Government of Western Australia
Department of Treasury

Review of the West Australian Rail Access Regime Draft Decision Paper

Submission by Roy Hill Infrastructure Pty Ltd

TABLE OF CONTENTS

1 Introduction

The Department of Treasury (**the Department**) has sought feedback on how the recommendations in the Draft Decision Paper entitled "Review of the West Australian Rail Access Regime" (**Draft Decision**) can be improved, and advice on any unintended consequences of those recommendations that have not been covered.

This submission by Roy Hill Infrastructure Pty Ltd (**Roy Hill**) responds in Part 7 to each recommendation in the Draft Decision. However Roy Hill considers that there are additional important issues not addressed in the recommendations which require comment. These issues are addressed in Parts 2-6 of this Submission.

Roy Hill remains of the view that the regulation of the railway owned by Roy Hill from the Roy Hill minesite to the port of Port Hedland (the **Roy Hill Railway**) is not consistent with the objectives of the Competition Principles Agreement made between the Commonwealth and the States and Territories on 11 April 1995 (**CPA**), and that therefore the Roy Hill Railway should not be governed by the WA Rail Access Regime.

Roy Hill acknowledges that it agreed to encourage third party access to the Roy Hill Railway on the basis of the WA Access Regime as at the date of the *Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act* 2010. However, Roy Hill did not agree to encourage third party access on the basis of the WA Access Regime, as proposed to be amended in accordance with the recommendations set out in the Draft Decision and following the implementation of the Cost Recovery principles (see paragraph 6 below).

In addition, third party access to the Roy Hill Railway negatively affects the ability of Roy Hill to co-ordinate its supply chain in the most efficient manner (an impact which has been observed by the Productivity Commission in the National Access Regime Inquiry Report no 66, Canberra, pages 100-105).

The Draft Decision fails to recognise that, in relation to the vertically integrated iron ore railway owned by Roy Hill the application of the WA Rail Access Regime may cause significant disruption to, and inefficiencies in, the operation of and investment in both the railway and the entire supply chain. The WA Rail Access Regime frustrates rather than promotes the objects of Part 111A of the *Competition and Consumer Act 2010* (C'th). This has been recognised by Government – the Australian Government Competition Policy Review March 2015 (**the Harper Review**) concluded that in relation to assets such as the Pilbara railways owned by TPI and Roy Hill:

"… imposing an access regime upon privately developed single user infrastructure is more likely to produce inefficiency than efficiency, impeding the competitiveness of industry. This is particularly so for vertically integrated export industries that are subject to the constraints of international competition in the final goods market."

Accordingly Roy Hill is of the view that the application of the principles of the CPA should determine that the Roy Hill Railway is excluded from the operation of the WA Rail Access Regime.

2 Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010 (Act)

Third party access to the Roy Hill Railway is governed by the WA Rail Access Regime pursuant to the Act. The State Agreement, which forms part of the Act, conferred on Roy Hill the choice as to whether third party access to the Roy Hill Railway would be governed by the WA Access Regime or by Part 111A of the Australian Consumer Law. Part 111A of the Australian Consumer Law would apply if Roy Hill submitted a written undertaking to the National Competition Commission under Division 6 of Part 111A of the Australian

Consumer Law. However, the WA Rail Access Regime would apply if Roy Hill chose not submit that undertaking.

In good faith and on the basis of the then existing WA Rail Access Regime, Roy Hill decided that it should be governed by the WA Rail Access Regime. Roy Hill chose not to submit a written undertaking to the National Competition Commission.

The proposals now contained in the Draft Decision, and the proposed implementation of the Cost Recovery principles, materially :

(a) increase the ongoing obligations imposed on a railway owner by the WA Rail Access Regime, for example by changing the valuation methodology of the railway from GRV to DORC and the imposition of an annual obligation to review the valuation, and by requiring a railway owner to provide service quality information to the public on an ongoing basis (rather than just to access seekers when they make an application); and

(b) increase the cost of compliance with the WA Rail Access Regime, by the proposed changes to the Regime and the implementation of the Cost Recovery principles.

These changes impose a competitive disadvantage on those railway owners which are subject to the WA Rail Access Regime (namely Roy Hill and FMG/TPI). The changes constitute material amendments to the original WA Access Regime agreed to by Roy Hill in the State Agreement. Roy Hill agreed to encourage third party access onto its railway in accordance with the State Agreement on the basis of the then existing terms and conditions of the WA Access Regime, and not on any other basis.

The proposed amendments set out in the Draft Decision and the proposed introduction of the Cost Recovery Principles mean that Government cannot now suggest that Roy Hill agreed to encourage third party access onto its railway on the basis set out in the WA Rail Access Regime.

