NATIONAL
COMPETITION
COUNCIL

Western Australian Rail Access Regime

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

Final Recommendation

13 December 2010

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Abbreviations and defined terms

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
Act	*Railways (Access) Act 1998* (WA)
ARTC	Australian Rail Track Corporation
BHPBIO	BHP Billiton Iron Ore Pty Ltd
CAA	*Commercial Arbitration Act 1985* (WA)
CBH	Cooperative Bulk Handling Ltd
clause 6 principles	The principles set out in clauses 6(2)-6(5) of the Competition Principles Agreement
CIRA	Competition and Infrastructure Reform Agreement
COAG	Council of Australian Governments
Code	*Railways (Access) Code 2000* (WA)
Council	National Competition Council
CPA	Competition Principles Agreement
ERA	Economic Regulation Authority of Western Australia
ERA Act	*Economic Regulation Authority Act 2003* (WA)
GRV	Gross Replacement Value
NWIOA	North West Iron Ore Alliance
OPR	Oakajee Port & Rail Pty Ltd
Part IIIA	Part IIIA of the *Trade Practices Act 1974* (Cth)
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.
Pilbara rail decisions	*In the matter of Fortescue Metals Group Limited* [2010] ACompT 2
Rail Safety Act	*Rail Safety Act 2010* (WA)
RHI	Roy Hill Infrastructure Pty Ltd
Rio Tinto	Rio Tinto Ltd

State Agreement Act or State Agreement	State Agreements are contracts between the Government of Western Australia and proponents of major resources projects which are ratified by an Act of the Western Australian Parliament. They specify the rights, obligations, terms and conditions for development of the project and establish a framework for ongoing relations and cooperation between the State and the project proponent.
TPA	*Trade Practices Act 1974* (Cth)
TPI Railway	The Pilbara Infrastructure Pty Ltd railway stretching 280 kilometres from Cloudbreak mine in the eastern Pilbara to Port Hedland
Tribunal	Australian Competition Tribunal
WA Rail Access Regime or Regime	The rail network access regime established under the Act and Code

1 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 view is that while the WA Rail Access Regime satisfies or reasonably conforms to the principles it must address in order to be certified as an effective access regime, the Regime does not provide for a consistent approach to regulation of third party access to railways in Western Australia. Accordingly, having regard to the objects of Part IIIA (s 44AA of the TPA), the Council recommends that the Commonwealth Minister **not certify** the Regime as effective.

1.3 The Council's reasons for its recommendation are set out in this report.

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). 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).

2.3 The Council published its draft recommendation on 17 August 2010. The draft recommendation indicated the Council proposed to recommend that the Regime be certified as an effective access regime. The Council invited interested parties to make written submissions in response by 16 September 2010. Four submissions were received (see appendix B).

2.4 Most of these submissions further addressed issues that had been canvassed in the submissions on the application and discussed in the draft recommendation. However, the submission by Roy Hill Infrastructure Pty Ltd (**RHI**), in particular, raised a number of additional issues and concerns. RHI had not made any submissions until this point.

2.5 Furthermore, the RHI submission and the recently agreed State Agreement in relation to development of that company's Pilbara railway[1], focussed the Council's attention on the increasing range of different approaches to third party access to railways in Western Australia (this issue is discussed in chapter 10).

2.6 As a number of the issues raised in the RHI submission on the draft recommendation had not been previously canvassed, the Council decided that the applicant and interested parties should have a formal opportunity to address these before the Council finalised its recommendation. Accordingly, the Council invited further submissions on these issues. Three further submissions were received (see appendix B), including one from the Western Australian Government.

2.7 The Council has considered all submissions received in making this recommendation.

2.8 The Council's final recommendation reverses the position taken in the draft recommendation. This is uncommon, although not unprecedented. There would be little purpose in preparing a draft recommendation and circulating this for comment if the Council could not alter its views as a result of further information or analysis following a draft recommendation.

[1] This State Agreement was not discussed in the West Australian Government's application and only came to the Council's attention following the RHI submission in response to the Draft Recommendation.

2.9 As the Council reversed its earlier position, the Council considered it appropriate to advise the Western Australian Government of this development and to invite it to consider ways in which the deficiencies in the Regime may be addressed.

2.10 The Council suggested to the Western Australian Government that given the application for certification was not receiving a recommendation primarily on the basis that there is a lack of consistency in the regulation of access to railways in Western Australia and that such inconsistency is not purely an historical legacy, this lack of consistency might be addressed by the Western Australian Government developing and adopting a principled policy that addresses how access to rail will be governed. The Western Australian Government has not sought to pursue such an approach, or to otherwise address the consistency issue identified by the Council, in the context of this application.

2.11 In the Council's view an overarching policy is necessary to provide the consistency in approach to access regulation that is necessary for certification of an access regime having regard to the objects of Part IIIA, in particular s44AA(b). The Council's strong preference is for such a policy to be enshrined in legislation of general application, rather than relying on implementation on a case by case basis in project specific State Agreement Acts.

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.

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)
- ring fencing 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 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.

3.5 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 facilities at Port Hedland (**TPI Railway**).

3.6 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.

3.7 The Council has been informed by RHI that its proposed railway to be constructed in the Pilbara will be subject to an access undertaking to be lodged with the Australian Competition and Consumer Commission (**ACCC**). This access undertaking will apply to

a haulage service rather than the below rail services to which the WA Rail Access Regime applies. This access undertaking is to be lodged and accepted by the ACCC prior to the commissioning of the RHI railway. If that occurs the Regime will not apply to the RHI railway.[2]

3.8 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**), some of which are declared under Part IIIA, or the railway line east of Kalgoorlie, which is controlled by the Australian Rail Track Corporation (**ARTC**).

[2] This arrangement is documented in the State Agreement Act– *Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010* (WA).

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 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[3], 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 the 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**).[4] There are some 23 such principles, a number of which have several elements. An effective access regime must satisfactorily address each of the clause 6 principles.

4.6 The Council's consideration of whether the clause 6 principles are satisfied is subject to several other requirements:

- section 44DA(1) of the TPA provides that the Council must treat each principle as having the "status of a guideline rather than a binding rule"
- section 44DA(2) provides that an effective access regime may contain additional matters that are not inconsistent with the CPA principles

[3] Parallel requirements to those applying to the Council in making its recommendation, apply to the Commonwealth Minister in deciding whether to certify an access regime as effective.

[4] The clause 6 principles are reproduced at appendix A.

- clause 6(3)(b) of the CPA requires that in order to confirm with the clause 6 principles an access regime must "reasonably incorporate" each of the principles in clause 6(4) of the CPA. Clause 6(3) also acknowledges that "there may be a range of approaches available to a State or Territory Party to incorporate each principle". The clause goes on to note that:

  > 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).

