] ARTC currently has responsibility for the management of over 5,800 route kms of standard gauge interstate track, in South Australia, Victoria, Western Australia, and New South Wales (commonly referred to as the defined interstate rail network).

ARTC is a vertically separated provider of access (ie does not compete with train operators that use its network). However, ARTC faces strong competition from road transport providers. Consequently, ARTC has a strategic commitment to improving the network by reducing travel times and decreasing real access prices so as to attract greater market share to rail. As ARTC is vertically separated the issues related to segregation are not present and hence were not addressed in the undertaking.

In May 2002, the ACCC approved (for 5 years) a voluntary Access Undertaking under Part IIIA of the TPA from ARTC, for the South Australia, Victoria and Western Australian interstate sections. A similar Undertaking to cover lines on the NSW leased network is under development. The Undertaking covers terms and conditions of access to rail tracks owned or leased by ARTC.

Following ACCC acceptance of the Undertaking, the services covered by the Undertaking can generally not be subject to a successful application for declaration. ACCC acceptance of the ARTC Undertaking means that the Undertaking forms the basis for access.

The Undertaking includes information concerning issues such as:

- The negotiation process, with definition of steps and the access seeker's rights to require infrastructure capacity and other key information;
- Pricing arrangements – including a two part tariff pricing structure and price escalation over time being limited to a proportion of CPI. The two parts to the access charge are a fixed component (or flagfall) which is a charge for occupying capacity on the network, regardless of train length. The second charge is a mass distance charge based on the gross train tonnage multiplied by the total distance (loaded and unloaded) travelled. The Undertaking also mandates equitable pricing in that users can have their access charges

[24] For further information on ARTC see: http://www.artc.com.au/

reviewed if they can demonstrate ARTC sold a like train path to another user of the network at a lower price;

- A standard ARTC access agreement. However, scope for flexibility in individual agreements between ARTC and access seekers is permitted;
- Key performance indicators;
- Arrangements in relation to train path allocation and scheduling, including the process for obtaining specific paths, train paths resumption rules and train priority rules; and
- Dispute resolution: in the event of a dispute during access negotiations, the first step is for the senior representatives to meet and attempt resolution. Failing agreement, the parties may either agree to refer the matter to mediation or, failing such agreement, to arbitration by the ACCC. The mediation process begins by the chief executives seeking to resolve the matter. Prior to commencing arbitration, the parties may also appoint a conflict manager to assist in facilitating discussions.

5.6 Tarcoola – Darwin Rail Line

The AustralAsia *(Third Party Access)* Code sets the principles for third party access to the existing line between Tarcoola and Alice Springs (approx. 830kms) and Alice Springs to Darwin (approx. 1,415kms). The relevant jurisdictions pertaining to this regime are South Australia and the Northern Territory.

The Commonwealth Treasurer on the recommendation of the NCC approved a thirty year certification for this regime in March 2000. The long term was granted because of the consortium's need for certainty in its operation of the rail facilities. As a greenfields investment, the NCC applied slightly different thresholds which provided the railway owner with some lighter handed requirements so as to enhance the bankability of the development.

The vertically integrated railway owner is Asia Pacific Transport (APT). The associated train operator is FreightLink. Access to APT's network is governed by the Australiasia Code. This Code became operative with commissioning of the line in January 2004.

The access regulator for the Australasia regime is the Essential Services Commission of South Australia (ESCOSA).

Under this regime, an access seeker submits a proposal to the access provider who then has a duty to negotiate in good faith. Whilst this duty is not underpinned by any penalty and is not enforceable, failure to negotiate in good faith can be used as a trigger for commencing arbitration.

The regime protects the interests of other existing train path holders.

The regime does not prescribe a standard access contract or list minimum heading requirements. It does not prescribe pricing principles with which access contracts must conform however, upon arbitration, the regime provides that the pricing be determined by applying principles and methods of calculation for fixing floor and ceiling prices set out in Division 1 in the Schedule to the Australiasia Access Code.

An access seeker may request ESCOSA appoint an arbitrator for a dispute. A dispute exists if the railway owner fails to enter into good faith negotiations within a prescribed period. If an access seeker, after making reasonable attempts, fails to obtain agreement on the proposal, or all parties agree a dispute exists.

ESCOSA is obliged to attempt to settle a dispute by conciliation or, failing this, appoint and refer the dispute to an arbitrator. The regime sets out matters the arbitrator must consider and restrictions on the award an arbitrator may make and any award is only binding on the access provider.

