Review of the Railways (Access) Code

Issues Paper

October 2009

Economic Regulation Authority
WESTERN AUSTRALIA

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For further information, contact:

Economic Regulation Authority
Perth, Western Australia
Phone: (08) 9213 1900

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EXECUTIVE SUMMARY

1. The Economic Regulation Authority (**Authority**) has prepared this issues paper to assist interested parties in making submissions on the Authority's proposed review of the *Railways (Access) Code 2000* (**Code**).

2. The review is being undertaken pursuant to the provisions of section 12 of the *Railways (Access) Act 1998* (**Act**).

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

4. In addition to the issues relating to the each part of the Code, as listed below, interested parties may also provide comment on any matters within the scope of the Authority's review which may be considered relevant.

List of Issues

Parts 1 and 2A

- Whether the required information specified under sections 6(a) and 6(b) is sufficient for prospective access seekers to gain a preliminary understanding of the railway network characteristics and relevant route section infrastructure capability and traffic loads.
- Whether the required information specified under sections 6(a) and 6(b) should be provided on the railway owner's web site, in circumstances where a railway owner has a web site, as well as in published hard copy format.

Part 2

- Whether the extent of information, which entities seeking access can request from the railway owner under section 7, is sufficient to allow such entities to properly prepare a proposal for access pursuant to section 8.
- Whether it may be of benefit, under section 7(1)(a)(i), for entities seeking access to also be provided with forecasts of available capacity over future years (up to three years ahead for example) in order to have a more complete indication of available capacity.
- Whether a further clause should be added to section 7 noting that any capacity information provided by the railway owner must be compiled on a reasonable basis consistent with the railway owner's obligation not to unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner (consistent with the requirements under section 16(2)).
- Whether section 9 should allow for the railway owner to also provide floor and ceiling prices to a proponent for future upgradings to rail infrastructure to meet that proponent's proposed traffic requirements. This would require the GRV methodology under Schedule 4 to be amended to provide for forecast rail infrastructure upgrading expenditure to be taken into account.

Part 3 (Divisions 1 and 2)

- Whether, under section 15, sufficient information is able to be obtained from the railway owner by a proponent pursuant to sections 6 and 7, to show that its proposed

rail operations can be accommodated on the relevant route or that an upgrading, if required, is technically and economically feasible.

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

Part 3 (Division 3)

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

Part 5

- Whether section 45 should include the costing principles and over-payment rules in order to ensure consistency in the public consultation process across all four Part 5 Instruments.
- Whether a provision should be included providing for reviews of the Part 5 Instruments after a specific period (for example 5 years or as otherwise determined by the Authority).
- Whether in the case of section 42, relating to public consultation of segregation arrangements or variations to segregation arrangements, provision should be made to only require such consultation for variations to segregation arrangements considered by the Authority to constitute material changes.

Schedules

- Whether the definition under section 52 of Schedule 1 needs to be more clearly defined with respect to the term ‘railway’.
- Whether under Schedule 2; (a) any clarification of any of the items listed under this schedule is required or (b) there is a need for any further information to be made available by the railway owner under this schedule. These matters have also been discussed in this issues paper under Parts 1 and 2A of the Code.
- Whether section 3(2) of Schedule 4 should include the requirement that for a new railway under the Code, the public consultation arrangements set out under sections 3(3) to 3(5) of Schedule 4 should apply to the initial WACC determination under the Code for this railway.
- Whether Schedule 4 should include provisions setting out a review period for floor and ceiling determinations, along similar lines to that suggested for the Part 5 Instruments and segregation arrangements (ie; five years or as otherwise determined by the Authority).
- Whether the GRV methodology under section 2 of Schedule 4 should be amended to include the provision for floor and ceiling cost calculations to take into account forecast expenditure by the railway owner on the upgrading of rail routes as previously discussed in this issues paper under Part 2 of the Code.

INTRODUCTION

Background

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

6. Part 2 of the Act provides for the establishment of the Code as subsidiary legislation. The Code contains provisions as set out under the requirements of Part 2 of the Act, including the process for the negotiation of access agreements between the railway owner and the entity seeking access, the arbitration of disputes during the course of such negotiations and the Regulator's role in this process.