- clause 6(3A) of the CPA provides that in assessing whether a State or Territory access regime is an effective access regime the assessing body:

  > (a) should, as required by the *Trade Practices Act 1974*, and subject to section 44DA, not consider any matters other than the relevant principles in this Agreement. Matters which should not be considered include the outcome of any arbitration, or any decision, made under the access regime; and
  >
  > (b) should recognise that, as provided by subsection 44DA(2) of the *Trade Practices Act 1974*, an access regime may contain other matters that are not inconsistent with the relevant principles in this Agreement.

4.7 In making its recommendation the Council must have regard to the objects of Part IIIA. This is discussed in detail in chapter 10.

4.8 Part IIIA has two objects. The first is concerned with economically efficient operation and use of, and investment in, infrastructure to promote effective competition in upstream and downstream markets. Together with a number of more specific requirements set out in various of the clause 6 principles, this object is directed to ensuring a certifiable access regime balances the interests of access seekers and asset owners/service providers in a way that advances the national interest.

4.9 The second object is to provide a framework and guiding principles to encourage a consistent approach to access regulation in an industry. Having reflected on the various approaches adopted in Western Australia in respect of third party access to railway infrastructure this object has taken on particular importance in relation to this application.

4.10 In its Guide to Certification[5], and in a number of its recommendations on applications for certification of 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 accords with the objects of Part IIIA.

[5] Available for download from the Council's website, www.ncc.gov.au.

4.11 A failure to secure certification of a particular access regime does not affect the enforceability or operation of a state or territory regime. Indeed, the Council notes that the WA Rail Access Regime has been in existence for approximately 10 years and while it appears that the Regime has not been utilised to gain access to any railway as yet, it has been available and could have been utilised by access seekers. Certification does, however, remove the potential for a service(s) to be declared under Part IIIA, and is likely to provide greater certainty to asset owners/service providers and access seekers.[6]

Structure of this recommendation

4.12 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.

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

4.14 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

4.15 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. These amendments came into 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

[6] Section 44H(4)(e)(ii) of the TPA provides that the designated Minister cannot declare a service if access to the service is already the subject of an effective access regime decision under s 44N of the TPA.

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. This clause also requires that 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 periodic 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.[7]

5.5 Thus the service to which access is 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.

[7] 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, and (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).[8]

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 (NWIOA Sub 1).

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, cannot be considered an effective regime in that context and submits that the Council should consider the specific characteristics of Pilbara iron ore railways in applying the certification principles (BHPBIO Sub 1).

Submissions in response to the Council's draft recommendation

5.13 NWIOA supports certification of the Regime, but considers that the Regime itself would be strengthened if it were to apply to all significant railway infrastructure, including all of BHPBIO and Rio Tinto's railways. NWIOA believes it is not in the best interests of uniform and consistent regulation for the Regime to apply to new railways only if and when regulated by the Western Australian Government under a State Agreement or by declaration (NWIOA Sub 2 at 5-6).

[8] Now replaced by the *Rail Safety Act 2010* (WA).

5.14 NWIOA query whether the CPA does actually require the inclusion of other existing or future railways because they would constitute significant infrastructure facilities as contemplated by clause 6(3)(a). NWIOA also submit that it is important that the Council is satisfied that the coverage of the Regime adequately embraces all significant railway infrastructure facilities within the applicant's (being the Western Australian Government) jurisdiction that satisfy the clause 6(3)(a) criteria (NWIOA Sub 2 at 7-8).

5.15 RHI submit that the Regime must comply with the definition of "service" in s 44B of the TPA and that it is important to determine the facility that is the subject of the WA Rail Access Regime. RHI assess that there are five discrete, stand alone facilities covered by the Regime, which provide fundamentally different services. RHI characterise the facilities as follows:

- urban – mostly passenger network
- non-urban narrow gauge freight network – intrastate freight
- non-urban standard gauge freight network – intrastate freight
- Perth/Kalgoorlie standard gauge line – interstate freight, and
- TPI Railway in the Pilbara.

RHI submit that both the TPA and the CPA require a regime to be for access to one service to be provided by means of one facility (RHI Sub 1 at 3.3—3.4, 3.6).

5.16 RHI also consider that the competition effects of certification can be distinguished from those associated with declaration because CPA clause 6(3)(a)(ii) refers to *permit effective competition* as compared with the *promote a material increase in competition* requirement in the declaration criteria in ss 44G(2)(a) and 44H(4)(a) of the TPA. RHI submit that "permit" is not the same as improving the conditions or environment for competition in upstream and downstream markets, nor is "permit" the same thing as promoting competition in upstream and downstream markets. "Permit" signifies that without access to the particular service there is no effective competition in an upstream or downstream market. RHI state that there is already significant or sufficient existing competition in the upstream and downstream markets covered by the Regime (RHI Sub 1 at 4.6).

5.17 BHPBIO state that the recent decisions of the Australian Competition Tribunal (**Tribunal**), *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 (**Pilbara rail decisions**) is significant to the consideration of whether the Regime satisfies clause 6(3)(a) of the CPA and is also relevant to s 5(3) of the Act which prescribes the questions the WA Minister must consider when applying the Regime to a new railway/route (BHPBIO Sub 2 at 2.15). Furthermore BHPBIO submit that the Council, in making its recommendation, should take into account the Tribunal's findings in relation to the effect of third party access on the public interest (BHPBIO Sub 3 at 2.4).

5.18 Reiterating points from its first submission (BHPBIO Sub 1), BHPBIO further submit that the application of the Regime to Pilbara railways is inconsistent with the Tribunal's Pilbara rail decisions (BHPBIO Sub 2 at 3.5).

Submissions in response to the RHI submission

5.19 The Western Australian Government (WA Govt sub 2, p 2) draw on principles of statutory interpretation to support its position that the services must necessarily involve the use of more than one facility and there is nothing to suggest that 'facility' should be read only in the singular. In respect of significance, the Western Australian Government argue that even if the analysis is undertaken on the basis of discrete railway networks, they would still constitute significant facilities and comply with clause 6(3)(a) (WA Govt sub 2, p 3).

5.20 In responding to the submission from RHI, the Western Australian Government state that consideration of whether a facility is uneconomic to duplicate is based on identifying whether a facility exhibits natural monopoly characteristics. Although it may be in RHI's own commercial interests to construct a railway, this does not diminish the natural monopoly characteristics exhibited by the railways currently covered by the Regime (WA Govt sub 2, p 3).

5.21 In further response to the RHI submission and the issue of whether the requirement to "permit" effective competition in clause 6(3)(a)(ii) is satisfied, the Western Australian Government submit that the Regime should be assessed on its ability to permit or promote effective competition generally in upstream and downstream markets (WA Govt sub 2, p 4).

5.22 The Western Australian Government also advise that the Code is subsidiary legislation and as such is subject to usual parliamentary procedures, including being capable of being disallowed by parliament. The Western Australian Government argue that the inclusion of new railways by way of s 5 of the Act is subject to scrutiny and compliance monitoring by the Joint Standing Committee on Delegated Legislation (WA Govt sub 2, p 5).