The regime also includes two safety Acts (the Northern Territory Rail Safety Act 1998 (NT) and the Rail Safety Act 1996 (SA)).

5.7 South Australian Intrastate

Australia Southern Railroad (ASR) is the vertically integrated intra-state railway owner in South Australia which is also a wholly owned subsidiary of ARG. In March 2004, ESCOSA was proclaimed the regulator for South Australia's rail access regime - as set out in Parts 3 to 8 of the Railways (Operations and Access) Act 1997 (the ROA Act). This role had been previously assigned to the Executive Director, Transport SA.

The regime has not been certified as effective by the NCC.

This regime aims to encourage negotiation for access on fair commercial terms with ESCOSA to monitor and oversee access matters, determine pricing principles and information requirements, and refer access disputes to arbitration. [25]

Coverage applies to railway services as defined under the ROA Act. This covers the TransAdelaide broad gauge network within metropolitan Adelaide, the ASR lines in the Murray-Mallee, Mid-North and Eyre Peninsula, and the Great Southern Railway passenger terminal at Keswick. ESCOSA is reviewing existing procedures established under the ROA Act to determine whether any changes are required.

Under this regime, ASR as railway owner has a duty to negotiate in good faith and there is also provision to protect the interests of other industry participants whose interests could be affected by a proponent's access proposal. Certain preliminary information is to be made available to an access seeker upon request, including terms and conditions; pricing principles and the extent of available network capacity. An access seeker puts forward an access proposal to the railway owner who in response must give notice of the proposal to ESCOSA and any industry participant whose interests could be affected.

The regime does not prescribe any form of standard access agreement principles, nor does it prescribe pricing principles. ESCOSA has discretion to establish floor and ceiling prices, however the prices are non-binding on the railway owner.

The railway owner must keep separate accounts for its South Australian operations.

[25] ESCOSA has published an Information Paper on the SA rail Access Regime which is available at: http://www.escosa.sa.gov.au/resources/documents/040421-I-RailIntraInformationKit.pdf

An access seeker can request ESCOSA to refer a dispute to arbitration. ESCOSA is obliged to settle the dispute by conciliation or to appoint and refer the dispute to an arbitrator. Matters that must be considered by the arbitrator are prescribed in the legislation. The access seeker is not bound by the arbitration but the railway owner is. The regime provides expressly that the Commercial Arbitration Act 1986 (SA) does not apply.

6 EFFECTIVENESS OF WA CODE IN MEETING CPA OBJECTIVES

6.1 Relevant sections of the CPA

The requirement for this review of the Code is contained in section 12(2) of the Act which states:

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

Consequently, the scope of the review is limited to the CPA, to the exclusion of other broader NCP agreements. The review is to consider all relevant clauses of the CPA, and need not be limited to clause 6 which covers *'Access to Services Provided by Means of Significant Infrastructure Facilities.'*

It is the view of the Authority that the most relevant sections of the CPA to be assessed are:

- the public interest test clause 1(3); and
- the access to services provided by significant infrastructure facilities of clause 6. A copy of clause 6 is provided in Attachment 3 to this Issues Paper.

This review is expected to result in recommendations on improvements to the Code to enhance the ability of the Code to give effect to the CPA. In relation to matters which may arise during the course of the review which fall under the provisions of the Act rather than the Code, the review will not deal directly with such matters. However, it is open to the Authority to bring these matters to the attention of the Government at the time the review is completed. For this reason, the Authority is also interested in hearing views on relevant issues which may fall under the provisions of the Act.

Are there other sections of the CPA which need to be considered?

Has there been adequate time elapsed to fully assess the effectiveness of the Regime?

6.2 Public Interest Test (clause 1(3))

Third party access regulation endeavours to further develop public interest. The CPA sets out a public interest test in clause 1(3), which is listed below.

"Without limiting the matters that may be taken into account, where this Agreement calls:

(a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or

(b) for the merits or appropriateness of a particular policy or course of action to be determined; or

(c) for an assessment of the most effective means of achieving a policy objective;

the following matters shall, where relevant, be taken into account

(d) government legislation and policies relating to ecologically sustainable development;

(e) social welfare and equity considerations, including community service obligations;

(f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;

(g) economic and regional development, including employment and investment growth;

(h) the interests of consumers generally or of a class of consumers;

(i) the competitiveness of Australian business; and

(j) the efficient allocation of resources."