7. The Authority is the Regulator responsible for administering the Regime.

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

9. In October 2004, the Authority commenced its first review of the Code by publishing a notice on its web site advising that the review had commenced. The first stage of the review involved the Authority publishing an issues paper seeking comment on the issues to be considered in the review of the Code. A Draft Report was published by the Authority on 1 July 2005. A workshop was held subsequent to the release of the Draft Report to discuss issues relating this report.

10. The Final Report was provided to the Treasurer on 23 September 2005 and following the Treasurer's approval, was published by the Authority on 5 December 2005.

11. Following consideration by the Government and a further round of public consultation by the Treasurer in accordance with section 10 of the Act, the Treasurer gazetted amendments to the Code on 23 June 2009.

Legislative Requirements

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

13. As Code commenced in 2001, the first review was required to be undertaken in 2004. The first review has been completed as outlined above. The second review is required to be undertaken in 2009, five years after the third anniversary of the Code's commencement.

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

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

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

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

17. Copies of the Act and the Code are available on the Authority's website (www.era.wa.gov.au).

Scope of the Review

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

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

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

21. The Competition Principles Agreement provides a framework to allow third parties to access significant infrastructure facilities which exhibit natural monopoly characteristics and cannot be duplicated economically.

22. The definition under the Act means that the relevant version of the Competition Principles Agreement of 11 April 1995, for the purpose of the Code review, is the most recent version of this agreement. The Authority understands that the Competition Principles Agreement of 11 April 1995, as amended to 13 April 2007, is the most recent version. A copy of this amended version of the Competition Principles Agreement (**CPA**) is attached as Appendix 1.

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

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

Invitation for Submissions

25. The Authority is inviting interested parties to make submissions on particular matters identified in this issues paper or on any other matters relevant to the scope of the Authority's Code review.

26. Submissions in printed form should be sent to:

    Review of the *Railways (Access) Code 2000*
    Economic Regulation Authority
    PO Box 8469
    Perth BC WA 6849

    Electronic submissions should be sent to: publicsubmissions@era.wa.gov.au

27. In general, submissions made to the Authority will be treated as in the public domain and placed on the Authority's web site. Where an interested party wishes to make a submission in confidence, it should clearly indicate the parts of the submission for which confidentiality is claimed and specify in reasonable detail the basis for the claim. Any claim of confidentiality will be considered in accordance with the provisions of Section 50 of the *Code.*

28. The receipt and publication of a submission on the Authority's web site shall not be taken as indicating that the Authority has knowledge either actual or constructive of the contents of a particular submission and, in particular, whether the submission in whole or part contains information of a confidential nature and no duty of confidence will arise for the Authority in these circumstances.

Review Process

29. It is anticipated that the process and timeframe for the Code review will be as follows.

Public Consultation Process	Anticipated Date
Publish Issues Paper inviting submissions	October 2009
Publish Draft Report inviting submissions	April 2010
Stakeholder workshop (if required)	May 2010
Final Report provided to the Treasurer	August 2010

KEY ISSUES

30. The Code has been divided into the following sections:

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

31. Each of the above areas is discussed below with key issues being identified relating to each segment of the Code.

Parts 1 and 2A – Preliminary and Publication of Information

Code Provisions

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

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

Key Issues

34. The key issues of relevance to Parts 1 and 2A of the Code would appear to be as follows:

- Is the required information, specified under section 6(a) and 6(b), sufficient for prospective access seekers to gain a preliminary understanding of the railway network characteristics and relevant route section infrastructure capability and traffic loads.
- Should the required information be provided on the railway owner's web site as well as in published hard copy format.

35. In relation to the second point, the Authority's view is that where a railway owner has a web site, such information should be also made available on the web site in order to facilitate access to this information by prospective access seekers.

Submissions are invited on Parts 1 and 2A of the Code in relation to:

- Whether the required information specified under sections 6(a) and 6(b) is sufficient for prospective access seekers to gain a preliminary understanding of the railway network characteristics and relevant route section infrastructure capability and traffic loads.
- Whether the required information specified under sections 6(a) and 6(b) should be provided on the railway owner's web site, in circumstances where a railway owner has a web site, as well as in published hard copy format.
- Any other matters relating to these parts of the Code.

