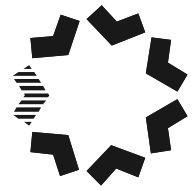


NATIONAL  
COMPETITION  
COUNCIL



# Western Australian Rail Access Regime

Application for certification as an  
effective access regime – section 44M  
*Trade Practices Act 1974 (Cth)*



**Draft Recommendation**

**17 August 2010**

# Table of contents

<b>Abbreviations and defined terms</b> .....	<b>4</b>
<b>1 Draft recommendation</b> .....	<b>5</b>
Invitation to make submissions .....	5
<b>2 Background</b> .....	<b>6</b>
The application and public consultation.....	6
<b>3 The WA Rail Access Regime</b> .....	<b>7</b>
<b>4 Certifying an access regime</b> .....	<b>8</b>
<b>5 Scope of the WA Rail Access Regime: CPA clauses 6(3)(a) and 6(4)(d)</b> .....	<b>11</b>
The scope of the services subject to the regime .....	11
Review of the right to negotiate access.....	15
<b>6 Treatment of interstate issues (clauses 6(2), 6(4)(p))</b> .....	<b>16</b>
<b>7 The negotiation framework: CPA clauses 6(4)(a) – (c), (e), (f), (g), (h), (i), (m), (n), (o)</b> ...	<b>20</b>
Clauses 6(4)(a)–(c): negotiated access .....	20
Clause 6(4)(e): reasonable endeavours .....	24
Clause 6(4)(f): access need not be on exactly the same terms .....	25
Clauses 6(4)(g), (h), (i): dispute resolution .....	26
Clause 6(4)(m): hindering access.....	26
Clause 6(4)(n): separate accounting .....	27
<b>8 The dispute resolution procedure: CPA clauses 6(4)(a) – (c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c))</b> .....	<b>29</b>
Clauses 6(4)(a)–(c): dispute resolution.....	29
Clause 6(4)(g): independent dispute resolution.....	29
Clause 6(4)(h): binding decisions.....	33
Clause 6(4)(i): principles for dispute resolution .....	35
Clause 6(4)(j): facility extension.....	36
Clause 6(4)(k): a material change in circumstances .....	37
Clause 6(4)(l): compensation .....	37
Clause 6(4)(o): access to financial information .....	38
Clause 6(5)(c): merits reviews of arbitration determinations .....	39

<b>9 Efficiency promoting terms and conditions of access .....</b>	<b>41</b>
<b>10 The objects of Part IIIA (s 44AA of the TPA).....</b>	<b>47</b>
<b>11 The duration of certification.....</b>	<b>49</b>
Application and submissions .....	49
Discussion .....	50
<b>12 References.....</b>	<b>52</b>
Tribunal decisions .....	52
Acts and other instruments .....	52
<b>Appendix A — The clause 6 principles .....</b>	<b>53</b>
<b>Appendix B – Index of application and submissions.....</b>	<b>56</b>
<b>Appendix C – Chronology.....</b>	<b>57</b>

## Abbreviations and defined terms

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
Act	<i>Railways (Access) Act 1998 (WA)</i>
ARTC	Australian Rail Track Corporation
BHPBIO	BHP Billiton Iron Ore Pty Ltd
CAA	<i>Commercial Arbitration Act 1985 (WA)</i>
CBH	Cooperative Bulk Handling Ltd
clause 6 principles	The principles set out in clauses 6(2)-6(5) of the Competition Principles Agreement
COAG	Council of Australian Governments
Code	Railways (Access) Code 2000
Council	National Competition Council
CPA	Competition Principles Agreement
ERA	Economic Regulation Authority of Western Australia
ERA Act	<i>Economic Regulation Authority Act 2003 (WA)</i>
GRV	Gross Replacement Value
NWIOA	North West Iron Ore Alliance
OPR	Oakajee Port & Rail Pty Ltd
Part IIIA	Part IIIA of the <i>Trade Practices Act 1974 (Cth)</i>
Part 5 Instruments	Part 5 of the Code requires a railway owner to submit separate subsidiary instruments to the ERA for approval. These instruments include the Train Management Guidelines, the Train Path Policy, the Costing Principles and the Overpayment Rules.
Rail Safety Act	<i>Rail Safety Act 2010 (WA)</i>
Rio Tinto	Rio Tinto Ltd
TPA	<i>Trade Practices Act 1974 (Cth)</i>
TPI Railway	The Pilbara Infrastructure Pty Ltd railway stretching 280 kilometres from Cloudbreak mine in the eastern Pilbara to Port Hedland Port
Tribunal	Australian Competition Tribunal
WA Rail Access Regime or Regime	The rail network access regime established under the Act and Code

## 1 Draft recommendation

- 1.1 Western Australia's rail network access regime (**WA Rail Access Regime**) is established by the *Railways (Access) Act 1998* (WA) (**Act**) and the *Railways (Access) Code 2000* (WA) (**Code**). In accordance with s 44M of the *Trade Practices Act 1974* (Cth) (**TPA**), the Council has considered whether it should recommend that the WA Rail Access Regime be certified as an effective access regime.
- 1.2 The Council's preliminary view is that the WA Rail Access Regime meets the requirements for certification. Accordingly, the Council proposes to recommend that the Commonwealth Minister certify the Regime as effective.
- 1.3 The Council's preliminary view is that the duration of certification of the WA Rail Access Regime be until 31 December 2015. The proposed duration reflects the fact that despite the Regime's existence for nine years, it has not yet been utilised and tested by any access seeker for the purposes of negotiating an access agreement or arbitrating an access dispute. Furthermore, the proposed duration will link the period of certification with the next review of the Code by the ERA, which is to occur in late 2014.

### Invitation to make submissions

- 1.4 The Council invites written submissions on the draft recommendation. The closing time and date for submissions is **5.00pm on 16 September 2010**. Submissions on the draft recommendation should be made to the Council with a completed submission cover sheet. Information on making a submission is available on the Council's website ([www.ncc.gov.au](http://www.ncc.gov.au)).
- 1.5 The Council will consider the submissions received in developing its final recommendation.

## 2 Background

### The application and public consultation

- 2.1 On 12 May 2010 the Premier of Western Australia, the Hon Colin Barnett MLA, applied to the Council for a recommendation pursuant to s 44M(2) of the TPA that the WA Rail Access Regime be certified as an effective access regime.
- 2.2 The Council gave public notice of the application in *The Australian* newspaper on 17 May 2010 and published the application and related documents on its website ([www.ncc.gov.au](http://www.ncc.gov.au)). The Council invited interested parties to make written submissions in response to the application and provided a closing time and date for submissions of 17 June 2010. A total of five submissions were received (see appendix B).

### 3 The WA Rail Access Regime

- 3.1 The WA Rail Access Regime is established by the Act and the Code and commenced on 1 September 2001. The Act and Code are available at:  
[www.slp.wa.gov.au/legislation/statutes.nsf/default.html](http://www.slp.wa.gov.au/legislation/statutes.nsf/default.html).
- 3.2 The Act provides for:
- the establishment of the powers and functions of an independent access regulator, namely the Economic Regulation Authority of Western Australia (**ERA**) (ss 20-23)
  - segregation arrangements which require a railway owner to separate its access related, below rail (non-competitive) functions from other competitive functions (s 28)
  - enforcement mechanisms, including penalties or Supreme Court injunctions against the railway owner for non-compliance with key parts of the Regime (ss 34-37), and
  - the establishment of the Code, and the legal basis for its enforcement.
- 3.3 The Code is subsidiary legislation that provides additional details as to how the provisions of the Act should be applied. Whilst the Act covers the broad policy principles of the WA Rail Access Regime, the Code covers the practical implementation of the regime.
- 3.4 The WA Rail Access Regime applies in respect of the rail network specified in Schedule 1 of the Code. This consists of about 5,000 kilometres of railway track in the south-west of Western Australia, including the urban (predominately passenger) network and the non-urban freight network. This generally comprises all standard and narrow gauge track and associated infrastructure west of Kalgoorlie. The WA Rail Access Regime also covers The Pilbara Infrastructure Pty Ltd railway stretching 280 kilometres from Cloudbreak mine in the eastern Pilbara to Port Hedland port (**TPI Railway**).
- 3.5 The Council understands that it is intended that the Regime will be applied at some point in the future to the new railway that is proposed as part of the greenfield infrastructure development of Oakajee Port & Rail Pty Ltd (**OPR**) in the mid west of Western Australia.
- 3.6 The Regime does not cover the railways in the Pilbara owned by BHP Billiton Iron Ore Pty Ltd (**BHPBIO**) and Rio Tinto Ltd (**Rio Tinto**), or the railway line east of Kalgoorlie which is controlled by the Australian Rail Track Corporation (**ARTC**).
- 3.7 The WA Rail Access Regime imposes a duty on the owner of a railway covered by the Regime to negotiate in good faith with an access seeker with a view to reaching an access agreement in respect of the route. If an access agreement cannot be reached through private commercial negotiation, a determination may be made through arbitration.

## 4 Certifying an access regime

- 4.1 States and territories may establish their own regimes for access to services and for regulating the prices and other terms and conditions for such access. A state or territory that is a party to the Competition Principles Agreement (**CPA**) may apply to have an access regime certified as an ‘effective access regime’ for the purposes of the TPA.
- 4.2 Where a state or territory regime is certified, that regime will govern regulation of access to the services to which it applies and those services cannot be declared under the provisions of the national access regime in Part IIIA of the TPA or be subject to an access undertaking to the Australian Competition and Consumer Commission (**ACCC**).
- 4.3 To obtain certification the responsible Minister—the Premier of a state or Chief Minister of a territory—may apply, in writing, to the Council asking the Council to recommend that the Commonwealth Minister certify an access regime as effective. The requirements for application to the Council are prescribed in regulation 6B of the *Trade Practices Regulations 1974 (Cth)*. The Council encourages applicants to support their application with explanations and evidence demonstrating how each of the clause 6 principles in the CPA is satisfied and how the regime has regard to the objects set out in s 44AA of Part IIIA of the TPA.

### The Council’s approach to considering an application for certification

- 4.4 Section 44M(4) of the TPA requires the Council, in deciding whether to recommend that a regime be certified as effective, to:
- assess whether the access regime is an ‘effective access regime’ by applying the relevant principles set out in the CPA
  - have regard to the objects of Part IIIA of TPA (in s 44AA), and
  - not consider any other matters (s 44M(4)(b) of the TPA).
- 4.5 The relevant principles are set out in clauses 6(2)–6(5) of the CPA (**clause 6 principles**).<sup>1</sup> The Council must treat each principle as having the status of a guideline rather than a binding rule (s 44DA of the TPA).
- 4.6 Certification does not necessarily limit the content of an effective access regime. An effective state/territory access regime may contain additional matters as long as they are not inconsistent with the clause 6 principles (s 44DA(2) of the TPA). The CPA specifically recognises that there may be a range of approaches available to a state or territory government in incorporating a principle, and that where a state or territory access regime adopts a reasonable approach to the incorporation of a principle, the regime should be taken to have reasonably incorporated the principle.
- 4.7 An effective access regime must satisfy each of the clause 6 principles and address the objects of Part IIIA, however, clause 6(3) of the CPA requires the Council to accept

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<sup>1</sup> The clause 6 principles are reproduced at appendix A.

that a range of regulatory arrangements may be capable of delivering efficient outcomes consistent with the guiding principles.

- 4.8 In its Guide to Certification<sup>2</sup>, and in a number of its recommendations on applications for certification of state access regimes, the Council has indicated its view that the process of certification does not involve an assessment of whether the access regime is 'optimal'. The Council has also said that certification does not necessarily require that the particular regime provides the most effective means of achieving efficient access outcomes but rather, certification requires assessment only that the particular regime satisfactorily addresses the clause 6 principles and the objects of Part IIIA.
- 4.9 In this draft recommendation the Council has applied the approach to certification as expressed in its Guide and past recommendations. The Council notes that in relation to the application for certification of Queensland's rail access regime some parties have submitted that a broader approach to consideration of the effectiveness in certifying state access regimes is required<sup>3</sup> The Council will consider those submissions in preparing its (draft and then final) recommendations on the Queensland applications.
- 4.10 In relation to the WA Rail Access Regime no party has submitted the regime is not effective and should not be certified even on the basis of a broader approach to certification.

