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

**PUBLIC SUBMISSION ON REVIEW OF THE WESTERN AUSTRALIAN RAILWAYS
(ACCESS) CODE 2000**

Dear Mr. Rowe,

Alcoa World Alumina Australia (Alcoa) is responding to your request for public submissions on matters raised in the Issues Paper dated 23 February 2005 on the Review of the Western Australian Railways (Access) Code 2000.

INTRODUCTION

Alcoa provides this response to your request as a current user who has been attempting to achieve access under the Code since the Code came into effect on 1 September 2001. We hope that the comments in this submission will provide some insight into the difficulties experienced over the intervening years. It should be noted that the delays experienced were, to a large extent, due to the fact that this was one of the first applications of the Code and that many of the issues which took time to resolve would not create the same delays for a proposal for access lodged today.

In reading this submission, it should also be noted that Alcoa has had and continues to have access to the WestNet Rail network under an interim access agreement albeit under different terms than those sought under the Code.

Alcoa continues to hold the view that access under the Code would be more beneficial than access outside the Code and has therefore sought to actively engage the railway owner, the Regulator, and more recently the Authority in making the Code work for all rail users. This submission is made in that same spirit - in an attempt to get a workable access regime given the monopoly status of the current railway owner.

EXECUTIVE SUMMARY

The following summary highlights the major changes to the Code which, in Alcoa's view, are essential to the on-going operation and development of an effective access regime.

1. Investment in the Network

Alcoa has recently requested an increase in the annual tonnage to be transported by rail from our Pinjarra facility. The response from the railway owner has been to advise that additional infrastructure will be required and the railway owner has requested funding from Alcoa for these works.

Whilst Alcoa is not averse to funding infrastructure development on lines dedicated to Alcoa traffic, we consider that expansions of capacity which benefit all users are best funded by the railway owner.

Were Alcoa to invest in the expansion, we consider that the current interpretation of the Code which increases the ceiling price and relies on overpayments to resolve third party contributions does not encourage third party investment. The recent amendment to the Code (Schedule 4 clause 6) provides a mechanism to negotiate the price for access taking into account the contributions by each party, however, we have been unable to reach a satisfactory outcome with the railway owner and we would suggest that a more formal process is required.

We recommend that the Authority reviews the approach in other jurisdictions which only allow capital charges in the ceiling calculation for infrastructure funded by the access provider and exclude payments by other parties e.g. government, operators or customers. The Code should be amended to redefine capital expenditure to include only funding provided by the railway owner. This amendment would have the additional benefit of providing new access seekers with a "real" access ceiling price. The real access ceiling would exclude contributed assets and indicate the maximum revenue attributable to access. Access seekers would then be free to negotiate any reduction from this figure rather than an inflated figure which includes revenue from other sources.

2. Competitive Advantage to AWR

It is our view that there is a competitive advantage to AWR as the owner of terminals and depots connected to the WestNet Rail network. During the tendering of Alcoa's above rail business in 2000,

several interstate tenderers had no choice but to include new depot facilities and marshalling yards in their bids. Whilst existing facilities are not available to new entrants and there is only limited availability of land suitable for these activities, we consider that AWR has a competitive advantage in bidding for above rail operations in Western Australia and that changes to the definition of railway infrastructure in the Code may be helpful.

3. Impact of track upgrades on users

We consider that there is currently no incentive for the railway owner to minimise the disruption to users during upgrade works. There is currently no protection within the Code or the standard access agreement for users and it is our experience that the additional costs borne by users are unacceptably high.

This is best illustrated by reference to the recent upgrade of the track between Pinjarra and Kwinana. The initial suggestion for downtime on this section of line was totally unacceptable to Alcoa as it provided no ability to continue raiing the contracted tonnages required to maintain throughput at our refinery in Kwinana. Various iterations of the downtime schedule were proposed but the final outcome was still unacceptable to Alcoa. As a result, Alcoa has incurred extra costs for the hire of wagons to create longer trains running on an amended schedule. Alcoa has also incurred additional terminal costs associated with stockpiling product and manually clearing product from the unloading area to permit bunched train arrivals during the reduced track access times. These additional costs effectively inflate the access charge to Alcoa but the railway owner does not incur any of these costs. In this case, the user effectively pays an inflated short term rate for access to assist the railway owner to upgrade the line.