Part 2 – Proposals for Access

Code Provisions

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

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

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

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

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

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

Key Issues

42. Key issues of relevance to Part 2 of the Code would appear to be as follows:

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

- Whether the obligations on the railway owner to respond, under section 9, to a proposal made by a proponent under section 7 provide the proponent with a sufficient level of information to proceed to the negotiation stage.

43. In relation to the first of the above issues, one of the principal matters relates to the available capacity of the relevant route. Section 7(1)(a)(i) requires the railway owner to provide an indication of the current available capacity. It may also be of benefit to entities seeking access to be provided with forecasts of available capacity over future years (up to three years ahead for example) in order to have a more complete indication of available capacity. This is likely to be of particular significance where the railway owner has above-rail operations which utilise capacity on the route to which access is being sought.

44. As a further point in relation to capacity information supplied by the railway owner, It may also be worth considering whether a further clause should be added to section 7 noting that any capacity information provided must be compiled on a reasonable basis consistent with the railway owner's obligation not to unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner (consistent with the requirements under section 16(2)).

45. With regard to the second issue outlined above, section 9 prevents a railway owner providing floor and ceiling prices to a proponent where the proposal requires an upgrade to the railway along the route on which access is sought. In this case the railway owner would not be able provide the proponent with the floor and ceiling prices as required under section 9(1)(c) because section 9 requires these floor and

ceiling prices to be assessed based on infrastructure as it exists (section 9(2)(a)) and excludes any proposed extension or expansion.

46. The process for calculation of floor and ceiling costs under the Code is based on an assessment of the Gross Replacement Value (**GRV**) of railway assets as existing at the time the GRV is undertaken, as set out under Schedule 4. Forecast upgradings of rail infrastructure are not taken into account under the GRV methodology outlined in Schedule 4. The Code only provides for the railway owner to provide floor and ceiling prices relevant to an upgrading at the time the upgrading has been completed. This could lead to potential difficulty both for a proponent wishing to enter into an access agreement under the Code and for the rail owner in seeking to negotiate an agreement to undertake such an upgrading under these circumstances.

Submissions are invited on Part 2 of the Code in relation to:

- Whether the extent of information, which entities seeking access can request from the railway owner under section 7, is sufficient to allow such entities to properly prepare a proposal for access pursuant to section 8.
- Whether it may be of benefit, under section 7(1)(a)(i), for entities seeking access to also be provided with forecasts of available capacity over future years (up to three years ahead for example) in order to have a more complete indication of available capacity.
- Whether a further clause should be added to section 7 noting that any capacity information provided by the railway owner must be compiled on a reasonable basis consistent with the railway owner's obligation not to unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner (consistent with the requirements under section 16(2)).
- Whether section 9 should allow for the railway owner to also provide floor and ceiling prices to a proponent for future upgradings to rail infrastructure to meet that proponent's proposed traffic requirements. This would require the GRV methodology under Schedule 4 to be amended to provide for forecast rail infrastructure upgrading expenditure to be taken into account.
- Any other matters relating to this part of the Code.

Part 3 – Negotiations (Divisions 1 and 2)

Code Provisions

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

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

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

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

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

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

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

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

Key Issues

55. The key issues of relevance to Part 3 (Divisions 1 and 2) of the Code would appear to be as follows:

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

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

Submissions are invited on Part 3 (Divisions 1 and 2) of the Code in relation to:

- Whether, under section 15, sufficient information is able to be obtained from the railway owner by a proponent pursuant to sections 6 and 7, to show that its proposed rail operations can be accommodated on the relevant route or that an upgrading, if required, is technically and economically feasible.
- Whether, under section 16, there is a need to expand 16(2) to clarify the intended meaning of the term "unfairly discriminate" in this context.
- Any other matters relating to this part of the Code.

Part 3 – Negotiations (Division 3)

Code Provisions

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

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

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

Key Issues

59. The key issue of relevance to Part 3 (Division 3) of the Code would appear to be the limited set of circumstances which an entity seeking access can refer to arbitration under the Code. Any disputes which may arise between the entity seeking access and the railway owner in relation to the provision of information prior to the proponent making a proposal pursuant to section 8 are not considered to be disputes for the purpose of arbitration under section 25. Similarly, any disputes which may arise relating to the proponent's proposal or the railway owner's response to the proposal, under Part 2 of the Code, are also not disputes which can be referred to arbitration under section 25.