5.23 NWIOA query and respond to RHI's claims on the following issues—certification of each distinct service; investment in railway infrastructure; meaning of "significant infrastructure"; economically feasible duplication; and competition in dependent markets (NWIOA Sub 3).

The Council's view

5.24 In the Council's view the debate over whether a specific railway should be included within the scope of the WA Rail Access Regime is not particularly germane to its consideration of an application for certification of that Regime. The inclusion of a railway is a matter for the ERA to advise on and for the WA Government to determine in applying the Regime, or in the context of negotiating a State Agreement.

5.25 Generally, the Council accepts that the railways to which the WA Rail Access Regime applies comprise significant infrastructure facilities having regard to their size and

importance to the Western Australian economy.[9] 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 and can be provided safely.

5.26 The Council accepts that the addition of further railways by way of an amendment to the Code is likely to be subject to sufficient scrutiny to reasonably ensure that the scope of the Regime remains consistent with the relevant clause 6 principles. However, extension of application of the Regime through amendments resulting from State Agreement Acts might lead to the inclusion of services without being subject to such scrutiny.

5.27 The Council accepts that the railways to which the WA Rail Access Regime applies are generally unlikely to be economically feasible to duplicate. Furthermore, given additions to the scope of the Regime are expected to be railways with similar economic characteristics to those covered by the Regime at the time of this recommendation, it is likely that this will continue to be the case.

5.28 The Council has not conducted a specific analysis of each of the railways subject to the Code. In the Council's view such an examination is not required as part of consideration of an application for certification. Whether a particular railway meets the requirements for inclusion within the scope of the WA Rail Access Regime is one for the ERA and relevant decision makers under the scheme. In the Council's view its consideration of an application for certification of an access regime cannot involve it pre-empting various regulatory determinations which are properly made under the regime.

5.29 The Council notes the findings of the Tribunal in the Pilbara rail decisions and the submissions made by RHI and BHPBIO on the issue of whether railways are economically feasible to duplicate. In the Pilbara rail decisions the Tribunal, in considering the meaning of "economically feasible to duplicate the facility" in clause 6(3)(a) of the CPA and whether that connoted a test of private profitability stated:

> ... Perhaps the most natural meaning of the phrase "economically feasible" connotes private profitability. However, it is not too strained to read "economically feasible" as economically efficient, in the sense that something that is inefficient may be economically unfeasible when looked at from society's perspective. (at [830])

5.30 The Council agrees with the submission of the Western Australian Government that while it may be privately profitable for a firm to build another railway (such as was the case for Fortescue Metals Group Limited in constructing the TPI railway and will be so for RHI in the construction of its proposed railway) that does not mean the railway is not a natural monopoly particularly when regard is had to what would be

[9] And in the case of the TPI railway, the national economy.

economically efficient when considering such railways from the perspective of Australian society as a whole.

5.31 In respect of competition, the Council considers that the difference in language between the expressions "permit" and "effective competition" in the CPA and "promote" and "material increase in competition" in Part IIIA to be immaterial, particularly when regard is had to the purpose, intent and objects of the National Access Regime. The Council considers that access to the services will improve the conditions and environment to permit effective competition in the dependent markets. While some competition may already exist in some dependent markets it is unlikely that all the dependent markets could be described as already effectively competitive such that there could be no improvement in competition from the Regime.

5.32 As noted above, 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.[10]

5.33 However, the Council is concerned about whether s 5(4) of the Act and also whether the inclusion of railways by means other than s 5 of the Act, such as by legislative amendment following the passing of a State Agreement 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.[11] 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,[12] 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

10 Section 12(2) of the Act.

11 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]).

12 See: CPA clause 6(3)(a); Act s 5(3).

an error to be corrected and the Council is not satisfied that the status of the Code as subsidiary legislation (subject to disallowance by the WA Parliament) provides any additional protection or surety that there exists an accessible and enforceable mechanism for such errors to be corrected.

5.34 The Council notes the conflicting views of NWIOA and BHPBIO regarding the scope of the services that should be subject to the WA Rail Access Regime in respect of railways in the Pilbara. The Council also notes the views of RHI that the application of the Regime to new railway lines is inappropriate and in respect of Pilbara railways it produces inefficient outcomes which would be better addressed by access being facilitated via a haulage service rather than regulating access to below rail infrastructure. RHI takes this position despite having agreed as part of its State Agreement that the WA Rail Access Regime will apply to its railway if the company fails to again acceptance of an access undertaking in relation to provision of haulage services from the ACCC.

5.35 The Council considers that it would be preferable to have all railways in Western Australia subject to the same access regime and for there to be consistency in railway access regulation both intrastate and interstate. However this does not mean that all railways should be subject to regulation. That is an issue to be determined in each case through the application of the relevant criteria in the WA Rail Access Regime.

5.36 Focussing on railways in the Pilbara, if a single access regime applied it would be more likely to provide for a consistent approach to access regulation. At present the regulatory landscape in the Pilbara consists of:

- unregulated railways – BHPBIO's Mt Newman railway line and Rio Tinto's Hamersley rail network, but subject to State Agreement Acts that appear ineffectual in respect of third party access
- railways declared under Part IIIA of the TPA – BHPBIO's Goldsworthy railway line and Rio Tinto's Robe River railway line[13]
- the TPI railway, subject to below rail regulation under the Regime, and
- the prospect that a new railway to be constructed by RHI will be the subject of an access undertaking for haulage and regulated by the ACCC.

5.37 The Council notes that while there is no provision in the CPA that requires that the WA Rail Access Regime include all railways in the Pilbara, or any railways that may exist in the future anywhere in Western Australia, s 44AA of the TPA specifies that an object of Part IIIA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry. The Council must have regard to the objects in its consideration what recommendation to make on an application for certification (s 44M(4)(aa)). This is considered further in chapter 10 of this report.

[13] It is noted that while these declarations are current they are the subject of current proceedings before the Full Federal Court of Australia.

5.38 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) and 44H(4) of the TPA.[14] The Minister's addition of new routes to Schedule 1 of the Code, whether by way of s 5 of the Act or via the passage of a State Agreement Act, will form part of the Regime. Should the Regime be certified any new routes would also be excluded from declaration under Part IIIA of the TPA.[15]

5.39 The Council considers that the Regime satisfactorily addresses the clause 6(3)(a) principles, although it notes its concerns about the potential for new railways to be included that may not satisfy the requirements of clause 6(3)(a). There is also a risk that railways that should be included will be excluded from regulation of third party access if a State Agreement provides for some other means of regulating access or for no regulation of access at all.

Review of the right to negotiate access

Application and submissions

5.40 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.

5.41 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.

5.42 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.

5.43 RHI submit that the requirement for the Minister to call for public comment on proposals to amend or appeal and replace the Code, and for the ERA to review and

[14] 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.

