Supplementary Submission

Review of the WA Rail Access Regime

March 2019

EXECUTIVE SUMMARY

1. Co-operative Bulk Handling Limited (**CBH**) makes this supplementary submission in response to the Draft Decision Paper released by the WA Department of Treasury (**Treasury**) on 21 December 2018 (**Draft Decision Paper**) into its review of the WA rail access regime (**WARAR**), comprising the *Railways (Access) Act 1998* (WA) (**Act**) and the *Railways (Access) Code 2000* (WA) (**Code**).

2. This submission supplements CBH's previous submission to the review made on 17 November 2017 (**CBH's Initial Submission**), and responds to the draft recommendations contained in the Draft Decision Paper.

3. In brief, CBH's position in relation to the review generally and the recommendations in the Draft Decision Paper specifically, can be summarised as follows:

   (a) The economic prosperity of the State is intrinsically linked to the success of the WA grains industry. The industry is the largest agricultural sector in WA and the 4th largest export industry overall, with CBH's 4,000 grain grower members producing an average of 14.7 million tonnes of grain annually, and contributing almost $4 billion to the State economy each year;

   (b) Over 90% of the grain produced in WA is exported to international markets. Although CBH consistently provides Australia's lowest-cost grain supply chain, the competitiveness of WA grain growers' in these markets is now under significant threat from alternative origins of grain supply, particularly the Black Sea region which can export grain into some markets at up to A$67 per tonne less than WA growers. To ensure the ongoing competitiveness of the industry, it is vital to have domestic regulatory settings that keep downward pressure on export supply chain costs;

   (c) The WA grain rail network is a significant part of the CBH supply chain, transporting about 60% of the annual grain harvest. Currently, the price charged by the railway owner, Arc Infrastructure, to access the grain rail network equates to about $7.40 per tonne, which is up to 5 times more than what growers in other Australian jurisdictions pay for equivalent rail systems. For over 5 years, CBH has been locked with Arc Infrastructure under the Code in an effort to secure a long-term and reasonable rail access price. Self-evidently therefore, the WARAR – and, in particular, the Code - is fundamentally flawed and not achieving its objectives;

   (d) CBH supports Treasury's current review of the entire WARAR, and considers that the pricing mechanisms contained in the Code are the most crucial area for reform and have the capacity to provide the most beneficial impact for WA grain growers, the grain industry, and the State. CBH's views in relation to the pricing mechanism draft recommendations in the Draft Decision Paper can be summarised as follows:

      (i) CBH agrees with Treasury's observations about the inherent deficiencies of the current Gross Replacement Value (**GRV**) asset valuation methodology, which allows windfall gains to be extracted by the railway owner, and the proposal to replace GRV with an alternative asset valuation methodology;

      (ii) There are a number of alternative methodologies that are available, including the Depreciated Actual Cost (**DAC**) approach. However, CBH considers that a reasonable and pragmatic option is Treasury's proposed Depreciated Optimised Replacement Cost (**DORC**) approach with a modified methodology that assigns a zero value to those assets that have exceeded their expected life. This approach takes into account the varied nature of the WA rail network, and removes the risk of windfall gains continuing to be extracted by a railway owner for older assets;

      (iii) It is critical that the alternative methodology 'locks in' or fixes the initial asset base price to stop continual revaluations of the rail asset currently enabled under the flawed GRV methodology, which has contributed to excessive access prices being charged. It is also important to allow access-seekers the right to put forward their views early in the initial asset base determination process, and prior to the regulator issuing their draft decision;

      (iv) Transitional arrangements put in place to protect the possibility of foregone revenue of railway owners because of a change to the GRV approach will simply perpetuate the current flawed system that allows railway owners windfall gains, and delay the important reforms necessary to ensure the prosperity of the WA grain industry and

other industries reliant on this key infrastructure. On the other hand, CBH accepts that a transitional arrangement may be appropriate to allow a railway owner to recover efficient capital expenditure it has actually incurred based on the expectation that GRV would continue; and

(v) The proposal to introduce a Competitive Imputation Pricing Principle (**CIPP**) – which would allow the price of an alternative mode of transport (road) to be taken into account when setting the rail access price - runs the risk of unintentionally disincentivising above-rail efficiency gains if it is used to set the "price" of rail access. However, CBH agrees that the principle may be useful if it was made clear that the CIPP price could only reduce the ceiling for rail access, and thereby lead to a reduction in transaction costs.

(e) Aside from the above views in relation to the pricing mechanisms, CBH generally welcomes the remaining reforms and makes the following broad comments about the more relevant draft recommendations:

(i) The introduction of tighter timeframes for obligations in the Code are welcomed, as are proposals to allow negotiations outside the Code to fast-track the process to arbitration under the Code;

(ii) CBH holds concerns that the proposed conferral of a right on the railway owner to refer access requests to the arbitrator if they consider it "frivolous" may be open to abuse, unless suitable safeguards are put in place;

(iii) CBH supports Treasury's proposal to allow an arbitrator to make an interim order, enabling continued access and certainty on access prices. CBH proposes that this essential protection be extended to agreements made outside the Code (as well as those made under the Code) to prevent a railway owner threatening significant disruption of existing business; and

(iv) CBH welcomes more transparency in the WARAR, including the proposed requirement for quarterly reporting on service quality indicators (such as run time performance and track under restriction), and standard access agreements, but suggests that the railway owner also be required to report and adhere to minimum performance standards (that are monitored and enforced by the ERA).

4. There are 30 years remaining on the lease of the WA rail freight network – this review provides a moment in time for significant and effective reform of a WA rail regulatory regime that underpins effective access to a key piece of State infrastructure that is crucial to the future viability of WA's grain growers, the grain industry, and the State.

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1. Introduction

1.1 WA grain growers' international competitiveness is under threat

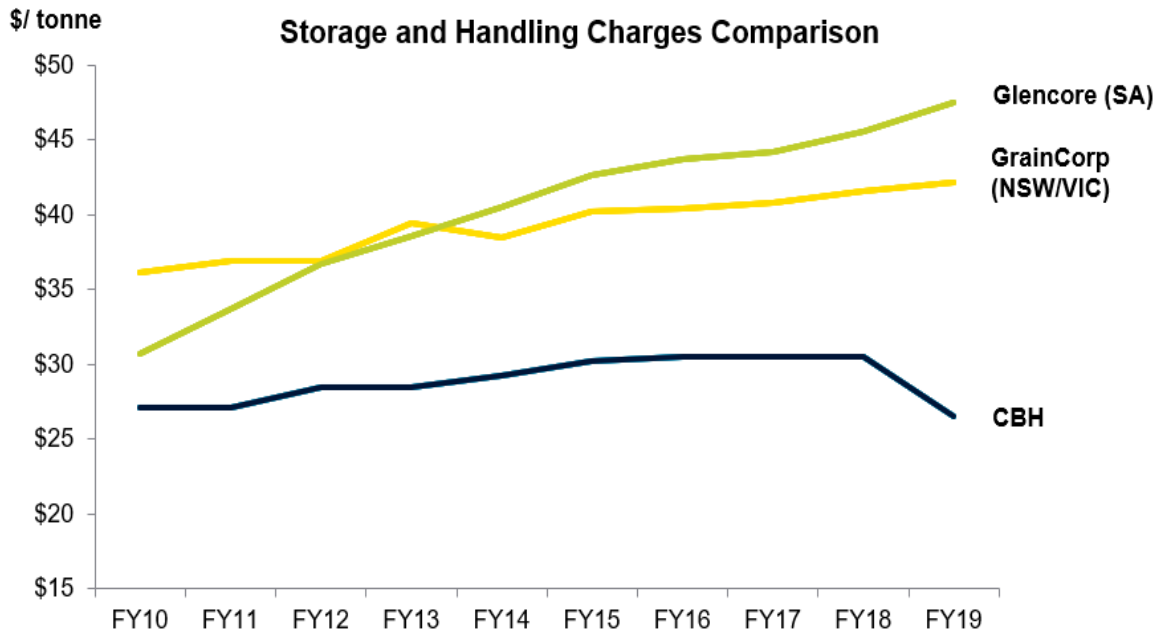
1. The WA grains industry is the largest agricultural sector in WA and the 4th largest export industry overall, with CBH's 4,000 grain grower members producing an average of 14.7 million tonnes of grain annually, and contributing almost $4 billion to the State economy each year.