60. The Act (section 36) notes that the obligations imposed by the Code are enforceable by arbitration under the Code or by section 37 of the Act. Section 37 provides that the Supreme Court may grant an injunction for conduct which breaches the Code other than conduct where a remedy by arbitration under the Code is available. Under this section, the Authority or the entity seeking access may make an application to the Supreme Court seeking such an injunction.

Submissions are invited on Part 3 (Division 3) of the Code in relation to:

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

Part 4 – Access Agreements

Code Provisions

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

Key Issues

62. The Authority is not aware of any issues where parties may have concerns in relation to Part 4 of the Code.

Submissions are invited on any of the matters covered in the provisions under Part 4 of the Code.

Part 5 – Certain approval functions of the Regulator

Code Provisions

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

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

Key Issues

65. The key issues of relevance to Part 5 of the Code would appear to be as follows

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

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

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

66. In relation to the first issue above, the Authority's approach has been to apply the same public consultation arrangements, as required under section 45 of the Code (which relates to the railway owner's initial train management guidelines and train path policy instruments) to all four initial instruments in the interests of consistency. The suggested changes to section 45 would therefore reflect the approach currently taken by the Authority.

67. With regard to the second matter mentioned above, Part 5 of the Code does not provide for any review periods for the Part 5 Instruments. The Authority has included in these instruments a review period. The review periods currently range from two years for the railway owner's initial instruments to five years for revised instruments. The current wording under Part 5 of the Code allows the Authority to require amendments to an instrument but makes no mention of reviews to these instruments. The suggested changes would make the Code clearer in this regard and reflect the approach currently taken by the Authority.

68. In relation to the third dot point above, the public consultation requirements under section 42 require the advertising of the railway owner's segregation arrangements or variations to these arrangements in daily and national newspapers. It would appear reasonable, in the interests of efficiency and timeliness, to not require section 42 to apply to non-material changes to segregation arrangements.

Submissions are invited on Part 5 of the Code in relation to:

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

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

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

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

Part 6 – General

Code Provisions

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

Key Issues

70. The Authority is not aware of any issues where parties may have concerns in relation to Part 4 of the Code.

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

Submissions are invited on any of the matters covered in the provisions under Part 6 of the Code.

Schedules

Code Provisions

72. The Code contains five schedules, as follows:

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

Key Issues

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

74. The key issues of relevance to the schedules in the Code would appear to be as follows:

- Whether the definition under section 52 of Schedule 1 needs to be more clearly defined with respect to the term ‘railway’.
- Whether under Schedule 2; (a) any clarification of the items listed under this schedule is required or (b) there is need for further information to be made available by the railway owner under this schedule. These matters have also been discussed in this issues paper under Parts 1 and 2A of the Code.

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

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

- Whether the GRV methodology under section 2 of Schedule 4 should be amended to include the provision for floor and ceiling cost calculations to take into account forecast expenditure by the railway owner on the upgrading of rail routes as discussed in this issues paper under Part 2 of the Code.

75. In relation to the first point above, section 52 of Schedule 1 mentions "…the railway constructed pursuant to the TPI Railway and Port Agreement". However, there are three railways mentioned in the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004.* These railways are the SRL Railway (from the port boundary to the Cloud Break minesite), the Port Railway (the railway inside the port boundaries) and the Railway (the entire railway consisting of the Port Railway and the SRL Railway).

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

77. With regard to the second item, the issue is whether the level of information required to be provided by the railway owner pursuant to section 6 of the Code is appropriate. It should be noted that the extent of information required to be provided has already been expanded as a result of the previous Code review.

78. The fourth dot point relates to the issue that a new railway coming into the Code should require public consultation as part of the assessment process for the Authority's initial WACC determination. In the case of the TPI railway for example, the Authority adopted such an approach.