### **Structure of this draft recommendation**

- 4.11 In assessing the application for certification, the Council has organised its consideration of the WA Rail Access Regime against the guiding clause 6 principles and the objects of Part IIIA of the TPA into six categories:
- the scope of the access regime – 6(3), 6(4)(d)
  - the treatment of interstate issues – 6(2), 6(4)(p)
  - the negotiation framework – 6(4)(a)–(c), (e), (f), (g)-(i), (m), (n), (o)
  - dispute resolution – 6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c)
  - efficiency promoting terms and conditions of access – 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b)
  - the objects of Part IIIA in s 44AA of the TPA.
- 4.12 The Council considers that these categories provide a logical framework for analysis, and help to clarify how a regime addresses the necessary elements of an effective access regime. The categories do not replace the clause 6 principles as the basis for assessing a regime's effectiveness. In forming its view as to the effectiveness of a regime, the Council considers each clause 6 principle relevant to each of the

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<sup>2</sup> Available for download from the Council's website, [www.ncc.gov.au](http://www.ncc.gov.au).

<sup>3</sup> This issue also arises in the context of the application by Pacific National for declaration of various Queensland coal railway networks, which the Council is considering in parallel with the Queensland intrastate rail certification application.

categories, and, as required by clause 6(3A)(a) of the CPA, only the relevant clause 6 principles.

- 4.13 When the Council recommends the Commonwealth Minister make a particular decision, the Council must also recommend the duration for which the decision should be in force. The Council has considered this matter in chapter 11.

#### **Legislative amendments**

- 4.14 The *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) was passed by the Commonwealth Parliament on 24 June 2010, making a number of amendments to Part IIIA which took effect on 14 July 2010. However, the amendments relevant to the Council's consideration of applications for certification do not apply to applications received prior to 14 July 2010. References in this recommendation to the Act or Part IIIA should be read as the legislation was in effect on 12 May 2010 (the day on which the Council received the Application), unless otherwise noted.

## **5 Scope of the WA Rail Access Regime: CPA clauses 6(3)(a) and 6(4)(d)**

- 5.1 CPA clause 6(3)(a) requires that for a regime to be certified as effective its application be limited to a narrow range of infrastructure services—those that are provided by significant infrastructure that is not economically feasible to duplicate—and where access to the services removes barriers to competition in upstream and downstream markets. Access should also be available only where any safety issues can be addressed at a reasonable cost.
- 5.2 CPA clause 6(4)(d) is intended to ensure there is periodic review of the need for access regulation to apply to a particular service. A facility might at the present time not be economically feasible to duplicate (so warranting access regulation) but this situation may change over time removing the need for access regulation. The review provision in clause 6(4)(d) relates to the point in time of the decision to make a particular service subject to a regime. The clause could be satisfied by way of provision for the review of coverage declarations.

### **The scope of the services subject to the regime**

#### **The WA Rail Access Regime**

- 5.3 The WA Rail Access Regime applies to the railway infrastructure that is within the routes specified in Schedule 1 of the Code (refer s 5 of the Code). This consists of about 5,000 kilometres of railway track in the south-west of Western Australia, including the urban (predominately passenger) network and the non-urban freight network. This generally comprises all standard and narrow gauge track and associated infrastructure west of Kalgoorlie (the railway infrastructure east of Kalgoorlie is controlled by the ARTC and is not covered by the Regime). The Regime also applies to the TPI Railway in the Pilbara but does not apply to the Pilbara railways owned by BHPBIO and Rio Tinto.
- 5.4 ‘Railway infrastructure’ is defined in the Code 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 s 3(3) or 3(4) of the Act from being railway infrastructure, and
  - (i) rolling stock, rolling stock maintenance facilities, office buildings, housing, freight centres, terminal yards and depots.<sup>4</sup>
- 5.5 Thus the service facilitated by the Act and Code is the use of the infrastructure described in paragraphs 5.3 and 5.4 above. This is consistent with the definition of a service in s 44B of Part IIIA of the TPA.
- 5.6 The Western Australian Government's application did not describe the process for adding routes to Schedule 1 of the Code. Section 5 of the Act provides that in deciding, for the purposes of establishing or amending the Code, which routes are to be included in Schedule 1, the Minister must be satisfied of all the criteria set out in s 5(3) of the Act. These criteria mirror the declaration criteria in Part IIIA of the TPA.
- 5.7 The Minister must conduct a public consultation process before amending the Code, including adding or removing routes to Schedule 1, in accordance with ss 10 and 11A of the Act. Section 11A provides that the Minister must consult with the railway owner in relation to any amendments to the Code, which may affect the railway owner, and have regard to any submissions that the railway owner may make regarding the Minister's proposal.
- 5.8 Section 5(4) of the Act provides that the Minister's decision to include a route in Schedule 1 of the Code is not liable to be challenged in, or reviewed or called into question by, a court. This section restricts the availability of judicial review of the Minister's decision.

### **Application and submissions**

- 5.9 The Western Australian Government submits that the WA Rail Access Regime satisfies clause 6(3)(a) of the CPA because:
- The rail network it applies to is a significant state infrastructure facility, even though the economic significance of the covered routes and line sections varies. The Kalgoorlie to Perth line carries all interstate rail freight and accounts for a high proportion of Western Australia's interstate trade. Rail freight also plays a significant role for the transportation of exported and imported freight to and from Western Australia's ports, which is particularly important to those regions that support significant mineral projects.
  - The rail network it applies to exhibits natural monopoly characteristics and is not economically feasible to duplicate.

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<sup>4</sup> Section 3A of the Act (Scope of access rights clarified) provides also that the rights which arise under an access agreement may entitle a person who has access to railway infrastructure to (a) use land managed and controlled by the railway owner, (b) construct and operate a rail or other connection to the railway infrastructure, for the purpose of exercising those rights.

- Access to the prescribed rail services is necessary to permit effective competition in the provision of downstream services such as rail freight and the delivery of goods to markets.
- Under the Code, an operator seeking access is required to demonstrate that they have the capacity to gain accreditation under the *Rail Safety Act 1998* (WA).<sup>5</sup>

5.10 The Western Australian Government also refers to s 11A of the Act which requires the Minister to consult with and have regard to the submissions of a railway owner, where any proposed amendment or replacement of the Code may affect that railway owner. The Western Australia Government submits that the consultation provisions in the Act ensure that railway owners are involved in the process to amend or replace the Code, including additions to Schedule 1, which reduces the need for a merits review process.

5.11 North West Iron Ore Alliance (**NWIOA**) considers that the Pilbara railways owned by BHPBIO and Rio Tinto should be covered by the WA Rail Access Regime in order for the Regime to be certified as effective. NWIOA argues that the operation of two separate regulatory regimes in the Pilbara (one being Part IIIA in relation to the BHPBIO and Rio Tinto railways, and the other being the WA Rail Access Regime in relation to the TPI railway) has the potential to result in anomalies in the competitive landscape of the Pilbara. NWIOA considers it important that a consistent regulatory environment applies equally to all railway infrastructure.

5.12 Conversely, BHPBIO argues that the coverage of the TPI Railway by the WA Rail Access Regime is 'manifestly inappropriate' and fails to understand the effect of applying third party access regulation to a railway operated in the context of a mine, rail and port supply chain. BHPBIO considers that the application of the WA Rail Access Regime to a vertically integrated Pilbara iron ore railway may cause significant disruption to, and inefficiencies in, the operation of and investment in both the railway and the entire supply chain. For these reasons, BHPBIO submits that the Regime does not satisfy the clause 6 principles and cannot be considered an effective regime in that context.

## Discussion

5.13 The Council considers that railways typically exhibit natural monopoly characteristics such that they are unlikely to be economically feasible to duplicate. Access to the railway infrastructure services that are subject to the Regime will very likely have the effect of improving the conditions for competition in upstream or downstream markets.

5.14 The Council accepts that the railways to which the WA Rail Access Regime applies are unlikely to be economically feasible to duplicate. Furthermore, given additions to the scope of the Regime must also be railways with similar economic characteristics to

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<sup>5</sup> Now replaced by the *Rail Safety Act 2010* (WA).

those covered by the Regime from the outset, it is very likely that this will continue to be the case.

- 5.15 To apply the Regime to a new railway, the Minister must undertake a public consultation process and consult with the railway owner before amending the Code by adding a route to Schedule 1. The Council considers that this process provides some level of transparency and protection against decision-making error. The Council also notes that under s 12 of the Act the ERA must conduct a review of the Code on a five yearly basis. The purpose of the review is to assess, amongst other things, whether the Code is giving effect to the CPA in respect of railways to which the Code applies.<sup>6</sup>
- 5.16 However, the Council is concerned about whether s 5(4) of the Act is compatible with clause 6(3)(a) of the CPA. Section 5(4) purports to exclude judicial review of the Minister's decisions to include or remove (or not include or not remove) particular routes in Schedule 1 of the Code.<sup>7</sup> In the absence of merits review or full judicial review, an erroneous Ministerial decision is reviewable only on the basis that the error can be shown to have gone to the Minister's jurisdiction to make the decision. Should the Minister erroneously prescribe a service that is provided by infrastructure that is not significant, is not uneconomic to duplicate, is not necessary for upstream or downstream competition or the safe use of which cannot be ensured economically,<sup>8</sup> the Regime would not conform to the principles in clause 6 of the CPA—because it applies to services that do not satisfy clause 6(3)(a) of the CPA. (There is also a risk that railways which are currently subject to the Regime continue to be included in Schedule 1 when one or more of the criteria in s 5(3)/clause 6(3)(a) are no longer satisfied.) Section 5(4) of the Act severely limits the potential for such an error to be corrected.
- 5.17 The Council notes the conflicting views of NWIOA and BHPBIO regarding the scope of the services subject to the WA Rail Access Regime in respect of railways in the Pilbara. The Council agrees that it would be preferable to have all the Pilbara railways subject to a single regulatory regime as it would promote consistency and seamless regulation in Western Australia. However, there is no provision in the CPA that requires that the WA Rail Access Regime include these railways, or any railways that may exist in the future.
- 5.18 In the Council's view, if the WA Rail Access Regime is certified, then the services provided by the routes listed in Schedule 1 of the Code will be subject to the Regime and will be excluded from declaration by virtue of criterion (e) in each of ss 44G(2)

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<sup>6</sup> Section 12(2) of the Act

<sup>7</sup> While provisions such as s 5(4) of the Act cannot completely deprive a state Supreme Court of its supervisory jurisdiction in respect of the exercise of State executive power, it can deny the availability of relief other than on grounds of jurisdictional error or error of law on the face of the record. (*Kirk v Industrial Relations Commission of NSW* [2010] HCA 1, [99]–[100]).

<sup>8</sup> See: CPA clause 6(3)(a); Act s 5(3).

and 44H(4) of the TPA.<sup>9</sup> The Minister's addition of new routes to Schedule 1 of the Code will have the effect of excluding those routes from declaration under Part IIIA of the TPA.

- 5.19 The Council agrees that access to the rail services covered by the WA Rail Access Regime is necessary to permit effective competition in dependent markets and that access can be provided safely. The Council considers that the Regime satisfactorily addresses the clause 6(3)(a) principles.

## **Review of the right to negotiate access**

### **Application and submissions**

- 5.20 The Western Australian Government submits that the WA Rail Access Regime satisfies clause 6(4)(d) because s 12 of the Act requires the ERA to conduct a review of the Code every five years. The ERA must call for public comment as part of the review and provide a report to the Minister.
- 5.21 Similarly, if the Minister intends to exercise the power under s 10 of the Act to amend the Code or repeal and replace it, he or she must call for public comment on the proposals. If the Minister considers that a proposed amendment or replacement of the Code may affect a railway owner, the Minister must consult with the railway owner and have regard to any submissions they make regarding the proposal.
- 5.22 Section 7 of the Act provides that the Code does not affect existing agreements. In other words, the Code does not affect the terms and conditions, or the operation, of an agreement for the use of railway infrastructure made with a railway owner before the commencement of the Code. Furthermore, s 38 of the Code provides that access agreements are not affected by amendments to the Code after the access agreement has been made.

### **Discussion**

- 5.23 The Council considers that the WA Rail Access Regime satisfies clause 6(4)(d) of the CPA because it provides for the ERA to review the Code periodically and to report to the relevant Minister. The Council notes that the ERA review includes a public consultation process, and that the Minister must also call for public comment on any proposals to amend or replace the Code.

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<sup>9</sup> These services would be subject to an effective access regime and the declaration criteria in ss 44G(2)(e)(i) and 44H(4)(e)(i) of the TPA would not be satisfied.