In a competitive environment, where an alternative rail line was available, the railway owner would either accommodate the requirements of its customers or lose the business to the competitive line resulting in a complete loss of revenue during the line closure. In the current situation, where there is a monopoly provider of rail access, the rail access regime should provide users with the same level of service that could be expected in a competitive environment. The Code, in its current form, does not require the railway owner to operate in this way. In fact the Code (through the Train Management Guidelines) says that the railway owner "..... need not obtain the Operator's consent to such repairs, maintenance or upgrading, or possession of the Network." Though the railway owner is required to consult with operators, in reality, the ability to negotiate with a monopoly provider is limited. It should also be noted that during discussions with WestNet over the terms of the Standard Access Agreement, WestNet would not amend its right to take possession of the track at any time whilst offering to take all reasonable steps to minimise any disruption. WestNet would also not accept any requirement to gain the above rail operator's consent to the train paths operating during the upgrade.

With additional costs to Alcoa in the order of \$500,000 during the six months of this upgrade, we consider that there is an important role for the Authority to assess the fairness of track downtime schedules.

We recommend that the Authority should become more "hands-on" in the assessment of the railway owner's behaviour with regard to such issues as network capacity, train management guidelines including downtime schedules and access agreements.

Response to other issues in the Issues Paper

In the following sections of this submission, Alcoa has responded to other questions or discussion points raised in the Issues Paper where these have relevance to Alcoa's operations. Where possible, the responses are linked to the discussions in Section 6 of the Issues Paper.

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

Alcoa is still negotiating the terms and conditions of its Access Agreement with WestNet Rail, more than three years after the Proposal for Access was lodged. We consider that the Standard Access Agreement provided by WestNet Rail did not adequately protect the operator and therefore Alcoa sought amendments to the standard clauses to adequately protect its future access requirements. Given that there have been no finalised access agreements under the Code, we would suggest that any review conducted at this stage will inevitably be incomplete.

6.2 Public Interest Test

The current structure of the Code provides little incentive for investment. The use of GRV as the basis for establishing ceiling prices provides the necessary return of and return on the investment but not over the same time period or rate as the railway owner would seek directly from customers. This situation is further compounded by a lack of direct government assistance to WestNet to create adequate capacity on the network ahead of demand from traditional or new users.

It has been our experience in the last twelve months that any request for additional train paths is resulting in a capacity constraint on the South West Main and requests from the railway owner to Alcoa to fund expansion of the network. Given the different treatment of capital investment by the railway owner and the Authority, the railway owner is showing no interest in investing and is seeking additional contributions from users. Since any contributions by users are then included in the calculation of the ceiling price, there is little incentive for investment by the users either. We consider that the definitions in the Code are not promoting investment and are not in the best interests of economic and regional development as they are reducing our competitiveness in the export market.

We would also assert that the Issues Paper is not correct in stating that "the WNR capital program has been more targeted to upgrades and capacity increases on rail lines where higher volumes (e.g. the

Kwinana to Bunbury rail line) enable an adequate return on such investments"¹ otherwise why would the railway owner be seeking additional access payments for investment in capacity increases on this line.

6.3 Coverage of services

Terminals and sidings

Whilst access to terminals and sidings was not tested when Alcoa tendered its above rail transport task in 2000, it was noted that several interstate operators expressed concerns about access to marshalling yards and rollingstock maintenance facilities given that the incumbent operator owned all these facilities under the Westrail sale process. Given the disputes in other jurisdictions, and the competitive advantage afforded to the incumbent above rail operator, the Authority should consider including additional facilities under the control of the railway owner in future amendments to the Act.