79. The next issue concerns the matter of ensuring consistency with review arrangements for the Part 5 Instruments, segregation arrangements and floor and ceiling cost determinations. In regard to floor and ceiling determinations, these are currently reviewed every three years. Extending these reviews to five years would be consistent with other regulatory regimes, such as the national gas access regime. The issue of being able to deal appropriately with the railway owner's forecast capital expenditure incurred during the reset period is likely to be of relevance in considering an extension to the floor and ceiling costs determination review period.

Submissions are invited on the Schedules in the Code in relation to:

- Whether the definition under section 52 of Schedule 1 needs to be more clearly defined with respect to the term 'railway'.
- Whether under Schedule 2; (a) any clarification of any of the items listed under this schedule is required or (b) there is a need for any further information to be made available by the railway owner under this schedule. These matters have also been discussed in this issues paper under Parts 1 and 2A of the Code.
- Whether section 3(2) of Schedule 4 should include the requirement that for a new railway under the Code, the public consultation arrangements set out under sections 3(3) to 3(5) of Schedule 4 should apply to the initial WACC determination under the Code for this railway.
- Whether Schedule 4 should include provisions setting out a review period for floor and ceiling determinations, along similar lines to that suggested for the Part 5 Instruments and segregation arrangements (ie; five years or as otherwise determined by the Authority).
- Whether the GRV methodology under section 2 of Schedule 4 should be amended to include the provision for floor and ceiling cost calculations to take into account forecast expenditure by the railway owner on the upgrading of rail routes as previously discussed in this issues paper under Part 2 of the Code.
- Any other matters relating to the schedules in the Code.

APPENDICES

APPENDIX 1 Competition Principles Agreement

Competition Principles Agreement – 11 April 1995

(As amended to 13 April 2007)

WHEREAS the Council of Australian Governments at its meeting in Hobart on 25 February 1994 agreed to the principles of competition policy articulated in the report of the *National Competition Policy Review*;

AND WHEREAS the Parties intend to achieve and maintain consistent and complementary competition laws and policies which will apply to all businesses in Australia regardless of ownership;

THE COMMONWEALTH OF AUSTRALIA

THE STATE OF NEW SOUTH WALES

THE STATE OF VICTORIA

THE STATE OF QUEENSLAND

THE STATE OF WESTERN AUSTRALIA

THE STATE OF SOUTH AUSTRALIA

THE STATE OF TASMANIA

THE AUSTRALIAN CAPITAL TERRITORY, AND

THE NORTHERN TERRITORY OF AUSTRALIA agree as follows:

Interpretation

1.(1) In this Agreement, unless the context indicates otherwise:

"Commission" means the Australian Competition and Consumer Commission established by the Trade Practices Act;

"Commonwealth Minister" means the Commonwealth Minister responsible for competition policy;

"constitutional trade or commerce" means:

(a) trade or commerce among the States;

(b) trade or commerce between a State and a Territory or between two Territories; or

(c) trade or commerce between Australia and a place outside Australia;

"Council" means the National Competition Council established by the Trade Practices Act;

"jurisdiction" means the Commonwealth, a State, the Australian Capital Territory or the Northern Territory of Australia;

"Party" means a jurisdiction that has executed, and has not withdrawn from, this Agreement;

"Trade Practices Act" means the *Trade Practices Act 1974*.

2. Where this Agreement refers to a provision in legislation which has not been enacted at the date of commencement of this Agreement, or to an entity which has not been established at the date of commencement of this Agreement, this

Agreement will apply in respect of the provision or entity from the date when the provision or entity commences operation.

3. 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 businesses; and

   j. the efficient allocation of resources.

4. It is not intended that the matters set out in subclause (3) should affect the interpretation of "public benefit" for the purposes of authorisations or notifications under the Trade Practices Act.

5. This Agreement is neutral with respect to the nature and form of ownership of business enterprises. It is not intended to promote public or private ownership.

Prices Oversight of Government Business Enterprises

2.(1) Prices oversight of State and Territory Government business enterprises is primarily the responsibility of the State or Territory that owns the enterprise.

(2) The Parties will work cooperatively to examine issues associated with prices oversight of Government business enterprises and may seek assistance in this regard from the Council. The Council may provide such assistance in accordance with the Council's work program.

(3) In accordance with these principles, State and Territory Parties will consider establishing independent sources of price oversight advice where these do not exist.