2. Unlike the Eastern States, the vast majority of grain produced by WA growers (approximately 90%) is exported to international markets, primarily to South East and North Asia (31% and 25%, respectively). Australian grain exporters are price-takers in these international markets.

3. WA grain has historically had an advantage in these markets due to its geographical proximity to South East Asia in particular, and because of the quality and consistency of its grain.

4. CBH also consistently provides the lowest-cost Australian grain export supply chain, which the majority of growers and exporters in WA choose to use to export their grain to these international markets.

Figure 1: CBH Storage and Handling fees compared to other Australian major bulk handling providers

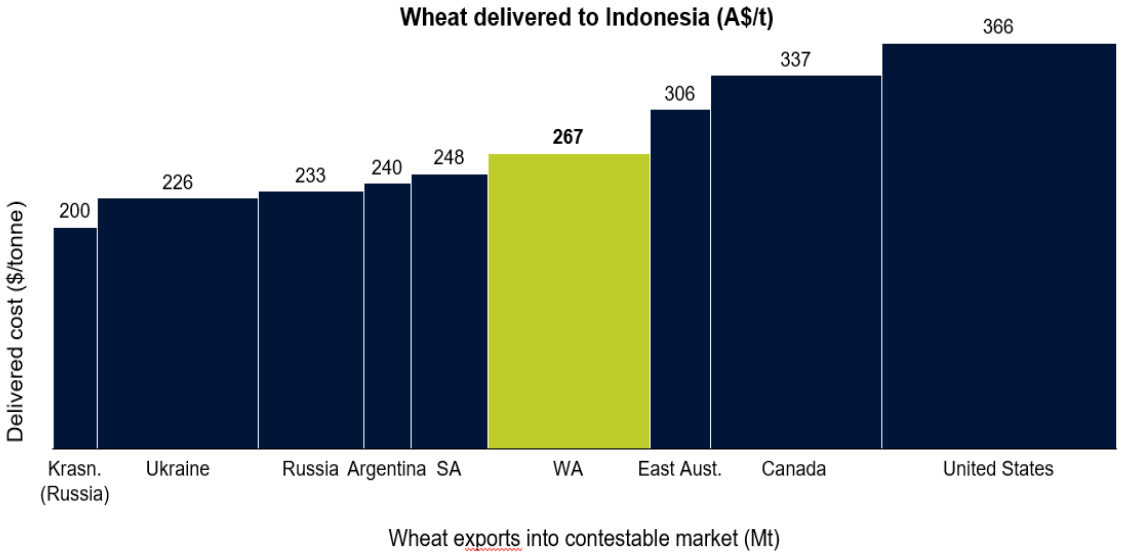


5. However, despite these advantages, the international competitiveness of WA growers is currently under significant threat, primarily because of the relatively recent rise in supply from lower-cost alternative grain origins like the Black Sea region (which includes Russia, the Ukraine, and the Krasnodar district).

6. Importantly, the Black Sea region benefits from much higher yields than WA (on average, up to 6 tonnes per hectare in the Krasnodar district, compared with 2 tonnes per hectare in WA), and can produce significantly higher volumes (over 100 million tonnes per year, compared to about 14 million tonnes, respectively).

7. By way of example, those factors allow wheat - WA's largest volume grain commodity - from alternative origins to be delivered into WA's main (and closest) contestable market, Indonesia, at a much lower price:

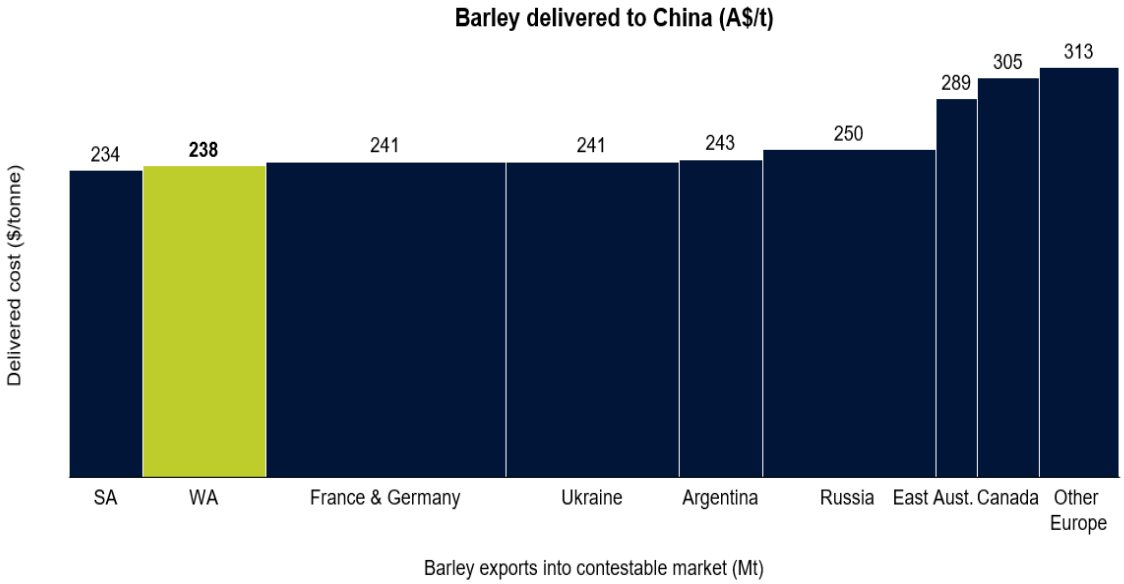
Figure 2: Cost curve depicting cost of delivering a tonne of wheat into Indonesia from various origins



8. As can be seen, it is currently up to A$67 per tonne more expensive for WA grain growers to grow and land wheat into this key export market than their competitors, despite WA's comparative geographical proximity. That margin will be exacerbated, and consequently the competitiveness of WA wheat growers into this market will continue to decline, if the gap between WA and other origins on the left-hand side of the curve increases – including by increasing, or keeping flat, WA supply chain costs.

9. In another example, the cost curve depicting the cost of delivering barley – WA's second largest crop – into its biggest international market, China, is much flatter, with the top six exporting origins having only a A$16 per tonne cost differential between them.

Figure 3: Cost curve depicting cost of delivering a tonne of barley into China from various origins



10. As can be seen, even relatively small increases in costs in this market may force WA barley growers to the right of the cost curve behind substantial barley production from alternative origins of supply, leading to potential loss of markets and lower export earnings for the State.

11. Accordingly, it is important that domestic regulation settings in WA are right in order to keep downward pressure on grain production costs – including supply chain costs – to ensure that WA growers, the grains industry, and ultimately the State, remain competitive in these international markets.

1.2 Reform of the rail access regime is vital to remain internationally competitive

12. As is well known, the below-rail WA Rail Freight Network is currently operated under a long-term lease arrangement from the WA Government to Arc Infrastructure (a Brookfield Group-subsidiary).[1] Access to the WA Rail Freight Network is governed by the Act and Code (together, the WARAR).

13. The grain rail lines on which CBH operates forms a significant part of the WA Rail Freight Network, comprising over 2,400 kilometres of track or about half of the entire WA Rail Freight Network (**Grain Rail Network**). Much of the Grain Rail Network, particularly the narrow-gauge lines, are old and have not been well maintained.

14. CBH is a substantial user of the Grain Rail Network, transporting an average of almost 8 million tonnes of grain per year on rail, which comprises more than 60% of the entire WA grain freight task.[2] The Grain Rail Network is therefore one of the most significant pieces of infrastructure in the WA grain supply chain.

15. The rail access fee that CBH currently pays to Arc Infrastructure to access the Grain Rail Network comprises about $7.40 per tonne of grain,[3] equating to about 50% of a WA growers' total rail freight charge and 8.5% of the entire supply chain fee. As discussed in previous submissions, CBH estimates that WA grain growers are paying up to 5 times more than what growers in eastern Australia pay for track access (that also have higher speeds/mass available).[4]

16. Efforts to use the Code to negotiate a long-term and cost-effective access agreement with Arc Infrastructure have also been lengthy, frustrating, and remains unresolved after more than 5 years since access was first sought. Self-evidently therefore, the current regulatory regime clearly does not provide satisfactory certainty or financial and operational security for CBH or its grower members.

17. Significant reform is therefore required in order to ensure that the Code promotes access to the railways covered by it.

18. To that end, CBH supports changes to the regime that:

    (a) bring about substantial and immediate changes to the pricing mechanisms in the Code;

    (b) encourage the efficient use of rail transport;

    (c) introduce greater transparency in the system; and

    (d) prevent the Code being misused to delay or frustrate the process of obtaining or continuing access.