[15] The Western Australian Government submitted that the Council's draft recommendation stated that additional routes prescribed as subject to the Code would not be excluded from declaration under the National Access Regime by virtue of certification of the WA Rail Access Regime by the Commonwealth Minister (WA Govt sub 2 at p 5). This is not correct. As noted here, certification of the WA Rail Access Regime would exclude the availability of declaration for routes that are subsequently brought within the scope of the Regime.

report on the Code to the Minister is not a lapse of a right to negotiate and a renewal of that right to negotiate. The right to negotiate continues unabated unless the Minister, following public comment takes a deliberate and affirmative decision to cancel and replace the Code. RHI submit that the Regime should operate such that access arrangements apply for a specified period so that the full analysis and approval process operates within a framework provided by that specified period. RHI submit that the lack of regulatory resets serves to perpetuate key unacceptable elements of the Regime (RHI Sub at 4.10).

5.44 The Western Australian Government respond to the RHI submission stating that the provisions relating to the negotiation process outlined in Part 3 Division 2 of the Code adequately provide for a lapse in the right to negotiate an access agreement and the ability to agree extension of that right. Section 20(1) of the Code states:

> Immediately before the negotiations are begun the railway owner and the proponent must jointly fix a day (the termination day) after which the negotiations—
>
> (a) will cease if, by the end of that day, they have not entered into an access agreement; or
>
> (b) will continue only if a later termination day is fixed jointly by the railway owner and the proponent.

5.45 The Western Australian Government go on to argue that Schedule 3 of the Code requiring parties to include provisions in the access agreement for variation and termination of an access agreement, combined with the periodic review provisions, ensures compliance with clause 6(4)(d) (WA Govt sub 2, p 6).

The Council's view

5.46 The Council considers that the WA Rail Access Regime satisfies clause 6(4)(d) of the CPA because s 20(2) of the Code provides for the revocation of a right to negotiate access. In addition, periodic review of the Code by the ERA, including public consultation is a key feature of the Regime. Public consultation is also invited on any proposals to amend or replace the Code by the Minister. These mechanisms provide an additional opportunity for the application of the Regime to be revisited periodically.

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.[16]

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.[17]

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

[16] Clause 3.1 of the Competition and Infrastructure Reform Agreement (**CIRA**) dated 10 February 2006 (as amended from time to time) outlines this commitment.

[17] 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".[18]

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.

6.11 RHI submit that the fact that rail operators must deal with two different access regimes renders the Regime ineffective and notes that the specific requirements of the Regime's Part 5 Instruments are different to those applying under the ARTC access undertaking applying to the railway line east of Kalgoorlie. In response to statements made by the Council in its draft recommendation concerning the costs of implementing a uniform national access and pricing regime applicable to the Perth/Kalgoorlie line, RHI state that the possibility of future policy outcomes and the promise of governments working together in the future to achieve uniformity in rail access does not satisfy the guidelines that must be applied now and is exactly what clause 6(2)(a) is designed to prevent. In pointing to the burden rail operators face in

[18] ARTC, *2005 Submission to the Economic Regulation Authority review of the Railways (Access) Code 2000.*

complying with two regimes, RHI submit that there is not a single process, a cooperative legislative regime, a single body nor a single forum in the WA Rail Access Regime, as is required by clause 6(4)(p) (RHI Sub, 5.1—5.3).

6.12 The Western Australian Government argue that the question regarding compliance with clause 6(2) is not a question of whether the Regime itself has extra-jurisdictional impact, but whether the influence of the facility beyond the jurisdictional boundary renders the Regime ineffective. Referring to clause 6(4)(p) and its approach to the principles that should be in place should more than one access regime apply to a service, the Western Australian Government resubmits that s 27 of the Code makes reference to dispute resolution where the issues in dispute affect both access regimes. Commercial arrangements in place for the interstate rail track enable parties to seek access through a single process (WA Govt sub 2, p 7).

The Council's view

6.13 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 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.[19]

6.14 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 Australia's freight rail network is a priority, with particular mention of the railway west of Kalgoorlie.[20] 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.

6.15 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:

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19 Section 44AA(b) of the TPA.

20 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)

> ... 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.

6.16 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.

6.17 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 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.[21]

6.18 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.

[21] 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 wherever possible 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.[22] 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). The Council is concerned how access arrangements agreed ex- the Code and within the Code for the same service will be reconciled as the Regime is silent on how these potentially competing priorities may be managed.

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

22 Application, p 15.

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 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 seeking access via the Code 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 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.

7.17 RHI argues that there is considerable doubt as to whether s 4A of the Code is valid. In support of this RHI note that s 4 of the Act requires the Code to be established and to include certain matters. Provisions is made for the Code not to apply to interstate services, but no such power is provided in respect of the services covered by the Regime that are not an interstate service. RHI argue that the requirements of s 4 of the Act are mandatory and as such powers to make and given effect to subsidiary legislation (such as s 4A of the Code) do not overrule the requirements of s 4 of the Act (RHI Sub at 6.2).

7.18 RHI submit further that the prescriptive nature of the WA Rail Access Regime—by way of the Part 5 Instruments, the requirements for a standard access agreement and the need to ensure that an access agreement complies with the requirements in Schedules 3 and 4 of the Code— fails the requirements of Part IIIA and the CPA (RHI Sub at 6.3—6.5). RHI considers that the WA Rail Access Regime is prescriptive and requires the railway owner and access seeker to negotiate within a number of parameters and with a number of predetermined elements of access having been determined by the ERA or specified in the Regime itself. These predetermined matters go to the very core of the access regime and are inconsistent with the fundamental requirements of the CPA. Matters which should be left to the parties to negotiate, and which should be left to the independent dispute resolution body to resolve if the parties cannot agree are prescribed by the Regime or are dependent upon ERA approved instruments and other determinations made by the ERA (RHI Sub at 6.6).

7.19 In response to the arguments of RHI, the Western Australian Government submit that the only reading of the Act that could question the validity of s 4A of the Code is one which would suggest that the Regime is mandatory, which is fundamentally flawed and not consistent with the CPA. Further, the Regime is designed to provide a framework and safety net for parties to utilise when information and market power asymmetries prevent successful commercial negotiations. While some aspects of the Regime are mandated, the periodic review of the Code by the ERA (s 12 of the Act) enables necessary changes to be implemented to improve the effectiveness of the Code (WA Govt sub 2, pp 8-9).

The Council's view

7.20 The Council accepts that the WA Rail Access Regime exists for access seekers to use at first instance or as a safety net in situations where an access seeker has attempted to negotiate access outside of the Code, but such negotiations have been unsuccessful. 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.

7.21 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[23] in arbitrating access disputes means that commercial negotiations are supported by credible enforcement mechanisms.