6.5 Negotiation Framework

"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?"

The current lack of competitive above rail intrastate operators is a major impediment to achieving efficient freight rates. Experienced interstate operators providing intrastate haulage would provide a depth of knowledge on interstate track access rates and train path utilisation which could result in lower freight rates. Whilst Alcoa has attempted to test this market through a tender process for above rail haulage, the impediments to an interstate operator establishing a base in Western Australia were significant and the Authority needs to find ways to address this imbalance.

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

We consider that negotiation arrangements could be improved by requiring regulatory review of the Standard Access Agreement to provide a more meaningful starting point for negotiation of access terms. Further, assistance from the Regulator as a mediator on issues as they arise during negotiations of the access terms would reduce the time taken to reach agreement.

"Is there merit in introducing a capacity register?"

¹ ERA Issues Paper: Review of the Western Australian Railways (Access) Code 2000 Section 6.2 Public Interest Test, page 33

We would also see a benefit in the requirement to publish a Capacity Register for parts of the network where allocated train paths are likely to exceed, say, 60% to 70% of available capacity. More importantly, the railway owner should be obliged to provide detailed information to support any proposed requirement for additional infrastructure to meet increasing demand and the basis for allocating the cost of any expansion solely to the user or operator triggering the expansion should be reviewed.

6.7 Appropriate Terms and Conditions

Whilst there is now a difference between the WA Code and other interstate regimes with regard to GRV versus DORC, it is our view that the longer term stability of the GRV calculation would be beneficial provided that the Code clarifies the definitions of contributed assets.

We do not agree with the assertion in the Issues Paper that "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."² This statement ignores the fact that monopoly providers will attempt to either negotiate as close to the upper bound as possible or creep prices towards the upper bound over time when negotiating with customers who, by the nature of their business, are captive to rail.

There appears to be major departure from the approach used or suggested for other jurisdictions³ where customer funded or government funded capital investments are not included in the ceiling price. We consider that this approach should be rectified in the Code and not left to the discretion of the Regulator in approving the Costing Principles.

"Do the railway owner's standard access agreements provide a fair and reasonable contract template?"

As previously stated, we do not consider that the Standard Access Agreement provided to Alcoa provided a reasonable starting point for negotiations and we would suggest that the Code should include a review and approval of the Standard Access Agreement issued by the railway owner under clause 9. The Code should include a requirement on the railway owner to submit Standard Access Agreement for approval as a "Part 5 instrument".

"Should users have some right to seek Authority involvement in contracts which have been established 'outside the Code'?"

² ERA Issues Paper: Review of the Western Australian Railways (Access) Code 2000 page 41

³ For example, the Victorian Department of Infrastructure Proposed Legislative Framework Reforms, December 2004, Section 4.2 Capital Charges, page 12

Alcoa believes that the Authority should provide assistance to users who have agreements outside the Code and are actively seeking to "transfer in". In Alcoa's case, we have submitted a Proposal for Access even though we have an interim access agreement. The proposal restates our current requirements for access and any changes which we sought at the time of application. However, we have been unable to gain assistance from the Authority with disputes occurring in relation to our interim access agreement even while we are attempting to "transfer in". A more active involvement by the Authority during this interim stage would, in our view, speed up the process of achieving access under the Code.

We also consider that customers with long term contracts which pre-date the introduction of the Code should have access to the Authority if they aim to negotiate access under the Code at the expiry of those contracts.

We do not see a role for the Authority's involvement in contracts signed outside the Code since the Code was introduced as these users have elected to remain outside the Code and presumably rely on the contract terms to provide adequate safeguards.

In all cases, we would assume that the Authority will still intervene in common issues such as network capacity, train paths and train management guidelines.

6.8 Institutional Arrangements

"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)."

Refer to Executive Summary item 3.

We submit these comments for consideration as part of the review of the Code. If you require any further information or clarification of any of the points raised in this submission, please feel free to contact me.

Yours faithfully

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Alcoa World Alumina Australia