[1] Since 2016, Arc has also been vertically integrated with above-rail services provider Linx, both subsidiaries of the Brookfield Group.

[2] CBH also owns 35 locomotives and 574 wagons, and continues to make significant investment in above rail infrastructure, recently leasing an additional two locomotives and 131 wagons to deal with increased harvest volumes.

[3] Excluding any licence and connection fees.

[4] See CBH Submission at pg. 11.

2. Response to draft recommendations

2.1 Pricing mechanisms

19. While CBH supports Treasury's review of the entire WARAR, CBH considers that the pricing mechanisms contained in the Code are the most crucial area for reform and will potentially have the most beneficial impact for access-seekers and the State. Significant reform of the flawed pricing mechanisms in the Code is key to providing balance in the regime and ensuring that CBH and WA grain growers can remain internationally competitive.

20. Given their importance, CBH engaged Frontier Economics – a leading Australian microeconomics consultancy providing economics advice to the public and private sector – to specifically consider those draft recommendations contained in the Draft Decision Paper that relate to the pricing mechanisms (that is, draft recommendations 1A, 1B, 2 and 3). Frontier's report dated 7 March 2019 (**Frontier report**) is annexed to this submission.

2.1.1 Draft recommendation 1A

Change the asset valuation methodology to a DORC method and align the floor and ceiling cost calculations to a building block methodology with an initial DORC calculation

21. CBH supports replacement of the current GRV pricing methodology and 'locking in' the initial asset value, and puts forward some improvements to the proposed alternative initial asset value methodology, and to the proposed process for determining the initial asset base and roll forward.

Detailed reasoning

'Locking in' the initial asset base

22. As identified in Frontier's report, irrespective of which alternative initial asset valuation method is ultimately adopted, the most important reform arising from Draft recommendation 1A is that the initial asset base is 'locked in' or 'fixed'.[5]

23. As is standard in other regulatory regimes[6], this feature will prevent further revaluations of the asset, which, as Frontier observes:

> "*[r]emoves uncertainty as to the value of the assets and provides access providers and access seekers with a clear picture of the capital charges that will be allowable*".[7]

24. To that end, we fully support Treasury's conclusion that one of the key benefits of DORC is that it "*avoids uncertainty about future valuations of the ceiling, since the initial RAB under DORC is 'locked in' when first calculated*".[8] Like Frontier, we assume that the reference to "*asset appreciation*" in the capital cost and RAB roll-forward equations in the Draft Decision Paper[9] is not intended to allow revaluations of the asset, and instead refers to indexation of the asset base. For clarity though, we suggest that this be made clear in the Final Decision Paper.

[5] See Frontier's report at pages 3, 4 and 7.

[6] For examples, see Frontier's report at page 4 and footnote 10.

[7] See Frontier's report at pg. 3.

[8] Draft Decision Paper, pg. 3.

[9] Draft Decision Paper, pg. 15.

Possible improvements

Calculating the regulatory asset base

25. CBH supports Treasury's proposed move away from GRV to an approach that better achieves the objectives of the regime.

26. With that said, while acknowledging that a standard DORC valuation has been used in a large number of cases by regulators in Australia, CBH considers that the choice of valuation method should also be asset-specific and we note that other approaches, including variations of the DORC approach, have also been used extensively in other regulatory regimes in Australia.[10]

27. When considering its appropriateness to the WARAR, CBH considers that there are likely to be disadvantages in a standard DORC approach applied across the wide variety of networks it covers[11] - which ranges from relatively new mining lines in the Pilbara to old narrow-gauge grain lines in the South-West - particularly if a positive value is placed on longstanding assets with expired useful lives that are still functioning (such as the sleepers and track on significant portions of the Grain Rail Network).

28. Allowing a railway owner to earn a return on assets with an expired expected useful life would yield windfall gains.[12] That is because at the time of construction or acquisition, the railway owner could not have reasonably expected that the lives of these assets would be extended beyond their projected lives and, as a result, a railway owner could not have expected to recoup these investments beyond the expected useful lives of the assets.

29. Allowing a railway owner to earn windfall gains is not necessary to ensure that it has incentives to invest in the network, and does not increase regulatory risk.[13]

30. Conversely, allowing a railway owner to earn windfall gains increases the risk that access prices are sufficiently high to distort competition in relevant markets (like the international grain market, as described in section 1.1 above), and impact adversely on investment in the WA grain industry and the bulk transport industry.[14]

31. Further, and more generally, we note that a DORC approach is a theoretical construct and therefore subjective in nature and prone to disputes. This is especially the case for portions of the network like the Grain Rail Network where a DORC-equivalent asset would simply not be built today. Instead, a new system would have characteristics that are markedly different from the existing system, which is old, outdated and not of the quality of a new, optimised equivalent system.[15] A standard DORC valuation would therefore allow the railway owner of old assets, like the Grain Rail Network, to earn returns on an asset that would never be built. Again, this scenario would contribute to making WA grain growers' uncompetitive in the international grain market, by perpetuating high access prices.

32. In its paper, Frontier recommended that three options should be considered for the asset valuation approach[16]:

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[10] Frontier report, page 9.

[11] Including Arc Infrastructure's freight network (which itself has a variety of line and freight sections), the urban network, and The Pilbara Infrastructure's mining network.

[12] See: '*Report for Queensland Competition Authority (QCA): Regulatory economics assessment of the proposed Western System asset valuation approaches'*, by Professor Flavio Menezes (**QCA report**), at pages 3, 8, 9, 10, 30, 31 and 32.

[13] QCA report at pages 9, 10, and 12.

[14] Similarly, the QCA report found that the impact of a DORC valuation which allowed windfall gains on competition in international coal markets was relevant, and a basis for placing a zero value on longstanding assets with expired expected useful lives: see QCA report at pages 9, 11, 22, 32 and 33.

[15] For example, much of the existing Grain Rail Network is narrow gauge track with a 19 tonne axle load (**TAL**) – if a new track were built today, it would be built to standard gauge, with at least 25TAL.

[16] Frontier report, pages 8-9.

(a) Depreciated historic cost;

(b) Depreciated actual cost (**DAC**), or 'depreciated cost based on actual capital recovery';

(c) a DORC approach, but (importantly) one that places a zero value on assets whose actual life has exceeded their expected useful life.[17]

33. As Frontier identifies[18], both of the valuation methods outlined in options (a) and (b) set the asset value based on costs actually incurred, with the key advantage over DORC being that they therefore connect returns to investors with the amount of capital actually invested in the business. In considering the appropriate method for the Queensland Rail Western Systems network, the independent expert also determined that a DAC approach also had the advantage of being simple and transparent, ensured no over-recovery of costs, and avoided inefficient bypass.[19]

34. The valuation method in option (c), which in essence is a modification of a straight DORC valuation, addresses the issue of including longstanding assets with expired expected useful lives in the asset calculation, and thereby mitigates the risk that access prices are set too high, and impact adversely on competition in relevant markets. Such an approach (along with DAC) was recommended by the independent expert for valuation of Queensland Rail's Western System network.[20]

35. CBH has previously supported options (a) and (b), and, based on Frontier's recommendations, maintains that these options may be suitable for the WARAR. However, noting Treasury's commentary in the Draft Decision Paper, a more palatable and pragmatic approach may be provided by option (c) – which is essentially a DORC approach that takes into account the varied nature (and ages) of the rail lines comprising the WA Rail Network by excluding certain assets from the initial asset valuation.

Processes for determining the DORC and roll forward

36. In relation to the proposed processes set out in Table 3 on page 17 of the Draft Decision Paper, CBH is concerned that for each of the tasks it is proposed that the regulator issues a draft decision *after* the railway owner proposal but *before* submissions from other stakeholders are received. CBH considers that this will lead to a situation where the regulator does not have the benefit of receiving other relevant views and information prior to issuing its draft decision.

37. CBH proposes that the process is revised for each of the tasks such that submissions are sought and received from interested parties prior to the regulator issuing a draft decision paper.

38. Further, to ensure transparency, CBH considers that the railway owner should not be permitted to claim confidentiality over information that is required to be provided during these steps, and that the regulator should be required to publish its draft decisions in full and without confidentiality restrictions.[21]

39. Finally, to aid transparency and assist all parties in negotiations, as part of the process the railway owner should be required to publish an annual capital expenditure and maintenance plan summary. This will provide guidance on expenditure and costs into the future, and allow visibility on maintenance of the network and likely performance improvements (if any). Further, the regulator should be required to publish its finding on its assessment of the 5 yearly review of the RAB roll forward, and document any approved changes to the RAB roll forward (and reasons for the changes and approval).