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

6.1 Clause 6(2) establishes principles for the treatment of a service(s) provided by a facility with an influence beyond a jurisdictional boundary or where there are difficulties because the facility providing the service that is subject to a regime is located in more than one jurisdiction. Clause 6(4)(p) is aimed at ensuring there is a single seamless process for obtaining access to a service, so promoting timely and efficient outcomes.

### Application and submissions

6.2 The Western Australian Government submits that the Code only applies to routes that are situated wholly within Western Australia. Whilst several rail operators conduct interstate operations using the Western Australian and interstate rail networks, the WA Rail Access Regime only applies to part of the interstate rail line, namely the section between Perth and Kalgoorlie. There are separate commercially negotiated third party access agreements in place for the section of the interstate line east of Kalgoorlie (the WestNet Rail / ARTC agreement).

6.3 The Western Australian Government submits that the principles of clause 6(2) are satisfied because the infrastructure covered by the WA Rail Access Regime does not extend beyond the jurisdictional boundary of Western Australia, nor is it subject to any other regime. The Western Australian Government submits further that the Regime is sufficiently flexible to allow for commercial negotiations to ensure that national operators will not be disadvantaged by having to operate within it.

6.4 The Western Australian Government notes that the Regime has been criticised for its divergence from the national access framework that is in place for the track between Kalgoorlie and the South Australian border (the ARTC access undertaking). As part of the Council of Australian Governments (**COAG**) reform process, it was agreed that a consistent system of rail access regulation, based on the ARTC model, should be implemented for all nationally significant rail corridors, including the section of rail track between Perth and Kalgoorlie, where the benefits of such consistency exceeded the costs.<sup>10</sup>

6.5 However, both the COAG Business Regulation and Competition Working Group and the COAG Reform Council have examined this issue and have determined that the ARTC model should not be applied in Western Australia until it can be demonstrated that the benefits of such an approach outweigh the costs.<sup>11</sup>

6.6 In support of its argument that it is questionable whether changing the WA Rail Access Regime would deliver a net benefit, the Western Australian Government

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<sup>10</sup> Clause 3.1 of the Competition and Infrastructure Reform Agreement (**CIRA**) dated 10 February 2006 (as amended from time to time) outlines this commitment.

<sup>11</sup> 2009 COAG Reform Council Report: Report to the Council of Australian Governments on Implementation of the National Reform Agenda, March 2009, pp 58-59.

refers to ARTC's description of the Regime as being "in many areas, broadly consistent with similar provisions incorporated in the ... undertaking"<sup>12</sup>.

6.7 Nevertheless, the Western Australian Government has stated its commitment to work with COAG and the Australian Transport Council to assess the merits of adopting a national regime, which may or may not be modelled on the ARTC access undertaking.

6.8 Section 27 of the Code does make provision for the appointment of an arbitrator who is capable of determining a dispute under the WA Rail Access Regime and some other access regime recognised under the TPA. Section 27(2) states that:

Where this subsection applies, the Regulator must, so far as is practicable, appoint under section 26 a person or persons who in his or her opinion is or are qualified and acceptable for appointment to conduct an arbitration both under this Code and the other access regime.

6.9 Subsection 27(1)(c) of the Code outlines the circumstances in which s 27(2) must be applied:

Subsection (2) applies if –

- (c) the issues in dispute are –
  - (i) likely to be the same as or similar to issues requiring to be arbitrated under the other access regime; or
  - (ii) issues directly affecting both access regimes.

6.10 Asciano's submission makes the point that in seeking to operate interstate services to Perth, Asciano must manage rail access across at least two regulatory regimes. Asciano refers to the potential lack of consistency between the WA Rail Access Regime and the ARTC access undertaking but considers that these concerns would be minimised if the regimes were separate and consistent. Asciano believes that the potential lack of consistency is not a reason to reject certification given the current policy recognition that the existence of different regimes is an issue which requires monitoring.

## Discussion

6.11 The Council considers that consistent regulation of national infrastructure is preferred as consistency provides a seamless approach to the regulation of that infrastructure, thereby facilitating transparency and reducing the regulatory burden with likely associated cost reductions. Indeed, the objects of Part IIIA, provide that one of the objects of the national access regime in Part IIIA is to:

- (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.<sup>13</sup>

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<sup>12</sup> ARTC, *2005 Submission to the Economic Regulation Authority review of the Railways (Access) Code 2000*.

<sup>13</sup> Section 44AA(b) of the TPA.

6.12 As noted above, consistency in regulation has also been endorsed by COAG and in the CIRA. Recent announcements by Infrastructure Australia also indicate that unified governance of Australian's freight rail network is a priority, with particular mention of the railway west of Kalgoorlie.<sup>14</sup> However, to establish consistency, governments need to develop a model approach to access regulation and provide it to the different jurisdictions for consideration and consultation. The Council notes that recent reforms in the energy markets suggest that a nationalised approach to regulation is not impossible, but is likely to require, amongst other things, a significant investment in time and commitment from all affected parties and stakeholders. Review of the CIRA is scheduled for 2011 and this may provide an opportunity for this matter to be advanced further.

6.13 Referring to the commitments in the CIRA to develop a model approach to rail access regulation, the ACCC stated in its *Final Decision, Australian Rail Track Corporation, Access Undertaking – Interstate Rail Network*, July 2008 at pp 28-29 that:

... clause 3.1 of CIRA *does not require* the ACCC to either develop the national system of simpler rail access regulation or to consider whether the ARTC Undertaking should be a future 'model' for a national rail access regulation in its assessment of the Undertaking. The COAG clause is a commitment between the Commonwealth and State and Territory governments to first develop the national system of rail access regulation and then implement the system using ARTC's Undertaking as a 'model.' This would require consultation among governments, stakeholders and ARTC to process and implement this commitment.

...

The ACCC consequently has not assessed whether ARTC's Undertaking is an appropriate 'model' for a national rail access regime.

6.14 The ACCC also stated in its Final Decision on the ARTC Access Undertaking at p vi that:

...the ACCC considers that the Undertaking is more likely than not to promote interface efficiencies.

6.15 In a submission to the ERA's current review of the Code, ARTC submit:

ARTC now manages the entire interstate network with the exception of that part of the interstate network between Kalgoorlie and Perth. ARTC has a wholesale agreement in place with the network manager in WA that permits it to enter into contracts for access for interstate services to available capacity on that part of the network. The network is still maintained, improved and controlled by the network manager. This agreement was initially made with a view to the establishment of a one-stop-shop for access to the interstate network. It has been in place for around 10 years, but has not been particularly

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<sup>14</sup> Infrastructure Australia, *Getting the fundamentals right for Australia's infrastructure priorities*, An Infrastructure Australia report to the Council of Australian Governments, June 2010. (<http://www.infrastructureaustralia.gov.au/publications.aspx>)

successful in delivering the one-stop-shop concept. To date, no customers have an access agreement with ARTC for access to the interstate network in WA. ARTC understands that this is largely because rail operators would prefer to contract directly with the entity responsible for maintaining and controlling the network.<sup>15</sup>

6.16 Although national consistency in regulation is desirable, it is not a mandatory requirement for certification of an access regime. The Council considers that the WA Rail Access Regime satisfies clauses 6(2) and 6(4)(p) of the CPA because:

- (a) although some interface issues may present because of the different access arrangements that exist across the national rail network, the WA Rail Access Regime does include mechanisms which appear likely to keep any such issues to a minimum, and
- (b) at the present time, there is no national approach to rail access regulation.

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<sup>15</sup> Australian Rail Track Corporation Ltd, Submission to the Economic Regulation Authority, Review of the Railways Access Code 2000, 29 January 2010 at p 2.

## **7 The negotiation framework: CPA clauses 6(4)(a) – (c), (e), (f), (g), (h), (i), (m), (n), (o)**

### **Clauses 6(4)(a)–(c): negotiated access**

- 7.1 Clauses 6(4)(a)–(c) seek to ensure that an access regime provides an appropriate balance between commercial negotiation and regulatory intervention to facilitate access negotiations. Clause 6(4)(a) requires that an effective access regime allows parties to try to reach mutually beneficial agreements through commercial negotiation. Clauses 6(4)(b) and (c) recognise that regulatory measures can provide an incentive to reach commercially agreed outcomes but also require that an effective regime provides a means for dealing with situations where access providers and access seekers are unable to reach agreement.
- 7.2 In some circumstances, access seekers may have insufficient information and bargaining power to negotiate with large incumbent service providers. Therefore, an effective access regime should appropriately address information asymmetries, so that access seekers can enter into meaningful access negotiations. This involves a balance between obliging the service provider to disclose sufficient information so that the access seeker can make informed decisions, while ensuring that the disclosure requirements are not overly onerous.

### **The WA Rail Access Regime**

- 7.3 Section 4A of the Code recognises the freedom of parties to negotiate agreements outside the Code. The Council notes that the Western Australian Government advised in the application that parties are free to negotiate the terms of an access agreement such as price, service standards and insurance, outside the parameters of the Code, with the only exceptions being that the safety conditions, train management guidelines and train path policy provisions of the Code must be adhered to.<sup>16</sup> This is not correct, but the error is not material to the Council's consideration of the application. For the avoidance of doubt, the Council notes that in a negotiation for access outside of the Code parties are only bound by the safety conditions and requirements contained in the *Rail Safety Act 2010* (WA). Parties are not bound by any of the Part 5 Instruments (unless they agree otherwise) and it is noted that the train management guidelines and train path policy provisions of the Code are Part 5 Instruments (for more information on Part 5 Instruments, see paragraph 7.8 below).
- 7.4 Part 2 of the Code sets out the procedures a potential access seeker must follow when making a proposal for access to a particular route under the Code. A potential access seeker may request the railway owner to provide it with the information that is prescribed in s 7 of the Code, and the railway owner is also required to provide the access seeker with technical information regarding any aspect of the railway infrastructure that affects the design of rolling stock. Section 9 of the Code provides

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<sup>16</sup> Application, p 15.

that once the railway owner receives an access proposal they must provide the access seeker with certain information including floor and ceiling prices for the proposed access and the cost of each route section on which those prices have been calculated. Timeframes apply in respect of the provision of information. A railway owner must keep a register relating to all access proposals received under s 8 of the Code.

- 7.5 A potential access seeker may withdraw an access proposal at any time before an access agreement is reached, provided the matter has not been referred to arbitration (s 9A of the Code).
- 7.6 The procedures for negotiating an access agreement under the Code are set out in Part 3, Divisions 1 and 2 of the Code. Division 1 of Part 3 outlines when the duty to negotiate arises for the railway owner, the requirement for the railway owner to negotiate in good faith, and the initial requirements on the access seeker (evidence of financial ability and an outline of the proposed operations). Division 2 of Part 3 outlines the general duties of a railway owner in negotiations and the matters that must be covered in negotiating an access agreement. An access agreement must provide for the matters set out in Schedule 3 of the Code (s 17 of the Code) and is intended to ensure that prospective users have certainty about the terms and conditions, including negotiated prices, which would apply to access to the covered infrastructure. Section 39 of the Code requires the railway owner to submit a completed access agreement to the ERA for registration as soon as is practicable.
- 7.7 The Code does not prescribe exactly how negotiations are to be conducted or the specific terms and conditions to be included in an access agreement (save for the matters set out in Schedule 3). The parties are responsible for negotiating these commercially with recourse to the dispute resolution process where necessary.
- 7.8 Part 5 of the Code requires a railway owner to submit separate subsidiary instruments to the ERA for approval (**Part 5 Instruments**). These instruments include the train management guidelines, the train path policy, the costing principles (which are used to determine floor and ceiling prices) and the overpayment rules, which form part of the framework for access negotiations for the particular route or railway to which they apply. These requirements apply independently of any request for access.
- 7.9 An access seeker may apply to the ERA for an opinion whether or not the price sought by a railway owner in negotiations for an access agreement meets the requirements of clause 13(a) in Schedule 4 of the Code (refer s 21 of the Code). Clause 13 of Schedule 4 sets out the guidelines which a railway owner must adhere to when negotiating prices for access.
- 7.10 The ERA is responsible for monitoring and enforcement of the Regime (s 20(1) of the Act). The Western Australian Government submits that the independence of the regulatory process is guaranteed by the fact that the ERA is an independent statutory body. Section 28(1) of the *Economic Regulation Authority Act 2003 (WA) (ERA Act)* provides:

...the Authority is independent of direction or control by the State or any Minister or officer of the State in the performance of the Authority's functions.