(4) An independent source of price oversight advice should have the following characteristics:

(a) it should be independent from the Government business enterprise whose prices are being assessed;

(b) its prime objective should be one of efficient resource allocation but with regard to any explicitly identified and defined community service obligations

imposed on a business enterprise by the Government or legislature of the jurisdiction that owns the enterprise;

(c) it should apply to all significant Government business enterprises that are monopoly, or near monopoly, suppliers of goods or services (or both);

(d) it should permit submissions by interested persons; and

(e) its pricing recommendations, and the reasons for them, should be published.

(5) A Party may generally or on a case-by-case basis:

(a) with the agreement of the Commonwealth, subject its Government business enterprises to a prices oversight mechanism administered by the Commission; or

(b) with the agreement of another jurisdiction, subject its Government business enterprises to the pricing oversight process of that jurisdiction.

(6) In the absence of the consent of the Party that owns the enterprise, a State or Territory Government business enterprise will only be subject to a prices oversight mechanism administered by the Commission if:

(a) the enterprise is not already subject to a source of price oversight advice which is independent in terms of the principles set out in subclause (4);

(b) a jurisdiction which considers that it is adversely affected by the lack of price oversight (an "affected jurisdiction") has consulted the Party that owns the enterprise, and the matter is not resolved to the satisfaction of the affected jurisdiction;

(c) the affected jurisdiction has then brought the matter to the attention of the Council and the Council has decided:

(i) that the condition in paragraph (a) exists; and

(ii) that the pricing of the enterprise has a significant direct or indirect impact on constitutional trade or commerce;

(d) the Council has recommended that the Commonwealth Minister declare the enterprise for price surveillance by the Commission; and

(e) the Commonwealth Minister has consulted the Party that owns the enterprise.

Competitive Neutrality Policy and Principles

3.(1) The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities.

(2) Each Party is free to determine its own agenda for the implementation of competitive neutrality principles.

(3) A Party may seek assistance with the implementation of competitive neutrality principles from the Council. The Council may provide such assistance in accordance with the Council's work program.

(4) Subject to subclause (6), for significant Government business enterprises which are classified as "Public Trading Enterprises" and "Public Financial Enterprises" under the Government Financial Statistics Classification:

(a) the Parties will, where appropriate, adopt a corporatisation model for these Government business enterprises (noting that a possible approach to corporatisation is the model developed by the inter-governmental committee responsible for GTE National Performance Monitoring); and

(b) the Parties will impose on the Government business enterprise:

(i) full Commonwealth, State and Territory taxes or tax equivalent systems;

(ii) debt guarantee fees directed towards offsetting the competitive advantages provided by government guarantees; and

(iii) those regulations to which private sector businesses are normally subject, such as those relating to the protection of the environment, and planning and approval processes, on an equivalent basis to private sector competitors.

(5) Subject to subclause (6), where an agency (other than an agency covered by subclause (4)) undertakes significant business activities as part of a broader range of functions, the Parties will, in respect of the business activities:

(a) where appropriate, implement the principles outlined in subclause (4); or

(b) ensure that the prices charged for goods and services will take account, where appropriate, of the items listed in paragraph 4(b), and reflect full cost attribution for these activities.

(6) Subclauses (4) and (5) only require the Parties to implement the principles specified in those subclauses to the extent that the benefits to be realised from implementation outweigh the costs.

(7) Subparagraph (4)(b)(iii) shall not be interpreted to require the removal of regulation which applies to a Government business enterprise or agency (but which does not apply to the private sector) where the Party responsible for the regulation considers the regulation to be appropriate.

(8) Each Party will publish a policy statement on competitive neutrality by June 1996. The policy statement will include an implementation timetable and a complaints mechanism.

(9) Where a State or Territory becomes a Party at a date later than December 1995, that Party will publish its policy statement within six months of becoming a Party.

(10) Each Party will publish an annual report on the implementation of the principles set out in subclauses (1), (4) and (5), including allegations of non-compliance.

Structural Reform of Public Monopolies

4.(1) Each Party is free to determine its own agenda for the reform of public monopolies.