[17] Like Frontier, we note that this principle seems consistent with the approach taken in Schedule 4, Clause 2(2) of the Code which implies that investments in cuttings or embankments made prior to commencement of the Code are valued at zero, requiring only assets installed after this date to be included and not funded by government or fully recovered from third parties.

[18] Frontier report, page 8.

[19] QCA report at page 34.

[20] Ibid.

[21] See, also, the commentary on confidentiality more generally at section 3.1.2 below.

2.1.2 Draft recommendation 1B

Allow for flexibility in the assessment of historical depreciation to manage transitional impacts on existing railway owners

40. CBH does not support this proposal as currently drafted, and instead proposes some initial requirements that must be met by the railway owner before a transitional approach could be considered by the regulator.

Detailed reasoning

Perpetuating a flawed system

41. While CBH accepts in principle that transitional provisions may be required in certain circumstances when there are changes in regulatory regimes, in this situation it would be neither appropriate nor reasonable for there to be a transitional arrangement simply to safeguard the revenue which railway owners expected under the GRV method.[22]

42. Such an arrangement would only serve to perpetuate the current flawed system that has allowed monopoly profits to be extracted by railway owners[23], disincentivising future investment and discouraging the use of the State's rail system for at least the term of the transitional period.[24]

43. As Frontier demonstrates, that outcome would be exacerbated further still for older rail lines, which under a GRV methodology have already allowed over-recovery of revenue compared with standard DORC in the period since their acquisition.[25]

Transitional arrangements are only reasonable to recover efficient capital expenditure

44. As Frontier observes, a transitional arrangement would only be fair and appropriate in this situation if it was to allow a railway owner to recover the efficient capital expenditure that it (and not third parties) have actually incurred under the reasonable expectation that the GRV methodology would continue. Accordingly, it should be a requirement for a railway owner proposing to use transitional arrangements to demonstrate that it has made such capital investments.[26]

45. In addition, CBH agrees with Frontier's suggestion[27] that, as a preliminary screening step, Treasury determine a threshold for the average age of the assets subject to possible transitional arrangements – if the railway is relatively new (for example, Frontier's modelling indicates that railway owners with assets less than 11 years old will potentially lose if they move from GRV to a

[22] Noting, as well, that as acknowledged by Treasury in the Draft Decision Paper any lowering of the ceiling by moving away from GRV would be offset in any event through recognition of actual operating and maintenance costs which would push up both the floor and ceiling, particularly for assets that are not new or well maintained (like the Grain Rail Network).

[23] To that end, CBH notes and supports the numerous findings by Treasury in the Draft Decision Paper that the current pricing methodology "*does not prevent prices from exceeding the efficient cost of providing access to the infrastructure (including a competitive return on investment)*" (page 7), "*is particularly not well suited to facilitating access for older freight routes*" (page 7), and "*does not adequately achieve the objectives of the Regime and does not provide effective guidance for negotiations, particularly where older lines are concerned*." (page 9)

[24] We say "at least" because we are not clear what occurs at the end of the transition period – for example, whether the initial asset valuation occurs at the conclusion of the transitional period, or whether the valuation occurs at the time the initial reforms are implemented.

[25] Frontier report, page 12.

[26] CBH notes, and agrees, with Frontier's observation there are obvious difficulties associated with the current proposal in the Draft Discussion Paper that to seek a transitional arrangement a railway owner provide evidence that the conventional DORC price would be below the prices that access seekers are "willing to pay" for the relevant railway (our emphasis). For example, how would a railway owner demonstrate the price an access seeker would be willing to pay in the context of it being able to market power over a monopoly infrastructure asset?

[27] Frontier report, page 14.

DORC methodology[28]), it may be appropriate for the regulator to determine transitional arrangements to recover capital expenditure; however, if the railway is older (that is, more than 11 years old based on Frontier's modelling[29]), transitional arrangements would be unnecessary.

46. Further, the regulator's determination of any appropriate transitional arrangements should be open and transparent, and seek submissions from all interested parties.

2.1.3 Draft recommendation 2

Require railway owners to publish a standing offer for defined rail tasks when required by the ERA.

47. CBH assumes that standing offers would not apply to the Grain Rail Network on which it operates, but provides some suggested improvements to the standing offer in any event.

Detailed reasoning

48. As Frontier's report identifies,[30] we assume that the proposed criteria for a standing offer requires *two* or more actual or potential operators on a route with similar freight tasks. If that assumption is correct, there would be no (or very limited) circumstances where standing offers would be available for the Grain Rail Network.

Possible improvements

49. However, as Frontier also notes,[31] a standing offer could be of benefit if the methodology by which it was calculated by the railway owner was also published. We note that a similar requirement is required for standing offers made under the National Gas Rules.[32]

50. Publishing the methodology would provide transparency, and, if the standing offer was reasonable, would almost certainly lead to a decrease in disputes, and an increase in efficiency in contracting.

51. Conversely, if the methodology behind the standing offer was not transparent it would be unknown whether the standing offer price was simply set at the ceiling price. In turn, this could actually inadvertently discourage access seekers from negotiating, and the standing offer price could be used as a price anchor by the railway owner during negotiations.

2.1.4 Draft recommendation 3

Introduce a competitive imputation pricing principle as a part of the pricing principles set out in Clause 13, Schedule 4 of the Code.

52. CBH holds serious concerns in relation to the introduction of a CIPP as drafted, and proposes some amendments.

Detailed reasoning

53. CBH is concerned that this proposed principle fails to recognize the inherent efficiencies of rail, and will simply be used to set the rail access "price", not the ceiling. If this occurs, a CIPP would actually discourage rail use in practice while also disincentivising above-rail efficiency gains.

54. CBH is unaware of CIPP being a feature of any other rail access regime, aside from the "sustainable competitive" pricing criteria contained in the AustralAsia Railway Access Regime (which covers the rail line from Darwin to Tarcoola) which, to our knowledge, has never been used.

[28] Frontier report, page 12.

[29] Frontier report, page 12.

[30] Frontier report, page 15.

[31] Frontier report, page 17.

[32] See section 554 of the National Gas Rules, reproduced at Figure 5 on page 18 of the Frontier report.

Possible improvements

CIPP should only be used to reduce rail access ceiling, not set the price

55. An unintended potential consequence of introducing a CIPP is that it allows the rail bypass cost (ie the cost of the alternative transport option, which for most access seekers will be road transport) to be used by the railway owner to effectively set the "price" of rail access.

56. If this occurs, it may artificially encourage access seekers to switch to the alternative transport mode, and, as demonstrated by the example in Frontier's report[33], could actually discourage implementing efficiency gains in above-rail services.

57. Further, as CIPP will be highly theoretical in application[34] it is consequently extremely theoretical in the results it produces, which would inevitably lead to substantial disputes between the parties.

58. CBH considers that the CIPP could only conceptually be useful if it was made clear that the theoretical cost of the alternate mode of transport was used as the new "ceiling" for the rail access price, and not used to set the precise access price. As Treasury has noted[35] it may be difficult to assess service quality differences to justify negotiating away from the CIPP resulting in at most a small arbitrary discount to artificially differentiate rail from road.

2.2 Ability to opt out

2.2.1 Draft recommendation 4

Extend the requirement in s.16(1)(b) of the Code to not unfairly discriminate between proponents to access agreements made outside the Code.

59. CBH supports this recommendation on the basis that it will promote the overall objectives of an efficient and fair access regime.

Detailed reasoning

60. CBH agrees with the position set out in the Draft Decision Paper; given that there have been no agreements made within the Code there is currently no basis for a comparison to give effect to section 16(1)(b).

61. To that end, section 16(1)(b) currently stands only as a matter of principle and does not achieve its intent. Including a review of agreements made outside the Code as part of the assessment of the access provider's compliance with section 16(1)(b) provides context for access seekers and strengthens the protections intended to be provided by this section. In turn this promotes the overall objectives of an efficient and fair access regime.

62. For all the same reasons, CBH is of the view that the unfair discrimination provisions should also apply to access seekers who are negotiating outside the Code. In light of Draft recommendation 5 there is an option for access seekers to fast-track from negotiation outside the Code to arbitration thereby providing an appropriate mechanism for an arbitrator to address any concerns with the application of section 16(1)(b) in the same way as would be applicable for access seekers negotiating within the Code.