7.22 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. However, the Council notes the submission of the Western Australian Government that it is committed to amending the Regime to comply with clause 2.6 of the CIRA to implement a binding six month time limit for ERA approval processes, with provision to extend this time limit where insufficient information has been provided. This amendment is to be considered once the current review of the Code by the ERA is concluded (WA Govt Sub 2, p 14). In the Council's view this would be a positive enhancement of the Regime.

7.23 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.

[23] 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.

7.24 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.

7.25 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 under the Code 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.

7.26 The Council notes RHI's concerns about the prescriptiveness of the Regime and the validity of s 4A of the Code. Nevertheless on its face s 4A of the Code provides, for the avoidance of doubt, that parties are free to negotiate access outside of the Code and where they do so can agree to have regard to some or all of the Part 5 Instruments.

7.27 The Council is not in a position to determine the validity of s 4A but the intention seems clear, even if the implementation is inelegant in its drafting. There may be difficulties in applying s 4A as suggested by RHI, but there have yet to be demonstrated in practice. In the circumstances the Council is of the view that it should adopt the view that s 4A will allow for negotiation outside the Code as intended.

7.28 The Council is satisfied that the Code then exists as another avenue/safety net for access seekers should negotiations independent of the Code stall or fail. As access seekers can elect to avail themselves of the Regime or to negotiate independent of it, the degree of prescription in the Code is not prohibitive to satisfying the requirements in the CPA concerning the negotiation framework.

7.29 Even if the effect of s 4A is limited, the Council considers that the requirements of cl 6(4)(a) may be met in any event.

7.30 The Council has considered the effect of the words "wherever possible" in cl 6(4)(a). In the Council's view the emphasis given to private negotiations as the preferred means of resolving access issues must be tempered by the circumstances in which any such negotiations must occur.

7.31 In respect of the railways to which the WA Rail Access Regime applies it appears to the Council there is only very limited scope for private negotiations to yield a satisfactory outcome. For example, it is unclear how bilateral private negotiations

would deal with multiple access seekers looking to use a route. Where capacity is constrained any agreement with one access seeker is likely to impact other parties. In such situations it is likely that private negotiations would need to be expanded to include multiple parties. Even then it is uncertain how the needs of future access seekers could be represented.

7.32 Where such complications arise it seems to the Council that such issues are necessarily addressed within the more prescriptive context provided under a regulated approach to access through the incorporation of principles concerning priority and competing interests into the Regime or at least by ensuring the relevant regulator has regard to the broader public interest, not just the interests of negotiating parties.

7.33 The Council also considers that where number of access requests are likely to emerge the costs of dealing with these on a case by case basis through private negotiation are likely to be significant. It may be that the imposition of a standardised approach to access by way of regulation will lower costs.

7.34 In the Council's view the WA Rail Access Regime reasonably allows sufficient flexibility for access to occur through private negotiation, in circumstances where the scope for such outcomes is likely to be limited.

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

Clause 6(4)(e): reasonable endeavours

7.36 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

7.37 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.

7.38 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

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

7.40 RHI submit that if a party elects to negotiate outside of the Code by virtue of s 4A of the Code, then the access seeker will not have the benefits of ss 13 and 16 of the Code (RHI Sub at 6.6).

The Council's view

7.41 Access to any of the railways that are subject to the Code can be sought either outside of or inside the Code. The ideal situation would be for the facility owner to be bound in both situations to use all reasonable endeavours to accommodate the requirements of persons seeking access. However, the WA Rail Access Regime does not impose such an obligation where arrangements are the subject of commercial negotiation outside the Code. Private parties are of course free to incorporate good faith requirements in any private agreement and should commercial negotiations fail, recourse to the WA Rail Access Regime is available.

7.42 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

7.43 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

7.44 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.

7.45 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 recognises 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

7.46 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.

7.47 RHI submit that because of the prescriptiveness of the Regime, access will, to a material and sufficient extent, be on exactly the same terms, include the core issues such as pricing. RHI goes on to say that the Regime does not offer the flexibility for railway owners and access seeking entities to negotiate and agree the terms and conditions of an access agreement within a reasonably accommodating framework that is contemplated by clause 6(4)(f). The entirely in or entirely out concept of s 4A of the Code does not assist this position (RHI sub at 6.9).

7.48 In response to RHI, the Western Australian Government submits that access agreements, including prices, are to be negotiated individually by the service provider and the access seeker, within the established negotiation framework and parameters of the Code. The Regime facilitates the flexibility necessary to ensure access agreements reflect differing requirements within the prescribed framework and parameters (WA Govt sub, pp 9-10).

The Council's view

7.49 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, subject to the parameters and framework imposed by the Code. 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), in which case parties are not bound by any of the aspects of the Code unless they elect and agree otherwise.

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

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

7.51 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.

7.52 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.

7.53 The Council notes the submission of the Western Australian Government that for dispute resolution to apply once an access agreement has been finalised, the parties to the access agreement must include such provisions in the relevant agreement. The

parties have the flexibility to determine the dispute resolution provisions that are suitable for their particular circumstances as the Codes does not specify what form these provisions should take (WA Govt sub 2, p 13).

7.54 The WA Rail Access Regime satisfies clauses 6(4)(g), (h) and (i).

Clause 6(4)(m): hindering access

7.55 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

7.56 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.

7.57 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.

7.58 A failure to comply with these provisions may attract financial penalties.[24]

Application and submissions

7.59 In addition to the provisions in s 34A 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 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.

7.60 RHI submit that having regard to s 4A of the Code, unless the parties otherwise agree, when negotiating outside of the Code the railway owner and the access seeker are not bound to comply with s 34A of the Act or s 16 of the Code (RHI Sub at 6.12).

[24] Section 34A(3) of the Act.

The Council's view

7.61 The Council is satisfied that the Regime itself provides sufficient mechanisms to address any hindering of access by the owner or user or a service.

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

Clause 6(4)(n): separate accounting

7.63 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.

7.64 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

7.65 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).

7.66 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

7.67 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).

7.68 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 (BHPBIO Sub 1).

7.69 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.

7.70 RHI agree with the submission of BHPBIO that the Regime's scope in respect of this principle goes beyond the requirements of the CPA. Accordingly, the additional requirements are unnecessary and will result in administration and compliance costs which, in themselves, are inefficient (RHI Sub at 6.13).

The Council's view

7.71 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.

7.72 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 types of service providers subject to the Code, more stringent segregation arrangements may be

required. The Regime needs to be utilised for access for the impact of these to be considered.

7.73 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.

The Council's view

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 *S*ection 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 made 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.