The key presumption of the NCP is that having more competitive markets leads to greater efficiency in resource use, lower costs and higher incomes thus yielding benefits for consumers. However, some restrictions on competition are justified in some circumstances. As a means of determining whether particular competition restrictions are justified, the public interest test is often used to evaluate overall impacts.

Where the CPA requires any of the following:

1. A costs/benefits analysis of a particular policy or course of action; or
2. The determination of the merits or appropriateness of a particular policy or course of action; or
3. An assessment of the most effective means of achieving a policy objective.

Then account must be taken, where relevant, of matters such as the impacts on social welfare, safety, environmental (including sustainable development) and regional impacts, as well as economic impacts. The more relevant aspects of the public interest test for evaluating the performance of the Code appear to be economic and regional development, investment, the interests of consumers, the competitiveness of businesses and efficiency (CPA clause1(3)(g-j)).

The upgrade and expansion of rail networks can produce significant economic and regional development benefits. Consequently, it is critical that the Code provides adequate incentives for efficient investment. Similarly the Code should avoid provisions which hinder expansion proposals.

In the period since the establishment of the Code, a substantial investment program is proceeding on the PTA network which is funded by WA Government capital subsidies.[27]

The WNR network does not receive significant capital subsidies and hence most investments need to produce a commercial return over the longer term. Consequently, the WNR capital program has been more targeted to upgrades and capacity increases

[27] For information on the expansion of the PTA network see: http://www.newmetrorail.wa.gov.au/

on rail lines where higher volumes (eg the Kwinana to Bunbury rail line) enable an adequate return on such investments.

The ARA has released an investment policy, *Investing for the Future*, which states that the Australian transport industry is facing a large capacity challenge related to accommodating a doubling in freight volume growth over the next 20 years which will require a policy and regulatory environment to encourage greater levels of public and private investment in both train operations and the rail network [28]

The extent to which the Code has been a positive, neutral or negative influence on the extent of investment on the WNR network will be the subject of further consideration as part of this review.

The Code has established a framework which facilitates the competitive testing of train services by end customers. As summarised in Section 3.6 of this Issues Paper, some freight rail customers have utilised this ability to hold a competitive tender for provision of above rail services and it appears some improvements in value for money and service quality have been obtained. The extent to which the Code has produced net benefits for consumers or end-customers will also be the subject of further consideration as part of this review.

For a range of different industries, such as mining and agriculture, transportation comprises a significantly large proportion of the cost structure. Hence, it is essential that rail transport costs are efficient to reduce costs to end customers to improve the competitiveness of businesses in those industries. Transport prices that are above efficient costs (including reasonable return of and return on capital) or above the transport prices paid in other markets can adversely impact on competitiveness and can represent the difference between a business investment being viable or not.

The Code and the Costing Principles provide incentives for cost efficiency as all components of the floor and ceiling costs are to be based on those that would be incurred by adopting efficient practices for the provision of new modern equivalent railway infrastructure, including the practice of operating a particular route in combination with other routes to achieve efficiencies. In the Authority's Floor and Ceiling Cost Determinations to date, significant reductions were applied to the cost levels submitted by railway owners as part of the application of the efficient cost assumption.

Is the Code effective in ensuring the consideration of the public interest?

What changes could be made to the Code, if any, to improve the operation of the public interest test as defined in clause 1(3) of the CPA?

Is the Code resulting in the efficient allocation of resources and adequate investment in the network? What changes to the Code, including to the public interest test, might be considered to an efficient allocation of resources and adequate investment in the network?

6.3 Coverage of services (clauses 6(3), 6(4)(d))

[28] See: http://www.ara.net.au/dbdoc/InfrastrucuteInvest.pdf

Coverage definition

The definition of what is covered by the Regime is found in the section 3(1) of the Act which defines "rail infrastructure" as:

> *"the facilities necessary for the operation of a railway including –*
>
> *(a) railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of a railway);*
>
> *(b) tunnels and bridges;*
>
> *(c) stations and platforms;*
>
> *(d) train control systems, signalling systems and communication systems;*
>
> *(e) electric traction infrastructure;*
>
> *(f) buildings and workshops; and*
>
> *(g) associated plant machinery and equipment,*
>
> *but not including –*
>
> *(h) sidings or spur lines that are excluded by subsection (3) or (4) from being railway infrastructure associated with the railway concerned;*
>
> *(i) rolling stock, rolling stock maintenance facilities, office buildings, housing, freight centres, or terminal yards and depots."*

Overall, the coverage components specified in the Act are essentially a policy decision for the WA Government.