63. A related issue considered as part of this Draft Recommendation is the application of Part 5 instruments to out of Code negotiations. Treasury express the view that these should only apply to in Code negotiations on the basis that it is desirable to otherwise retain flexibility. Where the objectives of the Code, and the proposed improvements, are to increase transparency and confidence in the process it remains unclear why the same protective framework should not apply to all parties seeking access, whether in or out of Code. CBH notes that Treasury does not recommend applying

[33] At page 19.

[34] That is, it requires calculating the *theoretical* competitive price of rail (having regard to the *theoretical* efficient cost of the alternate transport mode), and subtracting the *theoretical* efficient above-rail cost and margin

[35] Draft Decision Paper, page 29.

the Part 5 instruments outside the Code however the benefits Treasury sets out, being guidance for negotiations and improving transparency, seem to outweigh the costs in this case.

64. Whilst the draft recommendations have raised the issue of information asymmetry and have sought to address it by imposing additional disclosure obligations on the access provider, it remains the case that the railway owner will continue to be in an advantageous position with respect to knowledge about the railway assets and the rail network operations.[36] This imbalance in knowledge further compounds the disparity in bargaining power between access seekers and the railway owner in access negotiations, whether conducted within or outside the Code.

65. CBH agrees with the reasons set out by Treasury as to why the non-discrimination provisions should be extended to ensure that the mechanism can, in practical terms, be tested by an arbitrator with respect to parties negotiating for access under the Code.

66. It is less clear why the same protections should not be afforded to parties negotiating outside the Code for the same access. CBH agrees there is value in parties being incentivised to pursue a commercial agreement outside the regulatory regime, both with respect to the reduced regulatory burden and the rights of a party to elect to operate outside the regulatory framework, whether as a result of timing constraints or other requirements. However, where such an agreement cannot be reached, there appears to be little support for the argument that access seekers should then be deprived of further protections and may result in inefficiencies in conducting negotiations outside the Code and then inside the Code, or delayed benefits to access seekers.

67. This view is supported by the ACCC who suggest that the application of non-discrimination provisions to all access seekers would encourage customer confidence, competition and market growth. In their comments of the Issues Paper, dated 2 January 2018, the ACCC, with respect to the WARAR, state as follows:

> "*A key objective of such regulatory frameworks is to address the imbalance of bargaining power through elements such as greater transparency, the ex-ante provision of information, a requirement for mandatory non–discrimination clauses, performance measurement, and ideally, dispute resolution/arbitration mechanisms*".[37]

68. Further, where agreements reached outside the Code are not subject to the non-discrimination provisions or Part 5 instruments some thought must be given as to whether those agreements would indeed be a suitable comparator or measuring framework by which to assess the in-Code negotiations and agreements. Where the aims of a regulatory framework are to promote a negotiate-arbitrate model and provide a consistent and fair approach for all access seekers it seems somewhat of an anomaly to apply this fundamental principle of non-discrimination only to access seekers that negotiate within the Code.

Possible improvements

69. CBH agrees that allowing consideration of both out of Code agreements and in-Code agreements (if any) will ensure that s.16(1)(b) can operate as intended.

70. For the reasons set out above CBH considers that this should apply equally to access seekers negotiating agreements within and outside the Code. Likewise, there would be significant benefits to Part 5 instrument being applied to negotiations outside the Code (which would also be consistent with Draft recommendation 5 below).

71. However, CBH notes that if it were imposed on all agreements, care will be needed that its use does not inadvertently preserve "unfair agreements"; for example, a situation where an out of Code agreement with inordinately high access prices because of the exertion of market power is used by a railway owner to justify increases in other agreements based on anti-discrimination provisions in the Code.

[36] See, also, the commentary on confidentiality more generally at section 3.1.2 below.

[37] ACCC Submissions, Review of the Western Australian Rail Access Regime dated 2 January 2018, page 2

2.2.2 Draft recommendation 5

Allow access seekers who have begun negotiations outside the Code to fast-track the process to arbitration under the Code.

72. CBH supports this recommendation on the basis that it will reduce the time involved in complying with the mandatory pre-cursor stages that access seekers must currently comply with before being able to refer a matter to arbitration and reduce the need for inefficient duplication and rehashing of previously covered ground.

Detailed reasoning

73. CBH has previously submitted that the various pre-cursor steps that must be resolved before negotiations under the Code can commence are both unnecessarily technical and time-consuming and have served to delay and degrade confidence in the dispute resolution process.[38]

74. In light of these mandatory pre-cursor stages CBH's experience seeking access within the regulatory framework has shown that, by the time a matter is referred to the mandatory 90 day negotiation under section 19(1) of the Code, the parties would have already spent many months, or in CBH's case, years, in some form of negotiation. Where parties remain unable to agree by this point the issues should be considered in dispute and the parties should be able to take advantage of the fast-track option the subject of this recommendation.

75. As a final point in support of this recommendation CBH has also previously noted that the presence of an arbitration can affect the way parties negotiate[39]. This would apply even more distinctly to circumstances where referral to arbitration is not subject to so many specific pre-cursor steps, some of which, as Treasury points out in relation to floor and ceiling determinations by the ERA, may not be relevant to the issues in dispute. Overall implementing this recommendation should reduce delays and increase efficiency and confidence in the process.

Possible improvements

76. In line with the theme of increasing confidence in, and efficiency of, the Code process, specifically the arbitration component, CBH submits that the following initiatives should also be implemented.

77. Parties should have the right to agree on an arbitrator to adjudicate the dispute. The process for appointing an arbitrator, as currently set out in sections 24 and 26 of the Code, is unnecessarily time-consuming and counter-intuitive. Parties to a dispute are best placed to determine and agree on a suitable arbitrator, as is common practice in other arbitrations.

78. In its initial submissions CBH set out its experience with this process and the difficulties and delays experienced as a result of the requirement that the ERA may only include or remove persons from the panel of arbitrators on the recommendation of the Chairman of the WA Chapter of the Institute of Arbitrators and Meditators Australia (now the Resolution Institute) or the Perth Centre for Energy & Resources Arbitration Ltd.[40] CBH does not propose to re-produce those comments here, suffice to say that the process should be more consultative, or, ideally, allow the parties to agree the arbitrator in the first instance. CBH accepts that it would be reasonable to retain the right of the ERA to appoint the arbitrator where the parties cannot agree on an appointment.

79. Arbitration determinations should be made public (subject to allowances for genuinely confidential information to be redacted). CBH set out its reasoning in support of this amendment in some detail in its previous submissions[41] but it is worth re-iterating the key point; the value that would be derived from determinations being accessible should not be underestimated. If made public, the arbitration determinations would provide invaluable guidance to other access seekers and providers, potentially

[38] CBH Initial Submission, paragraph 4.3, page 27

[39] CBH Initial Submission, paragraph 4.2, page 26

[40] CBH Initial Submission, paragraph 4.5(a), page 31

[41] CBH Initial Submission, paragraph 4.5(e), page 36

reducing or limiting disputes (and therefore costs, resources and time for both the parties, as well as, potentially, the regulator) because parties would have a better idea of the potential outcomes for analogous applications. As CBH submitted previously it disagrees with the statement that arbitration determinations are simply resolutions to specific disagreements. They necessarily include statements about the law, and, as stated above, provide useful guidance (if not binding precedent value) for other parties involved, or considering being involved, in an access application.

2.3 Capacity extensions and expansions

2.3.1 Draft recommendation 6A

Make both parties responsible for assessing whether an expansion is required to facilitate an access request when a proposal for access is made.

2.3.2 Draft recommendation 6B

Place responsibility on the railway owner for demonstrating if an extension or expansion is technically feasible.

2.3.3 Draft recommendation 6C

Remove requirement to demonstrate technical feasibility as a pre-requisite to beginning negotiations and clarify that a request for an extension or expansion can be made at any time during negotiations if necessary to facilitate the access request.

80. CBH supports these proposals on the basis that these draft recommendations will assist in reducing those risks and increasing accessibility of the Code process for access seekers.

Detailed reasoning

81. CBH has previously submitted that further guidance is required under the Code to assist in overcoming the imbalance in knowledge, and therefore negotiating power, with respect to expansions and extensions. CBH also considers that the current arrangements and obligations on the access seeker to demonstrate that an expansion is required result in delays, particularly in the initial stages of the access process.