In addition, s 30(1) of the ERA Act requires members of the ERA to disclose any conflict of interest to facilitate separation of the ERA from facility owners, current users and access seekers.

- 7.11 If the parties cannot reach agreement as to the terms and conditions of access, or if a dispute arises under an access agreement, then the arbitration provisions under Part 3, Division 3 of the Code may be invoked. The process for resolving a dispute is considered in the following chapter.

### **Application and submissions**

- 7.12 The Western Australian Government submits that the Code is primarily intended to apply as a safety net in circumstances where an alternative to commercial negotiations between third party access seekers and a railway owner is required. In this way, the WA Rail Access Regime encourages third party access to be achieved through parties negotiating commercial arrangements that suit their particular needs and circumstances. For these reasons, the Western Australian Government submits that clauses 6(4)(a)-(c) of the CPA are satisfied.
- 7.13 NWIOA raised a number of concerns in its submission regarding the timeline for third party access requests under the WA Rail Access Regime. NWIOA considers that the timelines prescribed under the Code are too open-ended to produce timely access solutions. By way of example, NWIOA refers to the process for determining floor and ceiling prices in clauses 9 and 10 in Schedule 4 of the Code. NWIOA also notes that there is no timeframe for submission of Part 5 Instruments to the ERA for approval or for the ERA's approval process.
- 7.14 NWIOA argues that it is not possible for an access seeker to commence access negotiations under the Code until all Part 5 Instruments have been approved by the ERA. This is because an access seeker will not have access to the necessary information upon which to base its access negotiations. In this regard, NWIOA refers to the ERA's approval process for the TPI Railway's Part 5 Instruments and argues that the delays in this process have precluded access seekers from submitting an access proposal for the TPI Railway and from having recourse to arbitration.
- 7.15 NWIOA submits that the WA Rail Access Regime should include definitive deadlines for the submission and approval of Part 5 Instruments, and for the ERA's determination of floor and ceiling prices under Schedule 4 of the Code. NWIOA argues that the proponents of new railway infrastructure should be required to commence the Part 5 Instruments approval process upon the commencement of construction, and that the ERA's determination of floor and ceiling prices should be made prior to the completion of new railway infrastructure. NWIOA considers that this would reduce the number of years it takes for an access seeker to be in a position to submit an access proposal, and would avoid a repeat of its experience with the TPI Railway.

- 7.16 Asciano argues in its submission that information asymmetry exists between railway owners and access seekers. Asciano believes that for commercial negotiations to be effective, railway owners should be required to make more information available to address this asymmetry. Asciano also considers that there should be greater regulatory scrutiny of the details of access agreements, and that an indicative access agreement, which has been reviewed in a regulatory process, would be desirable to guide commercial negotiations.

## Discussion

- 7.17 The Council accepts that the WA Rail Access Regime encourages parties to enter into commercial negotiations to reach agreement on the terms and conditions of access. The Council considers that the negotiation provisions under the Code, the mandatory requirements of an access agreement, the mechanisms to address information asymmetries, and the Part 5 Instruments which a railway owner must submit to the ERA for approval, together establish an appropriate balance between the interests of railway owners and access seekers.
- 7.18 The Council agrees that the ERA is sufficiently resourced and vested with appropriate powers under the Code to undertake its duties in an independent and objective manner. Together the role of the ERA and the arbitrator<sup>17</sup> in arbitrating access disputes means that commercial negotiations are supported by credible enforcement mechanisms.
- 7.19 The Council notes NWIOA's concerns regarding the timeliness of outcomes of the ERA's approval processes and agrees that it would be preferable if the Regime included target or binding time limits for the ERA's decisions on Part 5 Instruments and floor and ceiling costs. Whilst target or binding time limits are desirable in an access regime and would appear to promote efficiency and timeliness in decision-making, they are not a requirement under the clause 6 principles. Accordingly, the Council considers that the absence of time limits for the ERA's decision-making processes under the WA Rail Access Regime does not preclude the Regime from satisfying the principles in clauses 6(4)(a)-(c) of the CPA.
- 7.20 In addition, the Part 5 Instruments for the relevant railway owners/operators (WestNet Rail, the Public Transport Authority, and The Pilbara Infrastructure Pty Ltd) whose railways are covered by the WA Rail Access Regime have been approved by the ERA and are available on the ERA's website. Whilst NWIOA's concerns regarding the timeliness of the ERA's decision-making process remain relevant for new railway infrastructure that may in due course be added to Schedule 1 of the Code, they are less relevant to existing railways covered by the Regime now that the Part 5 Instruments for those railways are in place.

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<sup>17</sup> Section 24 of the Code requires the ERA to establish panels of persons who may be appointed as arbitrators. Parties are also free to agree jointly on a mediation or private arbitration process.

7.21 In relation to Asciano’s submission that information asymmetry exists between railway owners and access seekers, the Council considers that the Part 5 Instruments provide access seekers with sufficient information to enable meaningful commercial negotiations to take place in relation to existing routes subject to the Regime. However, in the absence of the relevant Part 5 Instruments (for example, in the case of a newly constructed railway that has been included in Schedule 1 of the Code) a potential access seeker may not be in a position to negotiate access until such time as the ERA approves the Part 5 Instruments. As raised in NWIOA’s submissions, it appears that the ERA’s approval process can take a number of years, which is of concern to the Council.

7.22 The Council considers that the ability of an access seeker to request the ERA’s opinion on the prices sought by a railway owner in an access negotiation assists in ensuring that access seekers are not unduly disadvantaged by information asymmetries regarding pricing. However, the Council notes that this ability could be improved by incorporating a requirement for the ERA to respond within a specified timeframe.

7.23 The WA Rail Access Regime satisfies the principles in clauses 6(4)(a)-(c).

### **Clause 6(4)(e): reasonable endeavours**

7.24 Clause 6(4)(e) requires that an effective access regime provides for a service provider to use all reasonable endeavours to facilitate the requirements of access seekers. The Council considers that an access regime may either incorporate clause 6(4)(e) explicitly, or through general provisions that have the same effect.

### **The WA Rail Access Regime**

7.25 Section 13 of the Code imposes an obligation on the railway owner to negotiate in good faith whilst s 16 of the Code specifies the obligations of a service provider to:

- use all reasonable endeavours to avoid unnecessary delays
- not unfairly discriminate between one proponent and another, and
- not unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner, including the allocation of train paths, the management of train control and operating standards.

7.26 Section 34A of the Act prohibits conduct that prevents or hinders access. The prohibition aims to constrain any attempt by a railway owner to refuse to accept an application for access. The Act also prohibits those who have access under an access agreement from engaging in conduct aimed at hindering or preventing access by another party. A breach of this provision incurs a penalty of \$100 000 in addition to a daily penalty of \$20 000.

### **Application and submissions**

7.27 The Western Australian Government submits that the WA Rail Access Regime explicitly incorporates the principles of clause 6(4)(e).

### **Discussion**

7.28 The WA Rail Access Regime satisfies the principles in clause 6(4)(e).

### **Clause 6(4)(f): access need not be on exactly the same terms**

7.29 Clause 6(4)(f) requires that an effective access regime should allow for access to be provided on different terms and conditions to different users. An access regime should not limit the scope for commercial negotiation, which is consistent with the principles of commercial negotiation enshrined in clause 6 of the CPA.

### **The WA Rail Access Regime**

7.30 Section 37 of the Code provides that an access agreement, so long as it complies with the Code, does not need to contain the same provisions as another access agreement. That is, access to a particular route may be provided on different terms and conditions to different access seekers.

7.31 Whilst clause 13(a) of Schedule 4 of the Code stipulates that there should be consistency in the application of pricing principles, clause 13 of Schedule 4 of the Code does recognise that in some cases there may be a price differential for access to the same infrastructure. This differential will reflect the difference in cost or risks associated with the provision of access, which enables prices to be varied to suit the particular access seeker's service needs.

### **Application and submissions**

7.32 The Western Australian Government submits that the WA Rail Access Regime complies with clause 6(4)(f) because it gives access seekers the right to negotiate contractual terms and conditions that suit their individual needs and does not oblige a railway owner to offer access to all access seekers on the same terms and conditions.

### **Discussion**

7.33 The Council considers that s 37 of the Code makes it explicit that a railway owner may give access to access seekers on different terms and conditions. Further, the negotiation framework under the WA Rail Access Regime gives parties the flexibility to negotiate terms and conditions of access to suit their particular circumstances. The Council also notes that parties are not required to negotiate access under the Code. As has occurred to date, access arrangements can be made commercially outside of the Regime (s 4A of the Code).

7.34 The WA Rail Access Regime satisfies clause 6(4)(f).

### **Clauses 6(4)(g), (h), (i): dispute resolution**

- 7.35 An important element of the negotiation framework in an effective access regime is the requirement that if commercial negotiations and/or agreements between service providers and access seekers break down, then there are appropriate dispute resolution procedures in place. The decisions of the dispute resolution body must bind the parties and be enforceable.
- 7.36 The Council has considered the WA Rail Access Regime's procedures for independent dispute resolution and enforcement mechanisms in chapter 8. In summary, the Council's view is that these procedures adequately support the negotiation framework.
- 7.37 The WA Rail Access Regime satisfies clauses 6(4)(g), (h) and (i).

### **Clause 6(4)(m): hindering access**

- 7.38 Clause 6(4)(m) requires that an effective access regime prohibit conduct for the purpose of hindering access. This principle applies to both existing users (to address the risk of problems such as hoarding) and facility owners.

### **The WA Rail Access Regime**

- 7.39 Section 34A of the Act prohibits a railway owner from engaging in conduct aimed at hindering or preventing:
- access by any person to that part of the railways network for the purpose of carrying on rail operations to which the Code applies
  - the making of access agreements or any particular agreement in respect of that part of the railways network, or
  - the access to which a person is entitled under an access agreement or a determination made by way of arbitration.
- 7.40 Further, a person who has access under an access agreement must not engage in conduct aimed at hindering or preventing access by another person to any part of the railways network to which the Code applies.
- 7.41 A failure to comply with these provisions may attract financial penalties.<sup>18</sup>

### **Application and submissions**

- 7.42 In addition to the provisions in s 34 of the Act, the Western Australian Government also refers to s 16 of the Code which requires that a railway owner must use all reasonable endeavours to provide access. It also cites the competitive neutrality provisions in Part 5 of the Code as another means to ensure that a railway owner does not discriminate against access seekers. The Western Australian Government

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<sup>18</sup> s 34A(3) of the Act.

submits that the WA Rail Access Regime satisfies the requirements of clause 6(4)(m) by comprehensively restricting parties' ability to prevent or hinder access.

## **Discussion**

7.43 The WA Rail Access Regime satisfies clause 6(4)(m).

### **Clause 6(4)(n): separate accounting**

7.44 Clause 6(4)(n) requires that an effective access regime should impose separate accounting arrangements on service providers for the elements of the business covered by the regime. That is, facility owners must make available financial information that focuses exclusively on the elements of their business subject to the regime. The availability of relevant accounting information is necessary for access seekers and regulatory bodies (including dispute resolution bodies) to assess the terms and conditions of access.

7.45 To satisfy clause 6(4)(n), the Council considers that an effective access regime should include provisions that require a service provider to at least:

- maintain a separate set of accounts for each service that is the subject of an access regime
- maintain a separate consolidated set of accounts for all of the activities undertaken by the service provider, and
- allocate any costs that are shared across multiple services in an appropriate manner.

### **The WA Rail Access Regime**

7.46 Part 4, Division 3 of the Act requires the railway owner to put in place a number of arrangements to ring fence those businesses providing access to infrastructure from their other functions and services. The ring fencing requirements include:

- segregation of the infrastructure owner's access related functions from other functions (s 28)
- protection of access seekers' confidential information (s 31)
- ensuring that an officer of a railway owner does not have a conflict of interest between their duties performing access related functions, and their duties regarding other aspects of the business (s 32)
- a requirement that an officer of a railway owner must not have regard to the interests of the railway owner in a way that is unfair to access seekers or to other rail operators (s 33) and
- maintaining separate accounts and records for the elements of the business that are covered by the WA Rail Access Regime (s 34).