Access to terminals, sidings and ancillary services

Under this definition, access to yards, sidings and terminals was not included because it was deemed they did not exhibit nationally significant infrastructure characteristics and use by multiple parties may not be practical. This means that under the current arrangements, access seekers who need access to these facilities need to negotiate additional contracts outside their access agreement with the railway owner. The definition of railway infrastructure does however include 'stations and platforms' which could arguably be excluded due to the reasoning applied to terminals and sidings.

The TPA allows interested parties to seek declaration of these facilities, if it can be shown that they are not economically or practicably duplicable. The ARG stated in their response to the 'Options for Reform of the Victorian Rail Access Regime' that if *"a facility clearly exhibits these characteristics, and would therefore be likely to be declared, then it should be included in the coverage of the regime."*[29]

As this definition of the coverage of the Regime is contained in the Act, changes to this definition are outside this review. However, given the significance of this issue, the Authority is interested to hear views on the effect of the coverage of the Regime, and how effectively this definition gives effect to the CPA.

Whilst coverage is mainly defined in the Act rather than the Code, the Authority seeks views on the adequacy of the coverage of the Regime and views of potential refinement of merit. Is the coverage of service adequate?

[29] ARG submission to "Options for Reform of The Victorian Rail Access Regime", pg. 1.

What if any additional infrastructure could be included in the coverage to improve effectiveness of the Regime?

Greenfields investments and expansions

Greenfields investments and expansions of the railway infrastructure need to generate a considerable level of demand if operations are to be profitable, and to alleviate the high level of risk. Thus, regulation of greenfields projects needs to deal appropriately with the ex ante risks facing the investor, otherwise incentives to invest may be lower. Consequently, access arrangements should not deter investment, however it must also promote access and competition in related markets.[30]

Greenfield expansions are covered by section 3(2) of the Act, which states that if any new railways are constructed which connect to the railway, the Minister may declare the new railway to be part of the railway network. Any new lines also need to pass the test for inclusion which is covered in section 5(3) of the Act, whereby the proposed route needs to satisfy the following criteria:

(a) whether access to the route will promote competition in at least one market, other than the market for railway services;

(b) whether it would be uneconomical for anyone to establish another railway on the route;

(c) whether the route is of significance having regard to:

i. its length;

ii. its importance to trade or commerce; or

iii. its importance to the economy;

(d) whether access to the route can be provided without undue risk to human health or safety;

(e) whether there is not already effective access to the route; and

(f) whether access or increased access to the route would not be contrary to public interest.

Any new and extended route needs to pass this test for inclusion in order to be added to Schedule 1 of the Code which lists all the routes to which the Code applies. If railway infrastructure, covered by the Code, is extended or expanded the Code will also apply to that route or infrastructure.

Currently, the Authority under the Code has no formal involvement in regulating new rail lines until they are operational and formally added to Schedule 1 of the Code. Where the new rail line involves a new railway owner there is a need for this railway owner to submit Costing Principles, Segregation Arrangements, TMG, TPP and Over-payment Rules to the Authority for review and then approval. The Authority has been approached on occasions for assistance in relation to issues such as the negotiation rights of access seekers in relation to potential greenfields investments. Under current processes it could take three to six months between line commissioning and formal inclusion of the lines of a new railway owner within Schedule 1. During this review

[30] National Competition Council, "Australasia Railway Access Regime: Final Determination", February 2000, p.1.

the Authority will consider refinements to the Code to ensure access seekers interested in greenfields investments have some regulatory rights.

Is there a need to change the Act and/or the Code to provide greater certainty on the processes for obtaining coverage by the Regime of new routes and/or for extensions to existing routes?

6.4 Treatment of interstate issues (clauses 6(2), 6(4)(p))

Clause 6(4)(p) of the CPA states that there should be consistency of access arrangements, where more than one set of arrangements applies to a service. An effective access regime should be able to facilitate cohesion with other regimes to ensure smooth running over the interstate jurisdictions. This should enable the access seeker to coordinate usage of the rail infrastructure between states.