82. With respect to draft recommendations 6A and 6B, CBH agrees that the railway owner is best placed to demonstrate the need for, and test the technical feasibility of, extensions and expansions. In saying that, it is important that the costing information provided by the railway owner at any stage of the process be sufficiently transparent to ensure that access seekers are provided with enough detail to assess the appropriateness of the railway owner's proposal. CBH agrees with the statements made by Treasury in relation to the implementation of draft recommendation 6B, being that the notification of the efficient price for building the extension or expansion must be supported by material that would reasonably demonstrate to the access seeker how the price was calculated.

83. CBH has previously submitted that an access seeker's failure to specify an extension or expansion in an access proposal should not provide a reason for the access provider to refuse to deal with the proposal (or to claim that it is not a valid proposal) or enter negotiations.[42] The reality of determining whether the network has capacity to accommodate a service, and what expansions would be required, is a complex assessment based on information that is not likely to be within the knowledge of most access seekers at the time an access application is made. It also results in a substantial duplication of work and costs. To that end, CBH welcomes the outcome of draft recommendation 6C which removes the requirement to establish technical feasibility as a pre-requisite to negotiations.

[42] CBH Initial Submission, paragraph 6.4, page 67

Possible improvements

84. CBH has previously submitted that a fundamental impediment to clarifying the concepts of extensions and expansions is the lack of clarity around the definition of "capacity".[43] CBH maintains that the current definition is open to varying interpretations; [redacted]

85. By way of the actual definition, CBH submits that the meaning of "capacity" under the Code should be clarified to refer to the underlying infrastructure capacity of the particular route. CBH notes that the ERA has supported this interpretation. In its determination of costs relevant to CBH's access proposal (dated 30 June 2014), the ERA stated that it:

> *"…considers that the Code refers to extensions and expansions in the sense of creation of capacity in excess of the existing MEA specification of the route. The ERA considers that restoring capacity on the Tier 3 routes would not be considered an extension or an expansion in that sense, but more properly a repair or restoration as this would bring capacity back up to the MEA standard."*[44]

86. With respect to draft recommendation 6B, Treasury notes that the railway owner would be entitled to recover efficient costs incurred in complying with the requirement to assess if an extension or expansion is technically feasible and the estimated price for that work. In light of that, it remains unclear as to why, as part of Draft recommendation 6C, an access seeker would be required to show that it has the necessary financial resources to pay for the costs of expansion at the time the request is made by the access seeker. The issue with this approach is that firstly, the access seeker would not have an understanding of the costs at that time and, secondly there is no loss to the access provider in carrying out the assessment as they would be compensated for the work involved in the process.

87. Accordingly, CBH submits that an access seeker's financial position be assessed after the feasibility and pricing information is provided by the access provider.

Unintended consequences

88. Further to the comments set out above, it may be worth considering whether there should be some constraints around the costs that an access provider can incur for the purposes of assessing an extension or expansion; in CBH's experience, this can be quite a detailed process that could result in significant costs for the access seeker. A further alternative may be to limit the access provider to reasonable costs and to require the access provider to provide evidence of the costs it has incurred.

2.4 Improve efficiency of the regulatory process

2.4.1 Draft recommendation 7

Insert a provision to allow a railway owner to refer an access request to the arbitrator if they can establish a prima facie case that it is frivolous.

89. CBH does not support this proposal, but provides some proposed amendments to help ensure it is not misused if it were to be implemented.

[43] CBH Initial Submission, paragraph 6.2, page 65

[44] ERA, Determination of costs relevant to CBH's access proposal dated 10 December 2013 (dated 30 June 2014) at paragraph 71.

Detailed reasoning

90. As set out in our previous submission, CBH's experience over almost 5 years of negotiation and arbitration with Arc Infrastructure under the current Code clearly demonstrates that the regime already provides far too many opportunities for a railway owner to delay progress, resulting in the exertion of undue commercial and time pressure on access seekers.[45]

91. Based on that experience, there is in CBH's view an unacceptably high risk that the conferral of another proposed right on the railway owner to refer what it considers "frivolous" access requests to an arbitrator for determination, provides yet another mechanism to delay or defer the consideration of genuine access proposals.

92. That risk remains regardless of the proposal that the onus be on the railway owner to demonstrate why it should not negotiate; if the objective of a party is to delay the process, it matters little to them who bears the burden of proof, only that a delay is achieved.

93. We note that to our knowledge there have been no representations or evidence put forward by the regulator or any railway owners of any "frivolous" requests having been made that have caused unnecessary allocation of resources.

94. Further, sections 14 and 15 of the current regime already confer extremely broad powers on the railway owner to require certain information from an access seeker that, combined with section 18, operate to prevent frivolous access requests from proceeding if the information cannot be provided. It is worth noting that the only other Australian rail access regime that confers a power on a railway owner to refer *prima facie* frivolous requests to arbitration, the National Access Regime, does not contain the equivalent of sections 14 and 15.

Possible improvements

95. While maintaining our position, CBH strongly suggests that if this proposal were ultimately to be adopted it should be made explicit that a referral from the railway owner does not 'stop the clock' to allow the Code processes to continue while the referral is arbitrated, and thereby incentivising a railway owner to make the referral early and have it dealt with quickly.

96. In addition, CBH also suggests that it be made clear that a referral by a railway owner must be made within a specified short timeframe from receipt of the application, and that the arbitrator similarly be required to make a determination within a specified period.

2.4.2 Draft recommendation 8

Insert timeframes for obligations under the Code where these do not already exist.

97. CBH supports this proposal, subject to our comments and proposed improvements below.

Detailed reasoning

98. CBH welcomes the addition of the proposed timeframes into the Code.

99. In relation to the proposed addition to Part 3, Division 3:

    (a) While 180 days for an arbitrator to make a decision will inevitably be challenging, it provides much-needed certainty to the parties prior to commencing a Code arbitration. In CBH's view, it will not unduly compromise the ability of the parties to provide a considered response; rather, it will require the parties to focus on the key issues and refine their respective arguments.

    (b) We note that the proposed addition intends to require a decision within 180 "days", consistent with the National Access Regime. However, the Draft Decision Paper also proposes to implement previous ERA recommendations, including Recommendation 7 from the 2015 ERA Code Review to define "days" in the Act and Code to mean "business days". The National Access Regime requires a decision within 180 calendar days (that is, essentially 6 months), not "business days" (which would effectively increase the timeframe to

[45] See, for instance, the example cited at pages 27-28 of CBH's Initial Submission.

over 8 months). CBH supports a timeframe of 180 calendar days, not "business days", consistent with the National Access Regime.

100. In relation to the proposed addition to section 18:

(a) The proposal to confer a right to the railway owner to require the access seeker to provide further information should be clarified to confirm that this only extends to further "reasonable" information, otherwise CBH are concerned the right to request could be used as a 'fishing expedition' and/or to delay or frustrate the process by requesting unreasonable information;

(b) for clarity, we suggest that the additional timeframes should be as follows:

(i) 10 business days for the access seeker to provide further information;

(ii) 5 business days for the railway owner to consider and notify the access seeker as to its sufficiency; and

(iii) 5 business days for the access seeker to notify the railway owner that there is a dispute (if the railway owner has provided notice that the information is insufficient and the access seeker considers that the notice is not justified).

2.4.3 Draft recommendation 9A

Require the ERA to approve a standard access agreement for each railway owner and for this agreement, along with other relevant information to be published on a railway owner's website, instead of in hard copy format.

101. CBH supports this proposal on the basis that it provides more transparency, subject to the comments and proposed improvements below.

Detailed reasoning

102. As a statement of general principle, CBH welcomes reforms that provide more transparency, and fully supports the objectives of this draft recommendation.

103. However, we suggest the following improvements to ensure its effectiveness:

(a) Currently, the standard access agreements required by section 7A of the Code are not entirely useful because access seekers have no knowledge if the agreement is "standard" or not. In fact, in CBH's experience, the standard access agreements that have been provided to it in the past have each been materially different, bearing little resemblance to the final negotiated agreement. Far from aiding negotiations, this lack of consistency has created confusion and promoted uncertainty and delays in negotiated outcomes. Accordingly, we suggest that:

(i) as part of its approval process, the regulator requires the railway owner to maintain, so far as is reasonable, consistency of key terms and conditions between successive standard access agreements; and

(ii) to the extent of any overlap, it should be required that consistency is maintained between the key terms and conditions in the standard access agreement, and those contained in the standing offer (as proposed by Draft recommendation 2).