8.23 RHI argue that there is no guidance in the Regime as to the priority that is to be afforded the Act, the Code and matters determined by the Regulator and whether these prevail, in the event of inconsistency, over clauses 6(4)(i), (j) and (l) of the CPA. The matters under the Act, the Code and as determined by the Regulator are said to create a prescriptive regime that is not in keeping with clause 6(4)(i) which requires the dispute resolution body to take matters pertaining to the particular railway and railway owner into account, not proxies for them determined by, or under, the Regime. (RHI Sub at 6.10). RHI argue that the matters determined by the Act, the Code and the Regulator are numerous, prescriptive and place significant restrictions on the arbitrator. Furthermore, s 29 of the Code requires the arbitrator to have regard to clauses 6(4)(i), (j) and (l) of the CPA only in the circumstances set out in s 25(2)(a) or (c)—being a failure to negotiate or a failure to agree on an access agreement. RHI submit that if an access seeker does not agree with the outcome of a prescriptive provision of the Code or any of the matters pre-determined by the Regulator, the arbitrator has no jurisdiction to resolve that dispute. That is not independent dispute resolution (RHI Sub at 7.2).

8.24 In response to the RHI submission, the Western Australian Government resubmit that the provisions in s 25 of the Code are sufficiently broad to enable the Regime's dispute resolution procedures to be effective. Further, the likelihood of inconsistency is minimal given that clauses 6(4)(i), (j) and (l) are directly incorporated in s 29 of the Code and clause 6(4)(i) is also picked up in s 20(4) of the Act (WA Govt sub 2, p 10).

The Council's view

8.25 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 (s 25 of the Code). Parties are not precluded from jointly agreeing on a mediation or private arbitration process outside of the Code.

8.26 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).

8.27 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.

8.28 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 arbitrator is appointed from the panel and the CAA applies to the arbitration (subject to specific provisions of the Code). The arbitrator must take into account the matters set out in clauses 6(4)(i), (j) and (l) of the CPA. The Council considers that the specification in s 29 of the Code that the arbitrator is to have regard to clauses 6(4)(i), (j) and (l) of the CPA in situations where s 25(2)(a) or (c) applies does not unduly limit the ability of the dispute resolution process to achieve its aims and for parties to have recourse to resolution. The situations referred to in s 25(2)(a) and (c) are likely to cover a significant number of disputes that may arise and be referred for resolution under the Regime and 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.

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

Clause 6(4)(h): binding decisions

8.30 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.

8.31 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 appeal body must also bind the parties.

8.32 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

8.33 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.

8.34 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.

8.35 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.

8.36 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.

8.37 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).[25] The appeal body is the Supreme Court of Western Australia, which has 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.

8.38 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.

[25] As discussed in paragraph 5.33, judicial review is limited in relation to the Minister's decision to include (or not include) particular routes in Schedule 1 of the Code.

8.39 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).

8.40 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.

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

Application and submissions

8.42 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.

The Council's view

8.43 The outcome of an arbitration[26] 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.

8.44 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

[26] Called a determination or an award.

aggrieved by an arbitrator's determination would be at a material disadvantage were the decision instead made by a judge in a court.

8.45 The WA Rail Access regime satisfies clause 6(4)(h).

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

8.46 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

8.47 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).

8.48 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.

8.49 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

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

The Council's view

8.51 The Council notes the concerns of RHI that dispute resolution is not independent because it is constrained by the framework and requirements of the Act, Code and matters determined by the ERA (see paragraph 8.23 above). However, the Council notes that parties are free to seek to negotiate access outside of the Regime in which case, failing agreement and recourse being had to dispute resolution, such resolution will not be subject to any constraints or limitations. However, the Regime continues to exist as a safety net that may be utilised by parties where attempts at commercial

negotiation and independent dispute resolution fail. In such cases, while the framework of the Regime may be considered to be prescriptive it provides mechanisms and enforceability that otherwise may not be available. Furthermore, the Council notes that because an access seeker has a right, pursuant to s 34(2) of the Code, to not give effect to a determination, in the event that an access seeker is dissatisfied with the outcome of arbitration they are not bound to accept it.

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

Clause 6(4)(j): facility extension

8.53 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

8.54 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 8.47 above).

8.55 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

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

The Council's view

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

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

8.58 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.

8.59 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

8.60 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).

8.61 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

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

8.63 RHI submit that the requirement in Schedule 3 of the Code for an access agreement to provide for 'variation and termination of the agreement' should not be considered as the means by which parties will respond to a change in circumstances. This requirement is likely to encompass situations pertaining to default, insolvency, prolonged force majeure and perhaps some anticipated change in circumstances, such as the introduction of a carbon tax or other change in the tax regime. RHI argue that there is no basis upon which to conclude that parties will include a general change in circumstances as the trigger for a variation or termination of an access agreement and as such it is hard to see compliance with clause 6(4)(k) (RHI Sub at 7.3).

8.64 In response to the RHI submission, the Western Australian Government assert that it is an issue of interpretation and furthermore, that the Code does not need to be overly prescriptive on matters that will trigger variation or termination of an access agreement (WA Govt sub 2, p 10).

The Council's view

8.65 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. The Council considers that it is reasonable to expect that this would ordinarily include provision for where there is a material change in circumstances.

8.66 The WA Rail Access Regime satisfies clause 6(4)(k).

Clause 6(4)(l): compensation

8.67 Clause 6(4)(l) provides that a dispute resolution body should only impede a person's existing right to use a facility 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

8.68 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 8.47 above).

Application and submissions

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

The Council's view

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

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

8.71 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

8.72 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.

8.73 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.

8.74 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

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

8.76 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.

The Council's view

8.77 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.

8.78 The WA Rail Access Regime satisfies clause 6(4)(o).

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

8.79 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

8.80 The WA Rail Access Regime does not provide for merits review.

8.81 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 8.37—8.41 and 8.44 above).

Application and submissions

8.82 The Western Australian Government submits that the judicial review of arbitration awards under the CAA addresses clause 6(5)(c).

8.83 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.

The Council's view

Merits review of arbitration determinations

8.84 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.

8.85 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

8.86 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).

8.87 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 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.

8.88 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 dispute 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 (BHPBIO Sub 1).

9.12 In response to the CBH submission, WestNet Rail state that the floor and ceiling prices have not played a part in determining the rail access charges which have been determined by commercial negotiation outside the Regime. These commercially negotiated rail access charges equate to 25 per cent of the price allowable under the revenue ceiling provided for under the Regime. Furthermore in respect of CBH's claim that rail access prices have increased by 36 per cent over 2 years, WestNet Rail responds that this claim refers to increases to the bundled rail haulage price charged by the above rail operator to CBH. WestNet Rail charges access fees to the above rail operator and has no control over the actual fees charged to CBH. The increase CBH claims is primary driven by above rail charges; below rail access fees for grain services have increased in real terms by only 10 per cent since 2006 (WNR Sub).

9.13 WestNet Rail state that the Western Australian Government has recently audited the financial viability of the grain lines and confirmed that WestNet Rail continues to make a loss on the narrow gauge network at current prices. Despite this WestNet Rail submit that they continue to operate and maintain the narrow gauge grain network in accordance with its lease obligations with the Western Australian Government.