Under section 27(1) of the Code, if there is arbitration of an issue which is relevant to arbitration under another access regime, then arbitration is to take place both under the WA Code and the other Code.

Despite these arrangements to enable some consistency between jurisdictions, the practical effectiveness is yet to be tested. Currently, the ARTC Undertaking appears to be the most likely regulatory framework to emerge as a National Rail Access Regime. The ARTC has a wholesale agreement with WNR giving ARTC the ability to purchase interstate paths within WA on behalf of access seekers to provide them with a one-stop shop. However, the wholesale agreement has not yet been utilised and interstate operators to date such as PN (via predecessor entity National Rail) and SCT have had separate access agreements with WNR.

Is the Code and the wholesale agreement an effective framework for interstate access seekers? How could it be improved?

Are there any inconsistencies between the ARTC Undertaking and the Regime which result in a loss of efficiency or make obtaining third Party access more difficult?

6.5 Negotiation framework (clause 6(4)(a)-(c), (e), (f), (g)-(i), (m)-(o))

The NCC have stated that a "*negotiation framework should provide a solid environment in which negotiations are encouraged and are likely to produce outcomes similar to those expected in a competitive market*[31]*."* There are a number of elements that are considered to be necessary in order to give rise to a robust negotiation framework. The Regime has covered these issues with the provisions listed below.

Timely and effective

The Regime needs to ensure that negotiations are not frustrated by unnecessary delays in relation to information requests, processing of proposals, the commencement of negotiations and also the length of the negotiations. The railway owner is required to use all reasonable endeavours to avoid unnecessary delays on its part.[32] The railway owner and the access seeker must agree on the day to begin negotiations as soon as practicable[33], as well as a termination day after which negations will cease if they have not reached an access agreement[34].

As outlined in Section 4.2 of this Issues Paper, access seekers have the right to request information from the railway owner on the terms and conditions of proposed new business. The railway owner is afforded a reasonable time period to respond to requests for new business. When the railway owner receives requests for existing business, a large proportion of the information would have already been collected and calculated. Therefore, there could be some merit in introducing a quicker response time for information requests on existing business.

Establish minimum rights to negotiate access

The negotiation processes are defined under Part 3 of the Code which place an obligation to negotiate in good faith on the railway owner in receipt of an access proposal. However, the access seeker needs to be able to demonstrate it has the managerial and financial ability (section 14 of the Code) and its operations are within the current or expanded capacity of the route (section 15 of the Code).

Enforcement process to support right to negotiate access;

To be an effective access regime, there must be enforcement mechanisms that apply if a party fails to comply with particular obligations. The current enforcement provisions include fines issued by the Regulator, who can also apply to the Supreme Court to grant an injunction if it is satisfied that the railway owner has engaged or is proposing to engage in conduct that amounts to a breach of the Code. These measures impose financial penalties of sufficient size to deter non-compliance with the regime, and are supported by the railway owner. ARG have stated that they support *"enforcement being based on the power of the regulator to issue direction supported by appropriate civil penalties*[35]*."*

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[31] National Competition Council, "Australasia Railway Access Regime – Application for Certification under Section 44M(2) of the Trade Practices Act 1974", Final Recommendation, February 2000.
[32] Section 16(1)(a)(i) of the Code
[33] Section 19 of the Code.
[34] Section 20(2) of the Code.
[35] ARG submission to the 'Options for Reform of the Victorian Rail Access Regime', August 2004, p.4.

There could be some grounds to introduce the ability for access seekers to be awarded damages if it can demonstrate a loss or damage from breach of an access agreement with the railway owner.

Segregation arrangements to support negotiation;

The segregation arrangements in a regime are integral to the negotiation process, as they aim to ensure confidentiality of negotiations. The duty to segregate is under section 28 of the Act, which implies endorsement of a vertically integrated structure. However, vertically integrated railway owners have greater incentive to frustrate access by competitors, for example by using the access seeker's confidential information to benefit its affiliated rail operator. Therefore, the framework of this Regime should provide safeguards against the railway owner favouring its affiliated rail operator.

This is addressed in section 16 of the Code which requires that the railway owner must avoid unnecessary delays, meet the requirements of the proponent who has complied with the Code, and must not unfairly discriminate between proponents.