(b) Any claims of confidentiality by the railway owner over information to be included in a standard access agreement (whether such claims are made generally, or specifically under section 7B of the Code) will significantly undermine the use of the document and perpetuate information asymmetry in commercial negotiations. CBH therefore suggests that it be made explicit in the Code that the railway owner cannot claim confidentiality over the agreement, and section 7B is amended to make that clear.

(c) Timeframes and enforcement mechanisms should also be included in the proposed amendments to Part 2A to ensure that the standard access agreement is developed by the railway owner in a reasonable time, and that the ERA can act on partial- or non-compliance.

104. CBH notes that the Draft Decision Paper indicates that it will review the information required by Schedule 2, and welcomes the opportunity to provide feedback in due course.

105. By way of preliminary comment, we suggest that the following is also considered:

(a) The current requirement to publish 'the running times of existing trains' should be expanded or clarified such that it requires the equivalent of a de-identified Master Train Plan which includes information about whether a route section is contracted (with actual, forecast, and historical data), and the utilization on each of those route sections (again, with actual, forecast, and historical data). If those details were included this would provide valuable information of the route section that could be used to gain efficiencies and ease congestion in the network;

(b) Gross Tonne Kilometres (GTKs) should be added to Schedule 2 (noting that this is the measure by which CBH is currently charged), but gross tonnages and tonnages of freight should also remain to assist in indicating the efficiency of the network, and to prevent alternative charging methods;

(c) the service quality indicators proposed in Draft Recommendation 14 should be included in Schedule 2;

(d) minimum standards should be introduced for information contained in Schedule 2 (for example, the maximum permissible percentage of track that may be under temporary/ongoing speed/heat/weight restriction by route); and

(e) there should be oversight of the minimum standards by the ERA, with a mechanism to allow the ERA or an access seeker to seek specific performance, and for the ERA to enforce any partial or non-compliance that arises which may otherwise amount to hindering access to the network.

2.4.4 Draft recommendation 9B

Implement Recommendation 8 from the 2015 ERA review, to reduce the prescribed time limit for updating this information from two years to one year.

106. CBH supports this proposal and agrees that reducing the prescribed period for updating information will provide greater transparency.

2.4.5 Draft recommendation 10

Standardise section 8 and 14 requirements.

107. While supportive of the proposed changes to section 8, CBH does not support the proposed changes to section 14.

Detailed reasoning

108. In relation to the proposed changes to section 8, CBH supports the inclusion of more guidance for access seekers, and welcomes the opportunity to provide input into the development of standard information required for an access agreement.

109. As an aside, CBH notes that, logically, less information should be required for access agreement renewals because the railway owner would already have information and experience on how the access seeker has been using the network. On that basis, CBH suggests that specific provisions for a lower information requirement for renewals are included in the changes to section 8.

110. In relation to the proposed changes to section 14:

(a) CBH's consistent position is that section 14 should be abolished in its entirety.[46] If there is any issue about the financial capacity of the proponent then this can more properly be addressed through either negotiations (for example, by requiring an operator to provide security to support its financial position) or by the arbitration determination;

(b) If this position were rejected, then CBH agrees that the proposed introduction of prescriptive requirements for demonstrating financial ability in a re-drafted section 14 would provide greater clarity to access seekers and provide less opportunity for negotiations to be delayed or deferred; and

[46] CBH Initial Submission, page 107.

(c) It follows, and we assume, that the requirement to demonstrate managerial ability will be removed from the re-drafted section 14 – the managerial ability of a proponent is not a feature of any other rail access regime that we are aware of, and is irrelevant and unnecessary. If that assumption is incorrect, then for the same reasons that guidance in relation to financial ability is proposed to be introduced, CBH proposes that guidance in relation to managerial ability is also introduced into section 14.

2.4.6 Draft recommendation 11

Standardise consultation across Part 5 instruments.

111. While CBH generally supports this Draft recommendation, we hold some concerns in relation to the proposed change to section 42 and what would constitute a "material change".

Detailed reasoning

112. CBH supports amending section 45 to include the costing principles and over-payment rules, in order to ensure consistency in the public consultation process across all Part 5 instruments;

113. CBH also supports the regular review of all Part 5 instrument every 5 years, or as determined by the ERA.

114. However, CBH remains concerned that there is a risk associated with the proposed change to section 42 in that the ERA may not be in a position to determine whether a proposed change is material or not without consulting with all who might be affected by the change.

115. CBH suggests that an appropriate position may be to remove the requirement for public consultation as proposed, but replace it with a requirement for the ERA to conduct targeted consultation with parties who it may reasonably expect to be impacted by the approval.

2.4.7 Draft recommendation 12

Require the ERA to develop and maintain a model set of Part 5 instruments

116. CBH has no comment in relation to this proposal.

117. Given that this draft recommendation only requires the ERA to maintain a model set of Part 5 instruments for new railways, CBH does not have any comment other than observing that the preparation of a model set may be useful in providing a benchmark against which Part 5 instruments for existing railways, like the grain network, can be assessed.

2.4.8 Draft recommendation 13

Provide for an arbitrator to make an interim order on access prices, terms and conditions if parties have an agreement under the Code that is expiring and are renegotiating under the Code.

118. CBH supports this proposal in principle, but suggests some possible improvements.

Detailed reasoning

119. Over almost 5 years of negotiation and arbitration with Arc Infrastructure, CBH has repeatedly been placed in a situation where the railway owner is provided with an opportunity to exercise monopoly powers by unreasonably amending prices, terms and conditions and withholding access if the access seeker does not agree.[47]

120. CBH therefore supports the reforms in this draft recommendation to address the risk and use of exercise of monopoly power by railway owners.

121. However, CBH is concerned that the draft recommendation is proposed to only be available if the parties already have an agreement under the Code.

[47] See paragraph 10.4 at pages 96-97 of CBH's Initial Submission.

122. Given that after nearly 19 years of operation there have been no agreements made under the Code, and that CBH has taken nearly 5 years in obtaining access under the Code (which is still ongoing), this reform would have no impact on access seekers in the foreseeable future. This will effectively allow railway owners to ignore its effect for a significant period of time.

123. CBH therefore strongly suggests that this recommendation be amended to apply to where the parties have in place any existing agreement, whether negotiated under the Code or not, and are renegotiating access under the Code for the same route. This would be consistent with the recognition implicit in draft recommendation 5 – which allows parties that have been negotiating outside the Code to opt into the Code to access arbitration if negotiations have reached an impasse – that the Code process is extremely time-consuming, even with the introduction of sensible time-limits.

124. CBH further suggests that the recommendation require the arbitrator to preserve the status quo under the existing agreement (with a reasonable uplift of CPI) pending a final decision by the arbitrator (noting that a final decision would only be a maximum of 180 days away if Draft recommendation 8 is implemented).

125. CBH notes that Treasury have also specifically asked for feedback about confidentiality claims over information submitted to the regulator – CBH's views on these claims, and confidentiality claims in general, is found below at section 3.1.2.

2.5 Railway owner accountability

2.5.1 Draft recommendation 14

Include requirements to publish service quality indicators.

126. Subject to the clarifications set out below, CBH supports this proposal and agrees that it will allow access seekers to make an earlier assessment as to whether the service offering is suitable for their needs.

127. Whilst Treasury has indicated that the service quality indicators would not be binding on the access provider, CBH's view is that the service quality indicators must also be reflected in any standing offer and standard agreement to ensure consistency and commitment from the access provider. CBH submits that regular reporting with respect to the quality service indicators will increase transparency and allow users to better understand the service and plan for contingencies with respect to any discernable patterns.

Detailed reasoning

128. CBH agrees with Treasury's position that an access provider should be required to report, at least quarterly, in relation to the following service quality indicators:

(a) Actual minimum, maximum and average section run time performance

(b) Network entry and exit times against schedule

(c) Percentage of track under temporary speed restriction, being a speed restriction that differs from the one set out in the standard information package.

129. CBH acknowledges that Arc Infrastructure currently reports certain information to its customers on its Rail Access Management System (**RAMS**), including, where technically possible, the live section run times for each link on a route.

130. In order for section run times to be an effective indicator of service CBH submits that the information needs to be as granular as possible: that is, the section run times should be provided for each link in a route on the network, as currently reported in RAMS. By a "link", CBH is referring to the links between each rail location on a route. If section run times are not reported to this level of detail it would not accurately reflect the overall performance of a particular route.