(2) Before a Party introduces competition to a sector traditionally supplied by a public monopoly, it will remove from the public monopoly any responsibilities for industry regulation. The Party will re-locate industry regulation functions so as to prevent the former monopolist enjoying a regulatory advantage over its (existing and potential) rivals.

(3) Before a Party introduces competition to a market traditionally supplied by a public monopoly, and before a Party privatises a public monopoly, it will undertake a review into:

(a) the appropriate commercial objectives for the public monopoly;

(b) the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly;

(c) the merits of separating potentially competitive elements of the public monopoly;

(d) the most effective means of separating regulatory functions from commercial functions of the public monopoly;

(e) the most effective means of implementing the competitive neutrality principles set out in this Agreement;

(f) the merits of any community service obligations undertaken by the public monopoly and the best means of funding and delivering any mandated community service obligations;

(g) the price and service regulations to be applied to the industry; and

(h) the appropriate financial relationships between the owner of the public monopoly and the public monopoly, including the rate of return targets, dividends and capital structure.

(4) A Party may seek assistance with such a review from the Council. The Council may provide such assistance in accordance with the Council's work program.

Legislation Review

5.(1) The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:

(a) the benefits of the restriction to the community as a whole outweigh the costs; and

(b) the objectives of the legislation can only be achieved by restricting competition.

(2) Subject to subclause (3), each Party is free to determine its own agenda for the reform of legislation that restricts competition.

(3) Subject to subclause (4) each Party will develop a timetable by June 1996 for the review, and where appropriate, reform of all existing legislation that restricts competition by the year 2000.

(4) Where a State or Territory becomes a Party at a date later than December 1995, that Party will develop its timetable within six months of becoming a Party.

(5) Each Party will require proposals for new legislation that restricts competition to be accompanied by evidence that the legislation is consistent with the principle set out in subclause (1).

(6) Once a Party has reviewed legislation that restricts competition under the principles set out in subclauses (3) and (5), the Party will systematically review the legislation at least once every ten years.

(7) Where a review issue has a national dimension or effect on competition (or both), the Party responsible for the review will consider whether the review should be a national review. If the Party determines a national review is appropriate, before determining the terms of reference for, and the appropriate body to conduct the national review, it will consult Parties that may have an interest in those matters.

(8) Where a Party determines a review should be a national review, the Party may request the Council to undertake the review. The Council may undertake the review in accordance with the Council's work program.

(9) Without limiting the terms of reference of a review, a review should:

(a) clarify the objectives of the legislation;

(b) identify the nature of the restriction on competition;

(c) analyse the likely effect of the restriction on competition and on the economy generally;

(d) assess and balance the costs and benefits of the restriction; and

(e) consider alternative means for achieving the same result including non-legislative approaches.

(10) Each Party will publish an annual report on its progress towards achieving the objective set out in subclause (3). The Council will publish an annual report consolidating the reports of each Party.

Note: The Council of Australian Governments at its meeting on 3 November 2000 agreed to the following amendment to this Agreement to provide further guidance to the Council on how to assess whether jurisdictions have met their legislative review commitments.

In assessing whether the threshold requirement of clause 5 has been achieved, the Council should consider whether the conclusion reached in the report is within a range of outcomes that could reasonably be reached based on the information available to a properly constituted review process. Within the range of outcomes that could reasonably be reached, it is a matter for Government to determine what policy is in the public interest.

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) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5).

There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

(3A) In assessing whether a State or Territory access regime is an effective access regime under the *Trade Practices Act 1974*, the assessing body:

(a) should, as required by the *Trade Practices Act 1974*, and subject to section 44DA, not consider any matters other than the relevant principles in this Agreement. Matters which should not be considered include the outcome of any arbitration, or any decision, made under the access regime; and

(b) should recognise that, as provided by subsection 44DA(2) of the *Trade Practices Act 1974*, an access regime may contain other matters that are not inconsistent with the relevant principles in this Agreement

(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 access 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.

(5) A State, Territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) should incorporate the following principles:

(a) Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.

(b) Regulated access prices should be set so as to:

(i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;

(ii) allow multi-part pricing and price discrimination when it aids efficiency;

(iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

(iv) provide incentives to reduce costs or otherwise improve productivity.

(c) Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:

(i) may request new information where it considers that it would be assisted by the introduction of such information;

(ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; and

(iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.