7.47 Section 28 of the Act provides that a railway owner must have appropriate controls and procedures to ensure compliance with these requirements. Further, s 29 of the

Act stipulates that a railway owner must obtain the ERA's approval before establishing or varying an administrative arrangement relating to the segregation of its access related functions. The ERA may give directions to a railway owner regarding matters such as segregation if agreement on these matters cannot be reached between the two parties. The ERA is responsible for monitoring and enforcing a railway owner's compliance with the provisions of the Act, including the obligations imposed by Part 4, Division 3. If a railway owner fails to comply with the segregation requirements under the Act, a penalty of \$100 000 applies.

### **Application and submissions**

- 7.48 The Western Australian Government submits that the WA Rail Access Regime recognises the significance of implementing appropriately segregated administrative and accounting functions and as such has placed these provisions in the Act, rather than in the subsidiary legislation (the Code).
- 7.49 BHPBIO argues in its submission that the WA Rail Access Regime adopts an unnecessarily onerous approach to the segregation of a railway owner's access and other functions, which imposes extensive and intrusive obligations on the owner. BHPBIO considers that the segregation obligations are more onerous than those required by clause 6(4)(n) of the CPA and are contrary to the efficiency objectives of Part IIIA.
- 7.50 Asciano is of the view that given the current ownership and operating environment of rail infrastructure in Western Australia, the segregation arrangements under the WA Rail Access Regime are adequate. However, if in the future, the above and below rail ownership and/or operation were to become more closely aligned, Asciano argues that the segregation arrangements are unlikely to be sufficient.

### **Discussion**

- 7.51 The Council considers that the WA Rail Access Regime imposes adequate separate accounting arrangements on railway owners for the elements of their business covered by the Regime, having regard to the current rail industry structure in Western Australia. This structure includes, vertically integrated operators, being the Public Transport Authority (**PTA**) and The Pilbara Infrastructure Pty Ltd (for the TPI Railway) and a segregated below rail provider in WestNet Rail.
- 7.52 In the event that the ownership and/or operation of above and below rail infrastructure becomes more closely aligned or if it should become apparent that the existing accounting arrangements are inadequate for the different entities subject to the Code, more stringent segregation arrangements may be required. The Council has also considered these matters in considering the appropriate duration of certification of the WA Rail Access Regime.
- 7.53 The WA Rail Access Regime satisfies clause 6(4)(n).

## **8 The dispute resolution procedure: CPA clauses 6(4)(a) – (c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c)**

### **Clauses 6(4)(a)–(c): dispute resolution**

- 8.1 Clause 6(4)(a) establishes commercial negotiation as a cornerstone in determining access outcomes, while clauses 6(4)(b) and (c) complement and underpin the principle in clause 6(4)(a). They recognise that regulatory measures can provide a means for dealing with situations where access providers and access seekers are unable to reach agreement through private commercial negotiations and that an effective access regime should establish an independent and credible dispute resolution procedure.
- 8.2 In this way, the negotiation framework established by clauses 6(4)(a)-(c) is supported by the requirements for a dispute resolution procedure set out in clauses 6(4)(g)-(l), 6(4)(o) and 6(5)(c) of the CPA.

### **The WA Rail Access Regime**

- 8.3 The WA Rail Access Regime is intended to apply as a safety net in cases where an alternative to commercial negotiation between a third party access seeker and a railway owner is required. In this way, the Regime encourages access to be achieved through parties negotiating commercial arrangements that suit their particular needs and circumstances.

### **Discussion**

- 8.4 The WA Rail Access Regime establishes the right for parties to negotiate access for services, with binding arbitration available where agreement cannot be reached.
- 8.5 The WA Rail Access Regime satisfies clauses 6(4)(a)-(c).

### **Clause 6(4)(g): independent dispute resolution**

- 8.6 The clause 6 principles recognise the need for an independent arbitration mechanism to complement and encourage genuine negotiations. Clause 6(4)(g) requires an effective access regime to contain a mechanism to ensure that parties to a dispute have recourse to an independent dispute resolution body. The arbitration framework should be designed to produce credible and consistent outcomes so promoting confidence among the parties.
- 8.7 Clause 6(4)(g) also provides that an effective access regime should require the parties to a dispute to fund some or all of the costs of having an independent body resolve the dispute. At the same time, the costs of arbitration should not deter parties from seeking access.
- 8.8 The Council's past work in certification has raised the question of the balance between possible compromise of an arbitrator's independence if it also acts as the

access regime regulator on the one hand, and the value in an arbitrator being able to draw on past experience in relation to an access dispute, on the other. The Council is not opposed in principle to the same body having both roles, though it recognises the potential for issues of conflict to arise and the need for governments to consider the inclusion of safeguards.

- 8.9 The Council has previously considered that it is likely to be in the public interest if arbitration determinations on access disputes are published (with appropriate treatment of confidential material), so that greater certainty may be given about the arbitrator's likely approach to resolving disputes. In turn, this may encourage parties to resolve disputes themselves without arbitration.

### **The WA Rail Access Regime**

- 8.10 Section 36 of the Act provides that the obligations imposed by the Code are enforceable by arbitration under the Code or under s 37 of the Act, as the case may require, but a breach of those obligations does not give rise to an action for damages. Section 37 of the Act gives the Supreme Court the power to grant an injunction in relation to conduct that amounts to a breach of the Code if arbitration is not available as a remedy.
- 8.11 The provisions in ss 36 and 37 of the Act do not affect the enforceability of an access agreement as a contract, or the availability of damages for a breach of the agreement (refer s 35 of the Act).
- 8.12 Part 3, Division 3 of the Code deals with the arbitration of access disputes. Section 25 of the Code sets out the specific circumstances in which a dispute is taken to exist for the purposes of Part 3, Division 3. These include:
- the railway owner has refused to negotiate on an access proposal
  - the railway owner is not satisfied that the access seeker has the appropriate managerial and financial ability and that they can operate within the capacity of the specified route, or
  - the access seeker and railway owner have entered into negotiations on the proposal but they
    - have not reached agreement on the provisions to be contained in the access agreement before the termination date of the negotiation period, or
    - have jointly made a determination in writing that negotiations have broken down.
- 8.13 In practice, parties to a dispute are free to agree jointly on a mediation or private arbitration process outside of the WA Rail Access Regime.
- 8.14 To invoke the dispute resolution procedure under the WA Rail Access Regime, a party who is in dispute with a railway owner gives a written notice to the ERA to refer the dispute to arbitration (s 26(1) of the Code). Section 26(2) of the Code provides that once a dispute has been referred to the ERA for arbitration, the ERA must appoint an

arbitrator who is listed on a panel established under clause 24 of the Code. Those persons listed on the panel can only be amended on the recommendation of the Chairman of the Western Australian Chapter of the Institute of Arbitrators, an independent non-government body. Such recommendations are to be made at the request of the ERA. The ERA may not be included on this panel (s 24(4) of the Code).

- 8.15 The *Commercial Arbitration Act 1985 (WA)* (CAA) applies to the arbitration of access disputes under the WA Rail Access Regime, subject to specific provisions of the Code (see s 26 of the Code). The application of s 27 of the CAA to a dispute allows for mediation to occur prior to proceeding to arbitration (see s 23 of the Code).
- 8.16 Part III of the CAA governs the conduct of arbitration proceedings. Section 14 of the CAA provides that the arbitrator may conduct proceedings in such a manner as the arbitrator sees fit, subject to the provisions of the CAA and any existing arbitration agreement.
- 8.17 Sections 29-33 of the Code set out the types of determinations that the arbitrator may make and the matters that must be taken into account when arriving at this determination, including subclauses 6(4)(i), (j) and (l) of the CPA. The arbitrator must give effect to the Act, the Code and matters determined by the ERA and must not make a determination that is inconsistent with the *Rail Safety Act 2010 (WA)*. Apart from these matters there are no other restrictions placed on the arbitrator by either the Act or the Code. Subsection 29(1)(c) of the Code specifically states that the arbitrator may take into account any other matters considered relevant.
- 8.18 Section 34 of the CAA requires that the costs of arbitration (including the fees and costs of the arbitrator) are to be determined at the arbitrator's discretion. This should provide an incentive for the parties to negotiate in good faith and in accordance with the Code.
- 8.19 When a determination is made by the arbitrator, the railway owner must give a copy of the determination to the ERA as soon as practicable (s 39(2) of the Code). The ERA must register the determination and list the names of parties involved, the railway to which it relates, the date on which the determination was entered and its duration. The ERA is also required to make the register available for any person during office hours.
- 8.20 Whilst the Code does not expressly require the public release of the arbitrator's determination, nothing in the Code precludes such determinations becoming publicly available. If a determination was to be made public, the Western Australian Government submits that the confidentiality provisions in s 31 of the Act would apply.

### **Application and submissions**

- 8.21 The Western Australian Government submits that the establishment of a panel of arbitrators that excludes the ERA, safeguards the independence of the arbitrator. The ERA may approve or omit persons from this panel on the recommendation of the

Chairman of the Western Australian Chapter of the Institute of Arbitrators. Arbitrators must act in accordance with the CAA but cannot be directed by, or report to, either the ERA or any Minister. For a specific dispute, the ERA will appoint an arbitrator from the panel based on specialist knowledge pertaining to the matters under dispute. The ERA is to have no further involvement in the arbitration process unless a question is referred to them by the arbitrator.

8.22 The Western Australian Government submits that the WA Rail Access Regime achieves the objectives of clause 6(4)(g) of the CPA by providing for a fully independent dispute resolution process.

### **Discussion**

8.23 The WA Rail Access Regime provides for the arbitration of disputes where a railway owner has refused to enter into access negotiations or the negotiations have broken down. Parties are not precluded from jointly agreeing on a mediation or private arbitration process.

8.24 It appears that under s 25 of the Code, a dispute under an existing access agreement is not taken to be a dispute for the purposes of the arbitration provisions in the WA Rail Access Regime. In other words, the Regime's arbitration provisions only apply in circumstances where the railway owner has refused to negotiate with an access seeker or where access negotiations have broken down. Therefore, if a dispute exists in relation to an existing access agreement, the parties must jointly agree on a mediation or private arbitration process outside of the WA Rail Access Regime, or initiate court proceedings for breach of contract. In this regard, the Council notes that an access agreement must make provision for the resolution of disputes arising from the performance of the agreement (see s 17(1)(a) of the Code and item 19 of Schedule 3 of the Code).

8.25 The Council accepts that the ERA is established and resourced in ways which enable it to maintain independence in exercising its regulatory functions. This independence is likely to be assisted by the availability of a panel of qualified arbitrators who the ERA appoints from to arbitrate access disputes.

8.26 The Council considers that the arbitration provisions under the WA Rail Access Regime have a number of positive aspects:

- where the parties refer a dispute to the ERA, the CAA applies to the arbitration (subject to specific provisions of the Code)
- the arbitrator must take into account the matters set out in subclauses 6(4)(i), (j) and (l) of the CPA
- the requirement that the ERA must register the arbitrator's determination provides a degree of transparency, and
- the arbitrator's discretion to award costs (or not) provides incentives for the parties to engage in proper conduct during the arbitration and to make genuine attempts to resolve disputes.

8.27 The WA Rail Access Regime satisfies clause 6(4)(g).

### **Clause 6(4)(h): binding decisions**

8.28 Clause 6(4)(h) provides that an effective access regime should have credible enforcement arrangements to ensure an arbitrator's decision is binding and effective. The regime should give effect to the enforcement process through legislative provisions, with appropriate sanctions and remedies for non-compliance.

8.29 State or territory access regimes may allow for appeal of the decision of a dispute resolution body. To satisfy clause 6(4)(h), the ultimate decision of the appeals body must also bind the parties.

8.30 To satisfy clause 6(4)(h), an effective regime should not diminish any existing rights for appeal of an arbitrator's decision. This does not require the insertion of new appeal provisions.

### **The WA Rail Access Regime**

8.31 Section 31 of the Code provides that when an arbitrator issues a written determination, that determination is to be taken to be an award, with the term "award" having the meaning given to it under the CAA. Section 28 of the CAA states that the award shall be final and binding between the parties to the agreement. This is underpinned by s 34 of the Code which states that the railway owner must, subject to Part V of the CAA, give effect to a determination.

8.32 However, s 34(2) of the Code provides that:

Except as provided by subsection (5), the other party to an arbitration is not required to give effect to a determination if, within 14 days after the day on which it is notified of the determination, it elects not to do so.