In order to promote the principle of non-discrimination between access seekers, the railway owner could be obligated to disclose information about the capacity of the network. A capacity register could be published, which could be in the form of a map or a more detailed document. The railway owner would then be required to provide public notice when it intends to enter into an access agreement that would allocate a train path or substantial proportion of capacity on the network to an access seeker for a significant period. Such measures, which are in place in the NSW Rail Access Regime, will require adequate information on capacity management.

Is the maximum penalty for breaches of the regulatory framework ($100,000) adequate for providing railway owners with incentive to ensure full compliance?

Whilst there are not multiple intra-state operators visibly competing and operating in the WA market, is the threat of competition realistic enough to ensure that freight rates are efficient?

Are the segregation arrangements adequate and what changes might improve confidence of access seekers, whilst avoiding significant administration costs?

Is the negotiation framework effective?

What if any reforms to the negotiation framework would enhance the ability to meet the CPA objectives?

What options are there to try to ensure railway owners use all reasonable endeavours to accommodate the requirements of access seekers?

Is there merit in introducing a capacity register?

Should a shorter time limit be placed on the railway owner to respond to existing business access requests?

6.6 Dispute resolution (clauses 6(4)(a)-(c), (g)-(l), (o))

A regime must contain independent dispute resolution and enforcement processes. Independence from the parties is essential to guarantee that the regime will be affected without favour. Clause 6(4)(g) is primarily concerned with the independence of the dispute resolution managers. It also covers dispute resolution funding by the parties.

Due to the fact that there has been, thus far, no access agreement under the Code, the dispute resolution processes of the Regime have not yet been tested. However, the provisions in place endeavour to include the following principles:

- where regime negotiations are not successful, the Code enables the appointment of an independent body to resolve the dispute (an arbitrator);
- the decision of the arbitrator should be binding, however, existing legislative rights of appeal should be preserved;
- require the arbitrator to take into account:
  - the owner's investment and legitimate business interests;
  - the costs of providing access, including any extension costs but excluding any losses associated with greater competition;
  - the economic value to the owner of any additional investments;
  - the interests of all persons with existing contracts to use the facility;
  - binding contractual obligations of the owner or others already using the facility;
  - whether the request impacts on the safety and reliability of the facility;
  - whether the request impacts the economically efficient operation of the facility; and
  - the benefit to the public from competitive markets.
- the arbitrator should only impede the rights of existing users of the facility where they have considered whether there is a case for compensation of the person and, if appropriate, determined this compensation.

The Productivity Commission recommended that, in order to reflect Part XIC of the TPA, dispute resolution provisions should:

> *"permit class arbitrations; impose time limits on both the negotiation and arbitration phase; permit the making of interim determinations by the regulator; permit dissemination of information submitted; in one arbitration to contestants in another arbitration; and appeals from the regulator's determinations be limited in scope and duration."*[36]

In order for arbitrated outcomes to resemble those expected in a competitive market the access seeker should be provided with the level of information similar to that it would expect in the process of negotiating in a competitive market.

[36] Section 6 of the Gas Code.

Are the dispute resolution provisions in the Code appropriate and effective?

Are any refinements required?

Should the settlement of access disputes be subject to time limits, which would be subject to interim determinations by the Regulator?

Should "class" arbitrations (involving more than one access seeker) be introduced, where the Regulator could, if appropriate, disseminate information in one dispute to the parties in another?

Should access seekers be given the right to seek damages and other remedies in the case of a breach of an access agreement by the railway owner which causes significant damage or loss?

6.7 Appropriate terms and conditions (clause 6(4)(a)-(c), (e), (f), (i), (k), (n))

Access regimes should enable third parties "*to obtain access in a timely manner on terms and conditions which promote the efficient use of an investment in the infrastructure and do not distort the conditions for competition in related markets*."[37]

Pricing and Costing Principles

The Regime is unique in its use of the GRV based annuity modern equivalent asset (MEA) model, which is prescribed by the Code to determine the cost/revenue ceiling. GRV is the gross replacement value of the railway infrastructure, calculated as the lowest current cost to replace existing assets with assets that have the capacity to provide the level of service that meets the actual and reasonably projected demand and are, if appropriate, modern equivalent assets.

An alternate form of regulation used in other jurisdictions is the Depreciated Optimised Replacement Cost (DORC) model to calculate the ceiling tariff. The main difference between the two methods is that the DORC method produces initially lower ceiling tariffs that increase over time with capital and upgrading expenditure costs. The GRV method initially produces marginally higher ceiling revenues, which remain constant over the life of the asset. It has been shown that, over 30 years, both methods return broadly equivalent revenue to the owner.[38] The differences in the calculated ceiling revenues between DORC and GRV for defining upper price limits is less of an issue, because most customers prices are below the ceiling.