3 Competitive Disadvantage

3.1 Financial Disadvantage

The Department is aware that the WA Rail Access Regime does not cover the heavy haul Pilbara railways owned by BHP Billiton (**BHPB**) and Rio Tinto (see page 5 of the Issues Paper dated July 2017). BHPB operates two railway lines which carry ore mined by BHPB to port - the Goldsworthy line and the Mt Newman line which each terminate at Port Hedland. Rio Tinto operates two railway lines which carry ore mined by Rio Tinto to port - the Hamersley line which terminates at Dampier and the Robe line which terminates at Cape Lambert.

The Department has stated that it is intended to implement the principle of cost recovery as from 1 July 2019 to recover the cost of regulatory oversight of the WA Rail Access Regime (see "Introducing Cost Recovery for the WA Rail Access Regime" workshop paper dated September 2018). The Department has stated that the recommended option is to recover from each railway owner an equal distribution of the standing charges with specific charges recovered from the relevant railway owners. The budgeted standing charges over the next 5 years range from $551,000 to $557,000 per annum. Accordingly the additional impost on Roy Hill each year is estimated to be a minimum amount of $130,000 per annum plus the amount of any specific charges which may arise from the regulation of the Roy Hill Railway.

Roy Hill has estimated (see paragraph 3.4 below) that the additional costs imposed on Roy Hill by the changes proposed in the Draft Decision will be:

(a) an initial up front cost of $530,000;

(b) an annual additional ongoing cost of $120,000;

(c) an additional cost each five years of $80,000; and

(d) if Roy Hill were required to publish a standing offer, a further additional cost of $420,000.

These additional costs will not be payable by BHPB or Rio Tinto, which are not subject to regulation by the WA Rail Access Regime, and instead are subject to regulation under Part 111A of the *Competition and Consumer Act 2010* (C'th). It follows that the combined effect of the implementation of the cost recovery principle and the proposed changes to the WA Rail Access Regime is that Roy Hill will be placed at a competitive disadvantage to BHPB and Rio Tinto to the extent of an estimated annual amount of at least $250,000, the initial estimated costs of $480,000 and every five years a further estimated amount of $80,000. If Roy Hill is required to publish a standing offer further significant costs will be incurred, which Roy Hill has estimated to be $420,000. None of these costs will be incurred by BHPB and Rio Tinto, placing Roy Hill at a clear competitive disadvantage against competitors operating in the same market who provide the same product to competing customers.

The Department should not seek to deliberately put Roy Hill at a competitive disadvantage as against BHPB and Rio Tinto.

This unintended consequence of the implementation of the costs recovery mechanism and the proposed changes to the WA Rail Access Regime should be eliminated by accepting that the Roy Hill Railway should not be regulated by the WA Access Regime.

Roy Hill would assume that FMG/TPI is placed at a similar competitive disadvantage to Roy Hill as against BHPB and Rio Tinto.

3.2 Provision of Information

Draft Recommendation 14 in the Draft Decision contemplates that a railway owner will be required to provide quarterly reporting on:

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

(b) network entry and exit time against schedule; and

(c) percentage of track under temporary speed restriction.

The suggestion from the Draft Decision is that this information will be required to be provided publicly "… so as to improve the transparency of the Regime and to facilitate more effective negotiations…" (page 60 of the Draft Decision) . Although the Department states in paragraph 8.3.3 of the Draft Decision that the reason why the information is proposed to be published publically is so that access seekers are able to access the information "… to enable them to make an early assessment of whether rail is likely to be a feasible freight solution for them", the proposal is that the service quality information is published. The information will be available to not only access seekers, but also to Roy Hill's competitors. Accordingly, Roy Hill's competitors (including BHPB and Rio Tinto) will have access to this information, some of which may be commercially confidential.

BHPB and Rio Tinto are not required to provide the same information publicly, or indeed they are not required to provide the information even to a more limited audience of potential access seekers.

Therefore Roy Hill (and FMG/TPI) will be required to provide information about the operation of its railway which is not at present publicly available, and some of which may be commercially sensitive, while similar requirements are not imposed on BHPB and Rio Tinto because they are regulated under different legislation.

4 Synergies Economic Consulting - Cost Benefit Analysis of a new pricing mechanism for rail access in WA

4.1 Fundamental Flaws

The Draft Decision at page 3 states:

"The Department of Treasury has commissioned a preliminary cost benefit analysis on the proposed changes to the pricing mechanism and pricing guidance (draft recommendations 1-3) which indicates that the changes would provide a net benefit of at least $24.4 million over 20 years. This is primarily due to allowing projects that rely on rail access to begin operations earlier, and to reducing negotiation costs."