Application of the Principles to Local Government

7.(1) The principles set out in this Agreement will apply to local government, even though local governments are not Parties to this Agreement. Each State and Territory Party is responsible for applying those principles to local government.

(2) Subject to subclause (3), where clauses 3, 4 and 5 permit each Party to determine its own agenda for the implementation of the principles set out in those clauses, each State and Territory Party will publish a statement by June 1996:

(a) which is prepared in consultation with local government; and

(b) which specifies the application of the principles to particular local government activities and functions.

(3) Where a State or Territory becomes a Party at a date later than December 1995, that Party will publish its statement within six months of becoming a Party.

Funding of the Council

8. The Commonwealth will be responsible for funding the Council.

Appointments to the Council

9.(1) When the Commonwealth proposes that a vacancy in the office of Council President or Councillor of the Council be filled, it will send written notice to the States and Territories that are Parties inviting suggestions as to suitable persons

to fill the vacancy. The Commonwealth will allow those Parties a period of thirty five days from the date on which the notice was sent to make suggestions before sending a notice of the type referred to in subclause (2).

(2) The Commonwealth will send to the States and Territories that are Parties written notice of persons whom it desires to put forward to the Governor-General for appointment as Council President or Councillor of the Council.

(3) Within thirty five days from the date on which the Commonwealth sends a notice of the type referred to in subclause (2), the Party to whom the Commonwealth sends a notice will notify the Commonwealth Minister in writing as to whether the Party supports the proposed appointment. If the Party does not notify the Commonwealth Minister in writing within that period, the Party will be taken to support the proposed appointment.

(4) The Commonwealth will not put forward to the Governor-General a person for appointment as a Council President or Councillor of the Council unless a majority of the States and Territories that are Parties support, or pursuant to this clause are taken to support, the appointment.

Work Program of the Council, and Referral of Matters to the Council

10.(1) The work of the Council (other than work relating to a function under Part IIIA of the Trade Practices Act or under the Prices Surveillance Act 1983) will be the subject of a work program which is determined by the Parties.

(2) Each Party will refer proposals for the Council to undertake work (other than work relating to a function under Part IIIA of the Trade Practices Act or under the *Prices Surveillance Act 1983*) to the Parties for possible inclusion in the work program.

(3) A Party will not put forward legislation conferring additional functions on the Council unless the Parties have determined that the Council should undertake those functions as part of its work program.

(4) Questions as to whether a matter should be included in the work program will be determined by the agreement of a majority of the Parties. In the event that the Parties are evenly divided on a question of agreeing to the inclusion of a matter in the work program, the Commonwealth shall determine the outcome.

(5) The Commonwealth Minister will only refer matters to the Council pursuant to subsection 29B(1) of the Trade Practices Act in accordance with the work program.

(6) The work program of the Council shall be taken to include a request by the Commonwealth for the Council to examine and report on the matters specified in subclause 2(2) of the Conduct Code Agreement.

Review of the Council

11. The Parties will review the need for, and the operation of, the Council after it has been in existence for five years.

Consultation

12. Where this Agreement requires consultation between the Parties or some of them, the Party initiating the consultation will:

(a) send to the Parties that must be consulted a written notice setting out the matters on which consultation is to occur;

(b) allow those Parties a period of three months from the date on which the notice was sent to respond to the matters set out in the notice; and

(c) where requested by one or more of those Parties, convene a meeting between it and those Parties to discuss the matters set out in the notice and the responses, if any, of those Parties.

New Parties and Withdrawal of Parties

13. (1) A jurisdiction that is not a Party at the date of this Agreement commences operation may become a Party by sending written notice to all the Parties.

(2) A Party may withdraw from this Agreement by sending written notice to all other Parties. The withdrawal will become effective six months after the notice was sent.

(3) If a Party withdraws from this Agreement, this Agreement will continue in force with respect to the remaining Parties.

Sending of Notices

14. A notice is sent to a Party by sending it to the Minister responsible for the competition legislation of that Party.

Review of this Agreement

15. Once this Agreement has operated for five years, the Parties will review its operation and terms.

Commencement of this Agreement

16. This Agreement commences once the Commonwealth and at least three other jurisdictions have executed it.