As discussed in Section 4.3.1, if the railway owner receives Government subsidies to support their operations (eg for upgraded level crossings), the Costing Principles do not require a reduction in ceiling costs to reflect this Government contribution. However, in evaluating whether revenues obtained by the railway owner exceed ceiling costs using the Over Payment Rules, these Government subsidies are recognised as a form of customer revenue.

[37] Victorian Department of Infrastructure, 'Options for Reform of the Victorian Rail Access Regime', July 2004, pg. 5.

[38] For more information see the ERA website http://www.railaccess.wa.gov.au/files/publications/GRV%20VS%20DORC.pdf

Key Performance Indicators

The Costing Principles require the railway owner to produce KPI's from a Regulator approved template. KPI results are available on the Authority's website. The aim of the KPI's is to monitor the quality of service being provided by the railway owner, and to promote ongoing investment in the infrastructure to maintain or improve quality standards. However, some end users and operators have questioned whether some of the KPI's are meaningful.

Is the hybrid model the most appropriate model for use in the Regime?

In this hybrid model, is there merit in introducing reference tariffs, which are firm prices for a defined services and route that the railway owners would offer access seekers? Would reference tariffs negate the effectiveness of the negotiate-arbitrate model?

Is there merit in introducing a statutory obligation on railway owners to periodically publish greater information about access (Access Information) to allow potential access seekers to develop business cases for freight operations?

Do the railway owners standard access agreements provide a fair and reasonable contract template?

Does WA's GRV annuity approach for setting the upper bound (ceiling) access revenue alter the prospect of access seekers entering an access agreement with the railway owner?

Do the railway owner's Overpayment Rules provide a fair and equitable approach to address any breaches of ceiling costs/revenues?

Are the Key Performance Indicators sufficiently meaningful? Can these be made more useful and relevant?

Should users have some right to seek Authority involvement in contracts which have been established 'outside the Code'? How might this be achieved, what risks might this create and what are the implications of these risks?

6.8 Institutional Arrangements

There may be scope within the Code to refine Institutional Arrangements so that third parties have a greater ability to obtain access without imposing significant resource requirements on the railway owner. Possible refinements may include changes to the roles and accountabilities for the railway owner and the Authority.

Regulator

In other rail access regime reviews, stakeholders have put forward proposals for a greater involvement by the regulator in different aspects of the negotiation process and even in resolution of contract management issues (eg track possession timing).

By way of example, the Victorian Regime Review Options Paper canvassed whether there was any merit in introducing reforms whereby the access seeker can deal with the regulator as an independent party for the purposes of making and processing an access application. This would prevent the railway owner from having access to confidential information which could be used to frustrate the access seekers' attempts

to attain customers. Under this option, the regulator could process an access application, to which the railway owner would be expected to enter into.

In order for this option to succeed, the regulator would require sufficient information from the railway owner, on prices for all access services, and the availability of train paths in order to make preliminary assessments regarding capacity.

In considering this option, the Victorian Regulator, the ESC was not supportive of the option as it would require an onerous exchanges and systems for capacity and pricing information and expertise not currently available within the ESC.

Railway Owner

A further reform option raised by the ESC is whether the railway owner should be subject to a licensing framework, which would complement the enforcement mechanisms under the Regime. Licensing is used in other utility industries such as Gas, Electricity, Water, Ports and Grain handling. The Authority would have specific powers of enforcement if the railway owner has contravened the conditions of the licence. The Authority would be able to apply penalties and enforcement via Supreme Court orders, which will often be more timely and less costly than activating the current provisions of civil enforcement.

Under the Rail Safety Act 1998, the railway owner is subject to accreditation which sets minimum standards of safety management systems of railway owners and operators. It is arguable that the accreditation system is a modest form of licensing.

Does the Regime encourage investment and are the information flows, that provide the signals for where investment in the system is required, efficient?

What reforms to the Code could improve investment incentive efficiency?

Is there merit in introducing a greater role for the Authority? (for example as the conciliator in train path issues, review fairness of track downtime schedules and evaluating progress towards MEA).

Would the benefits of having the Authority making and processing access applications, outweigh the costs of such a system?