8.33 The election referred to in this clause can only be made by the access seeker (ie not the railway owner), must be made in writing within 14 days of the determination and must be provided to the arbitrator and the railway owner. This provision is designed to ensure that third parties are not required to give effect to determinations where it is uneconomic for them to do so. Section 34(2) of the Code does not apply in relation to an award of costs under ss 34(1) or 34(4) of the CAA.

8.34 The arbitrator's determination is to be treated as an award under the CAA. Section 33 of the CAA provides that an award made under an arbitration determination may, with leave of the Court, be enforced in the same manner as a judgment or Court order.

8.35 Parties have the right to bring proceedings for judicial review of determinations under both the Act and Code, including decisions made by the arbitrator (s 38 of the CAA).<sup>19</sup> The appeal body is the Supreme Court of Western Australia, which has

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<sup>19</sup> As discussed in paragraph 5.16, judicial review is limited in relation to the Minister's decision to include (or not include) particular routes in Schedule 1 of the Code.

jurisdiction to hear an application in accordance with the *Supreme Court Act 1935* (WA). Ultimately, an aggrieved party can make an application (with special leave) to the High Court of Australia to appeal a decision of the Supreme Court.

8.36 In accordance with the CAA, the arbitration is subject to the supervisory control of the Supreme Court of Western Australia. In practice, this means that while the arbitrator is responsible for the conduct of the arbitration, a party may seek the assistance of the Supreme Court in certain circumstances including:

- where an arbitrator needs to be removed (s 44 of the CAA)
- where production of documents is required from third parties (s 17 of the CAA)
- review of a determination on a question of law (s 38 of the CAA), and
- enforcement of a determination.

8.37 A party has the right to appeal to the Supreme Court of Western Australia on any question of law arising out an arbitrator's determination, however an appeal may only be brought with the consent of all the other parties to the arbitration agreement or with the leave of the Court (s 38 of the CAA). The Court may only grant leave if it considers that the determination of the question of law could substantially affect the rights of at least one of the parties to the arbitration agreement. The Court must also be satisfied that there is a manifest error of law on the face of the award, or strong evidence that the arbitrator made an error of law and that the determination of the question is likely to add substantially to the certainty of commercial law (see s 38(5) of the CAA).

8.38 If an appeal from an arbitrator's determination is brought to the Supreme Court of Western Australia, s 38(3) of the CAA provides that the Court may:

- confirm, vary or set aside the award, or
- remit the award to the arbitrator (together with the Court's opinion) for reconsideration, in which case the arbitrator must make the award within 3 months of the date of the Court's order.

8.39 The decision of the Supreme Court of Western Australia binds the parties, subject to any further appeal rights.

### **Application and submissions**

8.40 The Western Australian Government submits that the WA Rail Access Regime Access meets the policy intent of clause 6(4)(h) of the CPA by providing a binding dispute resolution mechanism and preserving existing rights of appeal.

## Discussion

- 8.41 The outcome of an arbitration<sup>20</sup> is enforceable in the same manner as a judgment or court order. One of the advantages of arbitration is that it allows the appointment of an arbitrator who has specialist technical expertise and experience in the subject matter of the dispute. Thus an arbitration process can provide a specialist forum thereby facilitating more efficient and effective dispute resolution.
- 8.42 There is no provision for merits review in relation to an arbitrator's determination. Existing rights of appeal, in the nature of judicial review in the Supreme Court of Western Australia, are preserved. That is, a party may appeal an arbitration determination on a question of law arising out of the determination, subject to the requirements in s 38 of the CAA. This is not dissimilar to the avenues of appeal from a court judgment/order, in the sense that appeals from a court judgment/order usually only have some prospect of success if the appeal is based on an error of law, rather than on a finding of fact. In other words, to the extent that grounds for appeal may only be based on a question of law arising out of an award, it is unlikely that a party aggrieved by an arbitrator's determination would be at a material disadvantage were the decision instead made by a judge in a court.
- 8.43 The WA Rail Access regime satisfies clause 6(4)(h).

### **Clause 6(4)(i): principles for dispute resolution**

- 8.44 The Council considers that clause 6(4)(i) applies to any body responsible for determining the terms and conditions of access—that is, both arbitrators and regulators. Clause 6(4)(i) covers both price and non price terms and conditions of access. Where relevant, the dispute resolution body should also be obliged to take account of the clause 6(5)(b) principles in considering access prices.

### **The WA Rail Access Regime**

- 8.45 Section 29(1)(b) of the Code specifies that the arbitrator must take into account the matters set out in clause 6(4)(i) of the CPA when hearing and determining a dispute. This provision only applies in relation to disputes where an access seeker has made a proposal for access to a railway owner which complies with the Code and:
- the railway owner has refused to negotiate on the proposal as required by s 13 of the Code, or
  - the access seeker and the railway owner have entered into negotiations on the proposal but have been unable to reach agreement, or negotiations have broken down (see s 25(2)(a) and (c) of the Code).
- 8.46 The ERA is also required to take into account a number of matters in performing its functions under the WA Rail Access Regime. These matters are set out in s 20(4) of the Act and mirror the matters in clause 6(4)(i) of the CPA.

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<sup>20</sup> Called a determination or an award.

8.47 To the extent that a dispute resolution body should also be obliged to take account of the clause 6(5)(b) principles in considering access prices, the Council notes an arbitrator may take into account any other matter that the arbitrator considers relevant (s 29 of the Code).

### **Application and submissions**

8.48 The Western Australian Government submits that the WA Rail Access Regime incorporates the principles in clause 6(4)(i).

### **Discussion**

8.49 The WA Rail Access Regime satisfies clause 6(4)(i) of the CPA.

### **Clause 6(4)(j): facility extension**

8.50 In some situations, the needs of an access seeker can be met only by an extension of the facility's geographic range or an expansion of its capacity. These matters should be subject, in the first instance, to negotiation between the parties. When parties cannot reach an agreement, however, the arbitrator should be empowered to determine, subject to the criteria in clause 6(4)(j), whether the owner should be required to extend or permit extension of the facility.

### **The WA Rail Access Regime**

8.51 Section 29(1)(b) of the Code specifies that the arbitrator must take into account the matters set out in clause 6(4)(j) of the CPA when hearing and determining a dispute. This provision only applies in relation to the disputes described in s 25(2)(a) or (c) of the Code (see paragraph 8.45 above).

8.52 An arbitrator, in making a determination may, amongst other things, require the railway owner to extend or expand a route or the associated railway infrastructure (or to do both), (s 33(3) of the Code). Section 33(4) of the Code specifies that a determination must not require the railway owner to extend or expand a route or associated railway infrastructure unless the arbitrator determines that the access seeker has the necessary financial resources to pay any costs associated with the extension or expansion for which they are liable.

### **Application and submissions**

8.53 The Western Australian Government submits that the WA Rail Access Regime satisfies clause 6(4)(j).

### **Discussion**

8.54 The WA Rail Access Regime satisfies clause 6(4)(j).

### **Clause 6(4)(k): a material change in circumstances**

- 8.55 Clause 6(4)(k) provides for an access arrangement to be revoked or modified following a material change of circumstances. The Council considers that this clause should not be interpreted in a way that would compromise the certainty of contractual arrangements. Once an agreement is signed—whether through commercial negotiation or following arbitration—it should govern the relationship between the parties. An appropriate way in which to address a material change of circumstances might be for the parties to identify in the agreement any factors that would warrant the agreement being reopened in the future.
- 8.56 To satisfy this clause, an access regime could provide for parties to use an arbitrator to resolve disputes over what constitutes a material change in circumstances. This provision would accommodate instances where commercial negotiations fail to achieve agreement.

### **The WA Rail Access Regime**

- 8.57 Section 17(1)(a) of the Code provides that in negotiating an access agreement, the railway owner and access seeker must ensure that provision is made for the matters specified in Schedule 3 of the Code. The matters in Schedule 3 include the ‘variation and termination of the agreement’ (see item 16, Schedule 3 of the Code).
- 8.58 If the ERA considers that there has been a material change in the circumstances that existed when costs were approved or determined, the ERA may conduct a review and make a fresh determination of those costs (Schedule 4, clause 12 of the Code).

### **Application and submissions**

- 8.59 The Western Australian Government submits that the WA Rail Access Regime satisfies clause 6(4)(k).

### **Discussion**

- 8.60 Under the WA Rail Access Regime, the railway owner and access seeker are required to identify in an access agreement the circumstances in which the access agreement may be varied or terminated. In most cases, this would be where there has been a material change in circumstances.
- 8.61 The WA Rail Access Regime satisfies clause 6(4)(k).

### **Clause 6(4)(l): compensation**

- 8.62 Clause 6(4)(l) provides that a dispute resolution body should impede a person’s existing right to use a facility only when it has considered the case for compensating that person. The Council does not interpret this to mean that an access regime need allow a dispute resolution body to impede existing rights. However, where a dispute resolution body can do this, it must also be empowered to consider and if appropriate, determine compensation.

## **The WA Rail Access Regime**

- 8.63 Section 29(1)(b) of the Code specifies that the arbitrator must take into account the matters set out in clause 6(4)(l) of the CPA when hearing and determining a dispute. This provision only applies in relation to the disputes described in s 25(2)(a) or (c) of the Code (see paragraph 8.45 above).

## **Application and submissions**

- 8.64 The Western Australian Government submits that the WA Rail Access Regime satisfies clause 6(4)(l).

## **Discussion**

- 8.65 The WA Rail Access Regime satisfies clause 6(4)(l).

## **Clause 6(4)(o): access to financial information**

- 8.66 An effective access regime should provide the dispute resolution body and other relevant bodies (for example, regulators and appeal bodies) with the right to inspect all financial documents pertaining to the service. This principle seeks to ensure that the dispute resolution body (and other relevant bodies) have access to all information necessary to properly assess and settle any issues relating to third party access.

## **The WA Rail Access Regime**

- 8.67 The ERA Act provides the ERA with information gathering powers. Section 51(1) of the ERA Act states that:

If the Authority has reason to believe that a person has information or a document that may assist the Authority in the performance of its functions, the Authority may require the person to give the Authority the information or a copy of a document.

- 8.68 In addition, ss 20 and 21 of the Act give the ERA power to obtain financial information relating to a railway owner's own use of infrastructure to which the Code applies. The ERA may also require a railway owner to provide it with other information, including books, documents or records, as specified in a notice from the ERA. A failure to comply may result in a penalty of \$100 000 in addition to a daily penalty of \$20 000. The ERA also has a power of entry to inspect any premises that are used in connection with the operation of a railway that is covered by the Code (s 22A of the Act). A railway owner who does not facilitate such entry and inspection is liable to a \$100 000 penalty.
- 8.69 Section 26 of the Code states that the provisions of the CAA apply to arbitrations under the Code. Section 17 of the CAA provides that a party to an arbitration may obtain a subpoena from the Supreme Court of Western Australia requiring a person to attend an examination before the arbitrator and to produce any documents specified in the subpoena. Refusal or failure to comply with this requirement may

result in the subpoenaed party attending the Supreme Court for an examination (s 18 of the CAA).

### **Application and submissions**

- 8.70 The Western Australian Government submits that the WA Rail Access Regime satisfies clause 6(4)(o).
- 8.71 Asciano argues in its submission that the ERA's monitoring and information gathering powers under the Regime could be strengthened to align more closely with the powers of the ACCC, and that the Regime should provide for a regulatory auditing process. Asciano believes that an annual audit of a railway owner's regulatory obligations should be undertaken by an independent external auditor.

### **Discussion**

- 8.72 The Council disagrees with the assertions made by Asciano and considers that the ERA is vested with sufficient information gathering and investigative powers to enable it to properly assess and settle any issues relating to third party access. The substantial financial penalties prescribed in the Act for a railway owner's non-compliance with the ERA's requests encourage railway owners to cooperate with the ERA and strengthen the ERA's investigative powers. The Council further notes that a party to an arbitration under the Regime (and in turn the CAA) may obtain a subpoena from the Supreme Court of Western Australia for the production of documents or for a person to be examined.
- 8.73 The WA Rail Access Regime satisfies clause 6(4)(o).

### **Clause 6(5)(c): merits reviews of arbitration determinations**

- 8.74 Clause 6(5)(c) recognises that an important element of an access regime is the independent review of any access decisions. Clause 6(5)(c) provides that where merits review is provided, then the review should be limited to information submitted to the original decision-maker.

### **The WA Rail Access Regime**

- 8.75 The WA Rail Access Regime does not provide for merits review.
- 8.76 Under s 38 of the CAA, an aggrieved party may seek judicial review of an arbitrator's determination in the Supreme Court of Western Australia (see the discussion at paragraphs 8.35—8.39 and 8.42 above).