131. CBH's experience is that providing an average section run time across a whole route may result in average speeds that are not achievable from link to link and this has serious consequences on planning train movements, the overall time it takes for a train to traverse a route and the accurate monitoring of performance. Likewise, reporting on the minimum and maximum section run times over a 3-month period would not provide the transparency and value to users if the run times are

calculated over the whole route rather than individual links. For these reasons CBH submits that the recommendation should be clarified to ensure that reporting of sectional run times is for each link on a route.

132. CBH also agrees that the objects of the Code will be supported by the requirement to report train entry and exit times as against the train schedule. However, in order to be effective, the requirement needs to be updated to ensure that the details are captured and clearly understood. The train schedules are set on a weekly basis; CBH assumes that the intention is to report quarterly but against each of the weekly schedules applicable for that quarter. If so this should be clearly set out.

133. A further concern with entry and exit times is that reporting needs to give context to circumstances where a train has not met the entry and / or exit times, that is, a train is declared "unhealthy" by the access provider. Where a train is declared unhealthy access providers should provide reasons for this so that users can understand the reasoning behind the declaration and the failure to comply with the train schedule. This also provides support for the access provider as it allows for an opportunity to explain any anomalies in the data. Degradation in the service quality indicators will likely indicate a reduction in maintenance work or a failure to perform all required maintenance. This transparency will assist all parties in understanding the state of the relevant network.

134. CBH is very much in support of the reporting around temporary restrictions, such as heat restrictions. CBH has previously submitted that there is limited transparency in relation to the basis for temporary restrictions; this is problematic as they can have significant effects on CBH's operations and scheduling[48]. To address this, details such as time and length of restriction should be included in the reporting requirements, as well as the number and percentage of affected links in relation to the whole Network.

135. It is also important that the concept of a 'temporary restriction' be clarified so that parties understand the parameters. CBH assumes that a temporary restriction is one with a limited duration that is subject to remedial action to ensure it is addressed and removed as soon as practicable. In particular and worth highlighting, is that heat restrictions may mean that, at times, CBH cannot run loaded trains in daylight hours for over half the year. These additional reporting parameters are required because, in CBH's experience as a rail user, temporary restrictions have been applied on a long-term basis and have severely hindered effective supply chain operations. In light of that they should be subject to a more transparent reporting framework.

2.6 Regulator accountability

2.6.1 Draft recommendation 15

Improve up front guidance for the regulator and require additional expert advice to inform decision making where appropriate.

136. Subject to the comments set out below, CBH supports this proposal on the basis that it is likely to result in more consistent, consultative and transparent determinations by the Regulator. CBH considers that the initiative and proposals set out by Treasury would be of value to both the Regulator and the parties accessing the regulatory framework.

137. More generally on the issue of regulator accountability, it is worth noting the discussion by Commissioner Hayne in the recent Financial Services Royal Commission about the financial sector regulators.

138. Commissioner Hayne was critical of what he described as ASIC's starting point in relation to misconduct being one of: How can this be resolved by agreement?[49]

139. Similarly, the ERA has expressed the view in the past that it should "adopt a neutral role" in administering the WARAR, even though it has statutory responsibility for "monitoring and enforcing compliance by railway owners with [the] Act and Code."[50] This approach has led to a situation where

[48] Paragraph 2.3(b) of CBH Initial Submission

[49] Financial Services Royal Commission, Final Report, vol 1, page 424

[50] Act, section 20(1)(a).

CBH has been forced to apply for an injunction in the Supreme Court (even though the ERA has the express power to do so) to enforce Arc Infrastructure's non-compliance with the Code.

140. As Commissioner Hayne noted negotiation and persuasion, without enforcement, all too readily leads to the perception that compliance is voluntary[51]. CBH agrees and encourages the ERA to alter its approach and take a more proactive role when considering contraventions of the law and, as Commissioner Hayne recommends, ask itself at the outset the critical question: Why not litigate?[52]

Possible improvements

141. As part of the implementation of this draft recommendation it has been noted that the Regulator will not be required to obtain a second expert report in circumstances where the first report does not differ significantly from the proposal put forward by the railway owner. Whilst the railways owners' proposal and the consultants' reports will be published CBH maintains there is value is ensuring that a second report is provided. A second report would ensure transparency and increase confidence in the valuations and the regulator's decision-making process.

2.7 Greenfields developments

2.7.1 Draft recommendation 16

Amend the Code to explicitly allow for differential treatment of foundation customers as a form of 'fair' discrimination

142. CBH supports this proposal.

Possible improvements

143. Whilst there is a generally acceptable meaning of 'foundation customer', Treasury may consider defining the term as intended in this particular context.

3. Other matters

3.1.1 ERA recommendations that will be implemented

144. Appendix 2 to the Draft Decision Paper sets out a number of changes recommended by the ERA in its 2011 and 2015 review of the Code that Treasury intends to implements as part of this review.

145. In our previous submission[53], CBH provided its responses to those ERA recommendations which are maintained for the purposes of this submission.

3.1.2 Confidentiality issues

146. The Draft Decision Paper has sought specific feedback about the confidentiality provisions contained in the Code, as were reviewed by the ERA in their 2015 Code Review.[54]

147. As discussed in CBH's previous submission[55], the current confidentiality regime in the Code is unfortunately ambiguously drafted, and has been applied so as to allow the railway owner to make extensive confidentiality claims.

[51] Financial Services Royal Commission, Final Report, vol 1, page 424-425.

[52] Financial Services Royal Commission, Final Report, vol 1, page 427.

[53] CBH Initial Submission, page 107-110.

[54] Draft Decision Paper, at page 55.

[55] CBH Initial Submission, page 97.

148. CBH remains concerned that confidentiality claims by railway owners in relation to Code processes, particularly around the process of determining floor and ceiling costs, are unhelpful and have helped to continue information asymmetry in the regime.

149. As the Economics and Industry Standing Committee (Committee) found in their 2014 report into the management of the WA freight rail network (Report No. 3 dated October 2014):

> *"there is no good reason for the floor and ceiling costing process to take place under a shroud of secrecy."*

150. Similarly, the same can be said about the proposed processes in the Code – for example, the proposed processes in the Draft Decision Paper for determining the initial asset base and roll forward.[56]

151. To address these deficiencies and aid transparency, CBH maintains its position that:

(a) the railway owner should not be permitted to claim confidentiality over information that is required to be provided under the Code, and

(b) that the regulator should be required to publish its draft decisions in full and without confidentiality restrictions.

152. As in other regulatory regimes[57], a potential check and balance on these requirements may be introduced by allowing the regulator to release information where the detriment of doing so does not outweigh the public benefit.

153. Put simply, if the current 'shroud of secrecy' is allowed to stay in place, CBH considers that much of the benefits flowing from the draft recommendations will be lessened or lost: a railway owner will continue to be in an advantageous position with respect to knowledge about the railway assets and the rail network operations, compounding the disparity in bargaining power between access seekers and the railway owner in access negotiations.

3.1.3 Merits review

154. The Draft Decision Paper does not recommend allowing merits review for all regulator decisions, or for certain key decisions (most notably, the setting of the initial asset base).

155. As CBH set out in its previous submission[58], we maintain the view that the introduction of merits review of key regulatory decisions may be appropriate in certain situations.

156. If merits review is ultimately not included, CBH considers that this underscores the importance of amending the proposed process for setting the initial asset base to allow access seekers to provide submissions prior to the regulator issuing a draft decision (see paragraphs 36-37 above).

3.1.4 Marginal freight routes

157. In the course of this review, an issue under consideration by Treasury was whether marginal routes, including a number of 'Tier 3' rail lines that were closed after July 2014, should continue to be covered by the Code.

158. The Draft Decision Paper concluded that it was inefficient to remove lines from coverage under the Code, as this would remove the opportunity for anyone to require the lessee to provide access to the lines.[59] Similarly, the Draft Decision Paper did not recommend providing further guidance on access to these routes.

159. For its part, CBH maintains its position that the Code should maintain coverage over marginal routes, as it is the only way in which CBH can secure ongoing sustainable access to those routes.

[56] See Draft Decision Paper, Table 3 at page 17.

[57] For example, the National Gas Laws.

[58] CBH Initial Submission, page 59-63.

[59] Draft Decision Paper, page 67

4. Conclusion

160. CBH appreciates the opportunity to contribute to this review and will continue to work with Treasury for grower focused outcomes. CBH will also continue to seek opportunities to engage with stakeholders, to ensure that the position of CBH and WA grain growers is properly understood. We look forward to continued engagement with Treasury.

For Further Information

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