Should the railway owner be subject to licensing and what benefits would this bring? If licensing was to be established how might it best be implemented?

ATTACHMENT 1: TERMS OF REFERENCE

REVIEW OF RAIL (ACCESS) CODE 2000

Section 12 of the Railways (Access) Act 1998 provides the Terms of Reference of Review of the Railways (Access) Code 2000 as detailed below:

12. Review of the Code

(1) The Regulator must carry out a review of the Code as soon as is practicable after –

(a) the third anniversary of its commencement; and

(b) the expiry of each 5 yearly interval after that anniversary.

(2) The purpose of a 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.

(3) Before carrying out a review of the Code, the Regulator must call for public comment in accordance with subsection (4).

(4) The Regulator must –

(a) cause notice of the review to be published, in one issue of –

(i) a daily newspaper circulating throughout the Commonwealth; and

(ii) a daily newspaper circulating throughout the State;

and

(b) include in the notice –

(i) a statement that written submissions on the Code may be made to the Regulator by any person within a specified period; and

(ii) the address to which the submissions may be delivered for posted.

(5) The period specified under subsection (4)(b)(i) is not to be less than 30 days after both of the notices under subsection (3)(a) have been published.

(6) The Regulator must prepare a report based on the review and give it to the Minister.

ATTACHMENT 2: ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission.
APT	Asia Pacifc Transport
ARA	Australasian Railway Association
ARG	Australian Railroad Group
ARTC	Australian Rail Track Corporation
ATC	Australian Transport Council
ASR	Australian Southern Railroad
AWR	Australian Western Railroad
CAPM	Capital Asset Pricing Model.
CoAG	Council of Australian Governments.
CPA	Competition Principles Agreement
CSO	Community Services Obligation
DORC	Depreciated Optimised Replacement Cost
ESC	Essential Services Commission (Victoria).
Authority	Economic Regulation Authority of Western Australia
ESCOSA	Essential Services Commission of South Australia
EU	European Union
GRV	Gross Replacement Value
GSR	Great Southern Railway
IPART	Independent Pricing and Regulatory Tribunal of New South Wales.
KPI	Key Performance Indicators
MEA	Modern Equivalent Asset
NCC	National Competition Council
NCP	National Competition Policy
ORAR	Office of Rail Access Regulation, now part of the Authority
PN	Pacific National
PTA	Public Transport Authority
QCA	Queensland Competition Authority
QR	Queensland Rail
SCT	Specialised Container Transport
TPP	Train Path Policy
TPA	Trade Practices Act 1974
TMG	Train Management Guidelines
WACC	Weighted average cost of capital.
WNR	WestNet Rail
WAGR	Western Australian Government Railways

ATTACHMENT 3: CLAUSE 6 OF COMPETITION PRINCIPLES AGREEMENT

Access to Services Provided by Means of Significant Infrastructure Facilities

6. (1) Subject to subclause (2), the Commonwealth will put forward legislation to establish a regime for third party access to services provided by means of significant infrastructure facilities where:

   (a) it would not be economically feasible to duplicate the facility;

   (b) access to the service is necessary in order to permit effective competition in a downstream or upstream market;

   (c) the facility is of national significance having regard to the size of the facility, its importance to constitutional trade or commerce or its importance to the national economy; and

   (d) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.

   (2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

   (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or

   (b) substantial difficulties arise from the facility being situated in more than one jurisdiction.

   (3) For a State or Territory access regime to conform to the principles set out in this clause, it should:

   (a) apply to services provided by means of significant infrastructure facilities where:

   (i) it would not be economically feasible to duplicate the facility;

   (ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and

   (iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and

   (b) incorporate the principles referred to in subclause (4).

   (4) A State or Territory access regime should incorporate the following principles:

(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

(b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.

(c) Any right to negotiate access should provide for an enforcement process.

(d) Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

(e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

(f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.

(g) Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

(h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

(i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:

  (i) the owner's legitimate business interests and investment in the facility;

  (ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;

  (iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;

  (iv) the interests of all persons holding contracts for use of the facility;

  (v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;

  (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(vii) the economically efficient operation of the facility; and

(viii) the benefit to the public from having competitive markets.

(j) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

(i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;

(ii) the owner's legitimate business interests in the facility being protected; and

(iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

(k) If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.

(l) The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

(m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

(n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

(o) The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

(p) Where more than one State or Territory regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.