### **Application and submissions**

- 8.77 The Western Australian Government submits that the judicial review of arbitration awards under the CAA addresses clause 6(5)(c).
- 8.78 The Western Australian Government also refers to s 11A of the Act which requires the Minister to consult with, and have regard to, the submissions of a railway owner

where any proposed amendment or replacement of the Code may affect that railway owner. The Western Australian Government submits that the inclusion of consultation provisions in the Act ensures that railway owners are involved in the process to amend or replace the Code, reducing the need for a merits review process.

## **Discussion**

### *Merits review of arbitration determinations*

- 8.79 Because the WA Rail Access Regime does not provide for merits review of an arbitration determination, the Council has not considered the Regime's mechanisms for dispute resolution against clause 6(5)(c) of the CPA. It appears to the Council that, despite the wording of the clause 6 principles recognising that a procedure for independent review of decisions is desirable, the wording of clause 6(5)(c) contemplates that an access regime may not provide for merits review.
- 8.80 Arbitrations will generally focus on resolving a particular matter(s) in an access dispute that is a source of disagreement between the parties. Given the nature of the decision in an arbitration determination and the procedures and protections available under the WA Rail Access Regime (including the reliance on the CAA), the Council's view is that the benefit in providing for merits review of arbitration determinations is not clearly established.

### *Merits review of decisions of the regulator*

- 8.81 The WA Rail Access Regime does not provide for merits review of the ERA's regulatory decisions. In the Council's previous certification recommendations, the Council has expressed the view that providing for appropriate review of the decisions of regulators is good regulatory practice. As envisaged by the CPA, such review does not need to allow for a 'second roll of the dice' and can be tailored to allow for redress of decision making errors (such as where it can be established that there is an error of law or a finding of fact was not open to a decision maker).
- 8.82 An appropriate level of merits review does not require a general reconsideration of the initial decision or de novo re-determination. In relation to the reviewable regulatory decisions under the National Gas Law for example, applications to the Australian Competition Tribunal for merits review may only be made on the grounds of an error in the regulator's finding of facts, or that the exercise of the relevant regulator's discretion was incorrect or unreasonable, or that the occasion for exercising the discretion did not arise. In the Council's view this limited merits review appropriately balances the need for oversight of regulatory decision making and reduces scope for unacceptable delay.
- 8.83 Merits review of such arbitration outcomes or regulatory decisions is not a mandatory requirement under the clause 6 principles. The Council considers that certification of the WA Rail Access Regime can occur despite the absence of merits review of arbitration determinations and of the ERA's regulatory decisions.

## 9 Efficiency promoting terms and conditions of access

9.1 An effective access regime must enable outcomes that enhance the objective of efficient use of and investment in significant bottleneck infrastructure, so promoting competition. An effective regime needs to:

- incorporate an objects clause that provides a clear statement that the purpose of regulating third party access is to promote economic efficiency in the operation, use and investment in infrastructure thereby promoting competition in upstream and downstream markets (clause 6(5)(a))
- provide a robust framework for negotiating agreements and resolving disputes: a right to negotiate access supported by binding dispute resolution (clauses 6(4)(a)-(c), (g) and (h)), an obligation on the service provider to negotiate in good faith (clause 6(4)(e)), and availability of required information (clauses 6(4)(n) and (o))
- provide an entitlement to revoke or modify an access arrangement where there has been a material change in circumstances (clause 6(4)(k))
- enable efficient access terms and conditions while providing considerable discretion and flexibility in setting prices (clauses 6(4)(f) and 6(4)(i) specify the considerations/factors that a disputes resolution body should take into account when determining access terms and the pricing principles in clause 6(5)(b)), and
- require that regulated access prices be set to cover costs, provide a return on investment that is commensurate with the risks involved and provide incentives to reduce costs or otherwise improve productivity.

### The WA Rail Access Regime

9.2 The WA Rail Access Regime includes the following objects clause in s 2A of the Act:

The main object of this 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.

9.3 Schedule 4 of the Code contains the access pricing and negotiation provisions and sets out the elements of the costing framework, including the floor and ceiling price tests, which form a price range to guide negotiations of the access tariff. Clause 4 in Schedule 4 provides that:

The costs referred to in this Schedule are intended to be those that would be incurred by a body managing that railway network and adopting efficient practises applicable to the provision of railway infrastructure, including the practise of operating a particular route in combination with other routes for the achievement of efficiencies.

9.4 The floor price test in clause 7 of Schedule 4 specifies that an operator who is provided with access must pay an amount not less than the incremental costs resulting from its operations on that route and use of that infrastructure. The ceiling

price test in clause 8 of Schedule 4 prescribes that an operator provided with access must pay an amount no more than the total costs attributed to that route and associated infrastructure.

- 9.5 Clause 13 in Schedule 4 of the Code sets out the guidelines that a railway owner is to implement when negotiating prices for the provision of access. These include:
- (a) consistency in the application of pricing principles to rail operations on a specific route, irrespective of whether it is the railway owner or another entity
  - (b) price consistency requires that any difference between the respective prices paid for access to the same route must only reflect a difference between the costs or risks associated with the provision of access
  - (c) prices should reflect the standard of the infrastructure, proposed operations, the relevant market conditions, and any other identified preference of the proponent
  - (d) any apportionment of costs should be fair and reasonable
  - (e) prices should be structured in a way that will encourage the optimum use of facilities, and
  - (f) prices should allow the railway owner to recover over the economic life of the infrastructure concerned the costs of the owner in respect to any extension or expansion to accommodate the requirements of an operator.
- 9.6 Section 46 of the Code requires a railway owner to submit to the ERA for approval the costing principles that will be applied when determining the floor and ceiling prices referred to in Schedule 4.

### **Application and submissions**

- 9.7 The Western Australian Government submits that the objects clause in s 2A of the Act satisfies the requirement of clause 6(4)(a) of the CPA.
- 9.8 In addition, the Western Australian Government submits that the inclusion of floor and ceiling price tests in Schedule 4 of the Code ensures that access tariffs paid by an access seeker are efficient, with the establishment of a regulated price band (rather than regulated prices) allowing for price discrimination between access seekers. The Western Australian Government considers that the access pricing and negotiation provisions, which are supported by s 46 of the Code, satisfy clause 6(5)(b) of the CPA.
- 9.9 In its submission Cooperative Bulk Handling (**CBH**) raises several concerns with the methodology and assumptions that have been used to set the floor and ceiling prices for WestNet Rail, which CBH considers have been set at unfair and uncompetitive levels. CBH notes that unlike the position in other states, in its costing methodology the WA Rail Access Regime uses gross replacement value (**GRV**) of rail assets and considers modern equivalent asset values. CBH argues that the use of modern equivalent asset values is unfair because the railway network used to transport grain is predominantly narrow gauge track which has existed for many years – with some

sections as old as 100 years, many parts of the network comprising timber sleepers and with some sections based in gravel rather than ballast. In addition, CBH refers to its investment in infrastructure that has been advantageous to rail capacity and which it says has not been considered in the GRV used to determine floor and ceiling prices. CBH submits that there are issues with the methodology justifying maintenance and capacity and that the costing methodology in the Regime should be tested.

- 9.10 CBH observes that rail transport has historically been the most competitive mode of transporting grain to port in Western Australia, but this proportion has been declining in recent years partly because of the uncompetitive pricing of above and below rail services. By way of example, CBH states that prior to 2007 very few of the 146 operational CBH rail using sites were more expensive than road to transport grain to port. By 2009, 46 of the CBH rail using sites were more expensive than road to transport grain to port. CBH submits that rail access prices have increased by 36 per cent between 2006 and 2008 and suggests that Western Australia's rail access prices are four times that of prices in the Eastern States for similar services.
- 9.11 In its submission BHPBIO argues that the WA Rail Access Regime ignores the impacts of third party access on a railway owner's integrated system and fails to meet the requirements of clause 6(5)(b)(i) and (iv) of the CPA. BHPBIO further argues that the segregation obligations are more onerous than those required by clause 6(4)(n) of the CPA and are contrary to the efficiency objectives of Part IIIA.

## Discussion

- 9.12 Section 2A of the Act makes clear that the object of the WA Rail Access Regime is to promote efficiency and competition in the market for rail operations. Although this objects clause does not refer to '*promoting effective competition in upstream or downstream markets*' as stated in clause 6(5)(a) of the CPA, the Council considers that it is sufficient to address the certification requirement that the regime include an appropriate objects clause.
- 9.13 The WA Rail Access Regime satisfactorily incorporates the principles in clauses 6(4)(a)-(c) of the CPA by establishing a framework for parties to reach commercial agreement on access terms and conditions, with provision for binding arbitration where agreement cannot be reached. In this way, the WA Rail Access Regime provides a safety net framework in which commercial negotiations can take place using the procedures and timeframes specified in the Code. As the Regime is not mandatory, access agreements can be made outside of the Regime through private commercial negotiations.
- 9.14 The WA Rail Access Regime also satisfactorily incorporates the principles in clauses 6(4)(e) and (f) of the CPA by requiring a railway owner to use all reasonable endeavours to accommodate the requirements of an access seeker and by providing that access need not be on exactly the same terms and conditions.
- 9.15 In addition, both an arbitrator when making an award and the ERA in performing its regulatory functions are required to take into account the matters sets out in clause

6(4)(i) of the CPA (refer to s 29(1)(b) of the Code and s 20(4) of the Act). Parties are required to specify in an access agreement the circumstances which would constitute a 'material change in circumstances' such that the agreement may be varied or terminated (s 17 and Schedule 3 of the Code) which satisfies clause 6(4)(k) of the CPA.

9.16 The WA Rail Access Regime also implements ring fencing arrangements by requiring a railway owner to segregate its access-related functions from its other functions and to maintain separate accounts and records (Part 4, Division 3 of the Act). This satisfies clause 6(4)(n) of the CPA.

9.17 In regards to pricing and costing methodology the WA Rail Access Regime prescribes GRV as the asset valuation method. GRV is defined in the Code (Clause 2, Schedule 4) as:

...the gross replacement value of the railway infrastructure, calculated as the lowest current cost to replace existing assets with assets that—

- (i) have the capacity to provide the level of service that meets the actual and reasonably projected demand; and
- (ii) are, if appropriate, modern equivalent assets.

9.18 The WA Rail Access Regime is the only regulated industry to adopt GRV as depreciated optimised replacement cost (**DORC**) is the widely accepted asset valuation methodology for regulation in Australia. Furthermore, the Council notes that as GRV is specified in the Code, the ERA is bound to apply this methodology and has no discretion to apply another approach.

9.19 Access negotiations under the Code are subject to a price range that is bound by both a floor and ceiling price. The Western Australian Government submit that the floor price test ensures that the minimum cost a third party must pay for access is equivalent to the incremental costs resulting from its operations on the particular route and the use of particular infrastructure. While, the ceiling price test ensures that the maximum cost a third party could pay for access is equivalent to the total costs attributable to the particular route and infrastructure. Railway owners must submit the costing principles that are to be applied and followed in the determination of costs to the ERA for approval. Once approved they form Part 5 Instruments.

9.20 Schedule 4, clause 13 of the Code outlines guidelines that are to be applied in negotiating price for the provision of access and include:

- (a) consistency in the application of pricing principles to rail operations on a specific route, irrespective of whether it is the railway owner or another entity
- (b) price consistency requires that any difference between the respective prices paid for access to the same route must only reflect a difference between the costs or risks associated with the provision of access

- (c) prices should reflect the standard of the infrastructure, proposed operations and the relevant market conditions
- (d) any apportionment of costs should be fair and reasonable
- (e) prices should be structured in a way as to encourage the optimum use of facilities, and
- (f) prices should allow the railway owner to recover, over the economic life of the infrastructure concerned, the costs of the owner in respect to any extension or expansion to accommodate the requirements of an operator.

9.21 Submissions received raised issue with the pricing and costing methodology in the WA Rail Access Regime (see paragraphs 9.9—9.11 above). The Council has identified that similar issues have also featured in submissions made to the ERA in respect of its current review of the Code.<sup>21</sup> A theme emerging from those submissions is the application of GRV to greenfield railways and how appropriate the methodology is to greenfield developments.<sup>22</sup> The Council notes that when the Regime came into existence its application to new railways was limited and its application to privately developed heavy haul railways non-existent. At the time of its inception the then Code's application was limited to railways under the control of the state.<sup>23</sup>

9.22 The Council considers that GRV may present difficulties. In particular, GRV may affect greenfield developments, notably because GRV doesn't provide for the forecasting of capital expenditure. This may have flow on effects beyond access regulation as it may impact the success of a greenfield project—for example, in respect of securing finance for proposed new infrastructure—or impact investment in existing infrastructure affecting its repair, operating capacity and standards and longevity.