9.14 RHI argue that the Regime does not contain a complying objects statement, as required by clause 6(5)(a) and fails to address how it will promote competition in any dependent markets as the only market to which the Regime is directed is the contestable market for rail operations. The prescriptive nature of the Regime is a significant departure from the requirements of Part IIIA and the CPA. In this regard, RHI use as examples the GRV methodology that is to be applied in all circumstances

(see paragraphs 9.21-9.22 below for further information) and the Weighted Average Cost of Capital (**WACC**) that is be determined by the Regulator for specific routes and then routinely applied. RHI submit that the nature of infrastructure assets is that these prescriptive requirements will not produce an efficient outcome in all circumstances. There is no permission for the incorporating of future stay in business capital expenditure over a defined regulatory reset period. This does not encourage investment in rail infrastructure, efficient or otherwise. RHI argue that a much less prescriptive approach would allow an efficient result in all cases and all circumstances (RHI Sub, 8.1—8.6).

9.15 In response to the RHI submission, the Western Australian Government note that it maintains its position that whilst not replicating clause 6(5)(a), the object in s 2A of the Act complies with the principle underlying the clause (WA Govt Sub 2, p 11).

The Council's view

9.16 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.

9.17 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 obtained. 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.

9.18 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.

9.19 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 set 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). While not prescribed in the Regime, it is reasonable to expect that parties will 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.

9.20 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.

9.21 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.

9.22 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.

9.23 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.

9.24 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.

9.25 Submissions received raised issue with the pricing and costing methodology in the WA Rail Access Regime (see paragraphs 9.9 and 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.[27] A theme emerging from those submissions is the application of GRV to greenfield railways and how appropriate the methodology is to greenfield developments and railways in the Pilbara.[28] 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.[29]

9.26 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.

9.27 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 national regulation would be promoted with a review, and potentially replacement, of the GRV methodology.

9.28 Prescribing GRV within the Code is not inconsistent with the clause 6 principles and while it may have some disadvantages, the result need not be inconsistent with efficient access pricing.[30] The Council also notes the contentions made by the Western Australian Government on pricing and GRV, being as follows:

> Prescription of GRV in the Code eliminates uncertainty and ensures that different methodologies are not utilised on different sections of the same track;

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

28 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

29 *Government Railways (Access) Act 1998* (WA).

30 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.

> The Regime does not mandate the price that should be paid for access, it merely provides a regulated price band based on the efficient cost of providing access. Negotiations will then determine the actual price to be paid for access, between this regulated band (where negotiations are undertaken under the Code);
>
> For Greenfield projects, the GRV methodology is consistent with the commonly used Depreciated Optimised Replacement Cost (DORC) methodology, as in both cases the depreciation value would be zero. Given this, the State refutes the NCC's claim that utilising the GRV methodology may affect greenfield developments;
>
> The GRV methodology does allow for forecasts of capital expenditure to be incorporated;
>
> The regime provides for consideration of third party capital (capacity) contributions when assessing capital costs;
>
> Maintenance costs calculated under the GRV methodology may be lower than actual maintenance costs incurred (particularly in the case of the south-west rail lines, given their age); and
>
> The floor and ceiling price bands may not reflect the competitiveness of prices obtained in the market place through commercial negotiation. It should be noted that floor prices based on the GRV methodology are likely to be lower than if the floor price was calculated using DORC since:
>
> - The incremental cost (floor cost) is unlikely to have a capital cost element; and
> - The Regime uses a calculated value for operating, maintenance and overhead costs rather than actual values, in order to reflect the infrastructure as new. (WA Govt sub 2, p 15)

9.29 The Western Australian Government further submit that the only instance where application of the GRV methodology may be inappropriate is for costs incurred for the acquisition of land. Schedule 4 of the Code excludes land costs from inclusion as part of a railway owner's capital costs, but this has been considered in the current review of the Code by the ERA and features in its draft report. The Western Australian Government advised that it will conduct further public consultation on amendments to the Code to more appropriately treat land and related costs. At this stage the intention is that any amendments to the Code will provide the ERA with sufficient discretion to determine what methodology should be applied to these costs (WA Govt Sub 2, p 16).

9.30 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 RHI, 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. Furthermore, the content of the current review of the Code by the ERA and the submission made to the Council on these matters by the Western Australian Government suggest changes may be made to the GRV methodology which are expected to address some of the concerns.

9.31 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 have yet been struck under the Code and a greenfield railway has only recently been captured by the Code, there is no evidence or past performance to suggest the likelihood of such outcomes.

9.32 The WA Rail Access regime satisfies the efficiency requirements of an effective access regime.

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.

Competition and efficiency object – ss 44AA(a) of the TPA

10.3 Section 2A of the Act that established the WA Rail Access Regime 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 and are more onerous than required by clause 6(4)(n) (BHPBIO Sub 1 at 1.9, 4.5).

10.6 BHPBIO's further submissions repeat this argument and submit that the Council should have regard to the Tribunal's findings in the Pilbara rail decisions concerning public interest and how the objects of Part IIIA apply in these circumstances (BHPBIO Sub 2 at 3.6-3.21).

10.7 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.

10.8 RHI agree with the submission of BHPBIO and go on to say that a vertically integrated railway most effectively promotes the economically efficient operation and use of, and investment in railway infrastructure for the transport of iron ore in the Pilbara. To accommodate access in the Pilbara, RHI submit that it should be via the provision of haulage services and not the use of the below rail infrastructure. Use of the below rail infrastructure is likely to result in the railway owners being kept at the lowest common denomination in terms of the technical characteristics of a new railway line, and in applying technical developments to that railway. Where a haulage service is provided, however, the railway owner undertakes all the enhancements and meets all capital expenditure. The user of the haulage service benefits from the increased efficiencies and pays a capital contribution towards the network improvements or an increased haulage tariff determined in accordance with widely accepted asset valuation and pricing principles (RHI Sub, 9.2-9.3).

10.9 RHI further submits that the WA Rail Access Regime is an inappropriate regime to apply to new railway lines. The Regime was designed to apply to existing government railways and key prescriptive elements of the Regime, relating to pricing and tariffs, will not result in economically efficient investment in railway lines. Furthermore, the application of the Regime to railways in the Pilbara constructed and operated to transport iron ore results in the offering only of a service which prevents or hinders the efficient operation of the railway lines (RHI Sub at 9.6).

10.10 The Western Australian Government submit that the use of an infrastructure facility and the transportation of goods are two separate services. Thus the service dealt with by the Regime and that which will be dealt with under RHI's proposed access undertaking for haulage are two distinctly separate services and, as such, the potential existence of access provisions for both rail and haulage services should have no bearing on the Council's consideration of the effectiveness of the Regime. The Western Australian Government further submit that the issue of consistency in regulation should be assessed in terms of consistency with Part IIIA of the TPA generally, given that Part IIIA in its entirety provides the framework and principles that should underpin access regulation. It cannot be clearly or reasonably demonstrated that utilising the different instruments given in Part IIIA of the TPA will result in inconsistency of access regulation. The ability to utilise different policies and instruments for access regulation under Part IIIA is a matter for each jurisdiction to consider (WA Govt sub 2 pp 12-13).