9.23 Prescribing the costing methodology in the Code is not the preferred approach. The Council considers that it is advantageous for the regulator to have the discretion to determine the appropriate methodology on a case by case basis, particularly given the recent, and likely future, application of the Code to greenfield developments. The WA Rail Access Regime is also the only regime to adopt GRV and consistency in regulation would be promoted with a review, and potentially replacement, of the GRV methodology.

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<sup>21</sup> ERA, 9 Feb 10, Public submissions received on the Second Review of the *Railways (Access) Code 2000* – Issues Paper.

<sup>22</sup> See the following submissions made to the ERA – Oakajee Port and Rail Pty Ltd, Fortescue Metals Group Ltd and Department of Treasury and Finance (Government of Western Australia) – available at [http://www.erawa.com.au/3/829/48/second\\_review\\_of\\_the\\_railways\\_access\\_code.pm](http://www.erawa.com.au/3/829/48/second_review_of_the_railways_access_code.pm)

<sup>23</sup> *Government Railways (Access) Act 1998* (WA).

- 9.24 Prescribing GRV within the Code is not inconsistent with the clause 6 principles and while it may have some disadvantages need not be inconsistent with efficient access pricing.<sup>24</sup>
- 9.25 While the Council notes the concerns about the GRV methodology and the level of rail access prices in Western Australia raised in the submission by CBH and also BHPBIO's submission that the WA Rail Access Regime fails to meet the efficiency objectives of Part IIIA and the requirements of clause 6(5)(b)(i) and (iv), pricing forms one of the Part 5 Instruments that are created only with the approval of the ERA. The Council acknowledges that the ERA is an independent body with expertise and experience in relation to pricing and in addition to its approval functions also has review and oversight functions in relation to rail access matters.
- 9.26 The Council would, however, be concerned (in relation to the effectiveness of the WA Rail Access Regime) if there is evidence in the future that the commitment to the GRV methodology is resulting in inefficient access pricing and/or is generating an unreasonable number of disputes. As no access arrangements has yet been struck under the Code and a greenfield railway have only recently been captured by the Code, there is no evidence or past performance to suggest the likelihood of such outcomes.
- 9.27 The WA Rail Access regime satisfies the efficiency requirements of an effective access regime.

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<sup>24</sup> The Council notes the findings in the 2002 comparison paper of GRV v DORC that over the long term the different approaches have similar results: Office of the Rail Access Regulator, *A Brief Comparison of the WA Rail Access Code approach to calculating ceiling cost with the conventional Depreciated Optimised Replacement Cost methodology*, 18 July 2002.

## **10 The objects of Part IIIA (s 44AA of the TPA)**

10.1 The Council in recommending on the certification of an access regime and the Minister in making a decision on certification must have regard to the objects of Part IIIA (ss 44M(4)(aa) and 44N(2)(aa) of the TPA).

10.2 The objects of Part IIIA are set out in s 44AA, and provide that:

The objects of this Part are to:

- (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

### **The WA Rail Access Regime**

10.3 Section 2A of the Act provides that:

The main object of this 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.

### **Application and submissions**

10.4 The Western Australian Government submits that the WA Rail Access Regime satisfies the requirements outlined in s 44M of the TPA.

10.5 As noted in paragraph 5.12 above, BHPBIO considers that the application of the WA Rail Access Regime to a vertically integrated Pilbara iron ore railway may cause significant disruption to, and inefficiencies in, the operation of and investment in both the railway and the entire supply chain. BHPBIO argues that the WA Rail Access Regime would frustrate rather than promote the objects of Part IIIA and therefore cannot be considered to be an effective access regime in that context. BHPBIO also considers that a railway owner's segregation obligations under the Regime are contrary to the efficiency objectives of Part IIIA.

10.6 CBH submits that ten years since the privatisation of WestNet Rail, there has been no real above-rail competition, especially on the narrow gauge routes, which the grain industry is most reliant on. CBH considers that the Australian Railroad Group, which has been responsible for managing CBH's access agreements, has an interest in preventing above-rail competition.

### **Discussion**

10.7 The Council acknowledges that the stated object of the WA Rail Access Regime reflects the objects of Part IIIA of the TPA.

10.8 In the recent decision of the Australian Competition Tribunal on applications by Fortescue Metals Group Ltd (and a wholly owned subsidiary) for declaration of

services provided by Pilbara iron ore railways owned and operated by both BHPBIO and Rio Tinto Limited, the Tribunal stated in regard to the WA Rail Access Regime, at [1231]:

... the WA regime provides greater benefits to third party users than does Part IIIA. The benefits include scheduled timetables which give greater certainty in the use of the line and a more equitable sharing arrangement between the third parties.<sup>25</sup>

10.9 The Tribunal went on to say, at [1232]:

This is not to criticise Part IIIA. A significant difference between the two regimes is that Part IIIA applies to existing infrastructure and so, quite rightly, makes provision to ensure the owner is not prejudiced. Railway owners who fall under the WA regime know in advance of construction of a line that third parties can apply for access: see the Railways (Access) Act, s 7. This enables the owner to forward plan to accommodate line sharing.

10.10 Focussing on the objects of Part IIIA, the Council draws attention to its questions about the impact of particular aspects of the WA Rail Access Regime:

- interface issues will continue to exist for national rail transportation (see paragraph 6.16 above) and inconsistency in the approach to pricing and cost methodology with the adoption by Western Australia of the GRV (see paragraphs 9.17—9.26 above)
- the lack of timeframes for submission and approval of the Part 5 Instruments (see paragraph 7.19 above), and
- the exclusion of judicial review for the inclusion of new railways covered under the Code pursuant to Schedule 1 (see paragraph 5.16 above).

10.11 However, while the Council does have some reservations about the mechanics of the Regime and the practical implications thereof, it considers that the Regime appears to be broadly consistent with the objects of Part IIIA of the TPA.

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<sup>25</sup> In the matter of Fortescue Metals Group Limited [2010] ACompT 2

## 11 The duration of certification

- 11.1 When recommending to the Commonwealth Minister on the certification of an access regime, the Council must also recommend on the period that any certification should remain in force (s 44(M)(5) of the TPA).
- 11.2 A certification remains in force for the duration specified in the Commonwealth Minister's decision unless the relevant state or territory ceases to be a party to the CPA. There is no mechanism in the TPA for revocation or early termination of a certification.
- 11.3 Where an access regime has been certified as an effective access regime, in considering any application for declaration of a service to which the regime applies the Council is bound to follow that certification and must not recommend declaration, unless it believes there have been substantial modifications to the access regime or the clause 6 principles since the regime was certified (s 44G(2)(e)(ii) of the TPA). Similarly the Commonwealth Minister may not declare a service that is subject to a certified access regime unless he or she considers there have been substantial modifications to the access regime or the clause 6 principles since the regime was certified (s 44H(4)(e)(ii) of the TPA).

### Application and submissions

- 11.4 The WA Government's application did not specify a desired period for certification.
- 11.5 Alcoa's submission supports the certification of the WA Rail Access Regime but suggests that the period of certification be no longer than five years. In Alcoa's view, a shorter certification period is warranted on the basis that no access agreements have been negotiated within the framework of the Regime, which makes it difficult to determine whether the clause 6 principles are being satisfied in a practical, rather than theoretical, sense.
- 11.6 Similarly, Asciano's submission generally supports the certification of the WA Rail Access Regime but only when considered in the context of the current market and industry structures which exist for rail infrastructure services subject to the Regime. Asciano is concerned that if certification was granted for a long period of time and the current industry structure were to change it would be questionable as to whether the Regime would continue to meet the requirements for certification. Given that a certification decision cannot be revoked, Asciano proposes three options: the first is to strengthen the Regime so that it would be effective regardless of industry ownership structures; the second is for the Council to provide that the certification period will end upon a specified event such as the integration of above and below rail operations; and the third is to provide a short certification period of five years or less.
- 11.7 CBH states in its submission that it wants an opportunity to test and assess whether the WA Rail Access Regime is effective and fairly managed before being able to support it. CBH argues that the certification of the WA Rail Access Regime should be

postponed until at least one access agreement has been negotiated and managed under the Code. Alternatively, CBH suggests that the Regime be certified for only a limited period before review.

## Discussion

11.8 In considering the duration of a certification, the Council considers the need for infrastructure owners/service providers and users to have stability and certainty in the regulatory environment, on the one hand, with the recognition that there may be changes in the market environment and the fact that there is no mechanism in the TPA for revocation or early termination of a certification,<sup>26</sup> on the other. Where relevant, the Council also considers other factors such as whether a regime is proposed as a transitional measure or is being introduced in the early stages of industry reform and whether there are other relevant regulatory proposals such as for the development of a national access regime for an industry.

11.9 The ERA commenced its second review of the Code in October 2009, as required by s 12 of the Act. At the time of drafting this report, the ERA is yet to report on this review. The third review of the Code by the ERA is due to commence in late 2014.

11.10 In the Council's view, it is preferable that the period of certification coincide with the finalisation of the ERA's third review of the Code for the following reasons:

- While access regulation of rail in Western Australia has been in existence for some time the mechanisms it provides have not yet been used and the practical implications of the WA Rail Access Regime have not therefore been tested.
- Greenfield infrastructure has recently been captured under the Code and it is likely that more will be added in the future. There is some uncertainty about the application of the Regime to greenfield developments and vertically integrated providers.
- The limitations placed on judicial review may restrict the ability for aggrieved parties to seek redress of issues arising under the WA Rail Access Regime.
- If a regime is substantially modified, the exemption from declaration that arises from certification (ss 44G(2)(e)(ii) and 44H(4)(e)(ii) of the TPA) may be lost. The Council notes that the periodic review of the Regime undertaken by the ERA may result in modifications that could be regarded as substantial.
- The TPA provides a mechanism to extend the period that a certification decision is in force (s 44NA of the TPA). At the same time, the Council can consider any proposed variations to a regime. (s 44NA(3) of the TPA).

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<sup>26</sup> Unless the Council believes there have been substantial modifications to the access regime or the relevant principles in the CPA since the regime was certified (s 44G(2)(e)(ii) of the TPA).

11.11 The Council proposes that the appropriate duration for the certification of the WA Rail Access Regime is until 31 December 2015.

## **12 References**

### **Tribunal decisions**

In the matter of Fortescue Metals Group Limited [2010] ACompT 2

### **Acts and other instruments**

*Commercial Arbitration Act 1985 (WA)*

*Economic Regulation Authority Act 2003 (WA)*

*Interpretation Act 1984 (WA)*

*Rail Safety Act 1998 (WA)*

*Rail Safety Act 2010 (WA)*

*Railways (Access) Act 1998 (WA)*

*Railways (Access) Code 2000 (WA)*

*Trade Practices Act 1974 (Cth)*

## Appendix A — The clause 6 principles

—extract from the Competition Principles Agreement

- 6(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.
- 6(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).
- 6(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 that access regime;
  - (b) should recognise that, as provided by ss44DA(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.
- 6(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.
- 6(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.

## Appendix B – Index of application and submissions

### Application

Submission from the WA Government dated May 2010
Copies of relevant legislation, including the <i>Railways (Access) Act 1998 (WA)</i> and <i>Railways (Access) Code 2000 (WA)</i>
Contact details of interested parties

### Submissions on the application

Alcoa sub 1	Alcoa World Alumina Australia submission dated 17 June 2010
Asciano sub 1	Asciano Limited submission dated June 201
BHPBIO sub 1	BHP Billiton Iron Ore Pty Ltd submission
CBH sub 1	Cooperative Bulk Handling submission dated 17 June 2010
NWIOA sub 1	North West Iron Ore Alliance submission

## Appendix C – Chronology

Date	Event
12 May 2010	Application received by the Council
17 May 2010	Notice of the application published in <i>The Australian</i> and on the Council's website, inviting submissions in response to the application. Interested parties notified.
17 June 2010	Closing date for submissions on the application
17 August 2010	Draft recommendation released
16 September 2010	Closing date for submissions on the draft recommendation