The Council's view

10.11 The Council considers that the stated object of the WA Rail Access Regime reflects the first limb of the objects of Part IIIA of the TPA being to:

> 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. (s 44AA(a) of the TPA).

10.12 The Council also notes that in the Pilbara rail decisions, 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.[31]

10.13 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.

10.14 In the Council's view the WA Rail Access Regime accords with the first limb of the objects of Part IIIA.

Consistency object – ss 44AA(b) of the TPA

10.15 In considering the second limb of the objects of Part IIIA the Council has regard to whether the WA Rail Access Regime provides a framework and guiding principles to encourage a consistent approach to access regulation for railways in Western Australia.

10.16 While the railways that fall within the Regime will be subject to similar requirements, these railways are a subset of the railways in Western Australia.

10.17 Western Australian railways are subject to a variety of access regulation—some being for below rail access and the proposed RHI railway being for haulage; some being subject to Part IIIA and others to be regulated under the Regime; some regulated by the ERA, with others falling to the ACCC either as a result of declaration or via a proposed access undertaking, such as in the case of the proposed RHI railway. The current state of play means, within the Pilbara region, that there are at least three different forms of regulation that apply, two regulators and two railways that are not subject to any access regulation.

10.18 In addition the Western Australian Government for a considerable period of time has being considering the introduction of a regulatory scheme requiring rail operators to provide haulage services which was provided under the auspices of the Pilbara Rail Access Interdepartmental Committee (**PRAIC**).

10.19 The Council has been unable to discern an underlying policy that determines whether a railway is regulated, what is regulated (access to below rail services or haulage), by which regulator (ERA or ACCC) and what approach to key elements of regulation is adopted (for example whether a GRV or DORC approach to asset valuation is applied).

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

10.20 While the CPA principles do not necessarily require all Western Australian railways to be subject to the Regime, the second limb of the objects of Part IIIA does necessitate that there be consistency in the approach to access regulation where it is applied through a state access regime. The current situation, and in particular the recent decision to regulate access to the proposed RHI railway via haulage and an access undertaking to the ACCC, brings to the fore an apparent lack of consistency in access regulation in Western Australia. While an historical legacy explains why the Pilbara railways owned and operated by BHPBIO and Rio Tinto are not subject to the Regime, the recent decision regarding access regulation of the proposed RHI railway suggests that while the WA Rail Access Regime exists there is no consistency in or certainty to its application. Looking forward there is nothing to suggest that the opportunity and ability to structure rail access regulation outside of the Regime, or potentially structure arrangements such that there is no access regulation, will not continue.

10.21 In addition, in its draft recommendation, the Council also noted that interface issues will continue to exist for national rail transportation (see paragraph 6.18 above) and inconsistency in the approach to pricing and cost methodology with the adoption by Western Australia of the GRV (see paragraphs 9.21—9.31 above) also exists. These matters continue to be of concern, although not at a level that would preclude certification.

10.22 The Council believes that the WA Rail Access Regime is incompatible with a framework and guiding principles that encourage a consistent approach to access regulation for railways in Western Australia.

10.23 Accordingly, while the Regime may satisfactorily address the CPA clause 6 principles and is consistent with the competition and efficiency limb of the objects of Part IIIA of the TPA, having regard to the consistency limb of the objects of Part IIIA the Council considers that the WA Rail Access Regime cannot be certified as an effective access regime.

11 The duration of certification

11.1 Although the Council's recommendation is that the Regime not be certified as it does not satisfy all of the requirements of an effective access regime, consideration has been given to the duration for which the regime should be certified in the event that the Commonwealth Minister decides to certify the WA Rail Access Regime.

Legal requirements

11.2 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).

11.3 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.

11.4 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 designated 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

11.5 The WA Government's application did not specify a desired period for certification.

11.6 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.

11.7 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.

11.8 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.

11.9 WestNet Rail supports the certification of the regime for the period identified by the Council in its draft recommendation – up until 31 December 2015.

11.10 The NWIOA submission on the draft recommendation (NWIOA Sub 2) considered the proposed duration to be unnecessarily short and supports a longer period of certification. In support of its position NWIOA state that mining investments are capital intensive and in cases where financing is required for such investment or projects, then regulatory certainty is desirable. NWIOA Sub 2 states that any element of uncertainty as to the security or long term viability of a project could have a significant negative impact upon a proponent's ability to acquire finance for a project.

11.11 The Western Australian Government used the opportunity to respond to the issues raised by RHI to also address the Council's position on the duration of any certification in the draft recommendation. The Western Australian Government noted that it was content with the proposed duration, but requested that the Council provide further reasoning to support its statements concerning Greenfield infrastructure and vertically integrated service providers. The State considers that the segregation arrangement provisions contained in the Act and the proposal to amend the Code to more appropriately treat land and related costs (subject to the outcomes of public consultation) will adequately deal with these issues (WA Govt sub 2 at p 16).

The Council's view

11.12 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,[32] 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 specific access regime for an industry.

[32] 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).

11.13 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 has released its draft report and submissions in response are due by 7 January 2011. The third review of the Code by the ERA is due to commence in late 2014.

11.14 Having regard to the submissions made in response to its draft recommendation, the Council's view continues to be that it is preferable that, should the Regime be certified, 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). However, no mechanism exists to revoke a certification should there be a change in circumstances or substantial modification of a regime.

11.15 In the event that the Regime is certified as an effective access regime (contrary to this recommendation), the Council considers that an appropriate period for certification would be a period of 5 years.

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 *Railways (Access) Act 1998 (WA)* and *Railways (Access) Code 2000 (WA)*
Contact details of interested parties

Submissions on the application

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

Submissions on the draft recommendation

WestNet sub	WestNet Rail submission dated 13 September 2010
BHPBIO sub 2	BHP Billiton Iron Ore Pty Ltd second submission
NWIOA sub 2	North West Iron Ore Alliance submission dated 16 September 2010
RHI sub	Roy Hill Infrastructure Pty Ltd submission

Submissions in response to the submission by Roy Hill Infrastructure Pty Ltd

WA Govt sub 2	The Government of Western Australia further submission to the National Competition Council October 2010
BHPBIO sub 3	BHP Billiton Iron Ore Pty Ltd third submission
NWIOA sub 3	North West Iron Ore Alliance submission dated 4 October 2010

Appendix C – Chronology

Date	Event
12 May 2010	Application received by the Council
17 May 2010	Notice of the application published in *The Australian* 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
6 October 2010	Closing date for further call for submissions in response to Roy Hill Infrastructure Pty Ltd's submission
13 December 2010	Final recommendation provided by the Council to the Commonwealth Minister