The Department appears to have placed significant reliance on the preliminary cost benefit analysis prepared by Synergies Economic Consulting (**the Synergies Report**). The Synergies Report forms Appendix 4 to the Draft Decision. In section 4 of the Draft Decision the Department concludes that the preliminary analysis:

"provides a robust framework for assessing the costs and benefits of the proposed changes to the pricing mechanism, but at this stage provides indicative estimates of the values of the costs and benefits for further testing. Feedback is sought from stakeholders on the reasonableness of these value estimates."

Roy Hill can advise the Department that the Synergies Report is fundamentally flawed, and the Department cannot rely on the conclusion that the changes will provide a net benefit to the State of at least $24.4 million over 20 years. If Government choses to implement any of the proposed changes to the WA Rail Access Regime, it cannot use the financial conclusions in the Synergies Report to support the introduction of the changes.

In relation to the Pilbara railways it would be incorrect and misleading for the Department to justify the implementation of the changes to the WA Rail Access Regime on the basis that the changes will result in a net financial benefit to the State. The changes will not result in a financial benefit to the State. Roy Hill has estimated that (see paragraph 2.4 below) the net cost to the State and to Pilbara railway owners of the implementation of the changes is:

(a) an initial up front cost of $1.7m;

(b) an annual additional ongoing cost of $240,000;

(c) an additional cost each five years of $160,000; and

(d) if an owner was required to publish a standing offer, a further additional cost of $420,000.

Any announcements regarding the implementation of the changes must acknowledge these costs.

The Synergies Report is fundamentally flawed because it:

(e) relies on a series of assumptions which are incorrect. The assumptions have not been tested, have no basis, and are inconsistent with historical evidence;

(f) uses as the basis of its calculations six "committed" projects which are not relevant to the WA Rail Access Regime in any way, and in particular would not be impacted by the proposed changes to the Regime; and

(g) does not refer to one project which would have benefited from the proposed changes to the WA Rail Access Regime;

(h) fails to include in its assessment of the costs of the proposed changes to the Regime which require the publication of service quality indicators (see recommendation 14 below). This would appear to be a simple omission in the calculation, which is repeated in Part 4 of the Draft Decision.

4.2 Incorrect assumptions - Costs

Synergies suggest that the cost of the development and maintenance of RAB will be "moderately material" and that it will consist of (a) the costs of amending a railway owner's Costing Principles; (b) the cost of developing the RAB; (c) the cost of the annual asset roll forward; and (d) the cost of the five year roll forward review (paragraph 2 of the Synergies Report).

The cost of amending the Costing Principles for each railway owner is assessed by Synergies at 0.5 FTE for three months, and for the ERA 1 FTE for three months. The suggestion that the changes to the Costing Principles can be implemented in three months conflicts with Roy Hill's recent experience in finalising its Costing Principles. The process for Roy Hill's Costing Principles commenced in 2016 when Roy Hill first drafted the document submitted to the ERA on 11 October 2016, the document was reviewed by ERA which then called for submissions on 24 March 2017, and a final document was published by the ERA in June 2017. Therefore, the process took in excess of nine months. Roy Hill notes that, in relation to the changes to each owner's Costing Principles required by the Draft Decision, the ERA will prepare a draft decision and ask for submissions on the changes before the ERA publishes its final decision (see page 17 of the Draft Decision). It is quite unrealistic to suggest that the process will be completed in three months by 0.5 FTE for each railway owner and 1.0 FTE for the ERA.

Synergies suggest that the cost for railway owners to develop a DORC valuation will be $100,000 plus $250/km of railway. No explanation of how these costs have been calculated is provided, except that "each railway owner has on average 2100 km of rail assets". This averaging over the three railways is clearly inappropriate given that the length of the Pilbara railways are 500kms (FMG) and 350kms (Roy Hill) and the Arc Infrastructure railway network is more than 10 times those Pilbara railways at 5500 kms. A separate calculation should be performed for the Arc Infrastructure railway and for the Pilbara railways.

An explanation of the $100,000 cost estimate is needed – Roy Hill notes the comment at para 297 of the Arc Submission that:

"To calculate ceiling costs in a regime featuring depreciation (such as EAB or a DORC) every single asset existing on the 5,500 km of the Arc Network will require a remaining and total technical life to be determined to accurately calculate depreciation. To put this into context, Arc currently has data on approximately 8 million rail assets (such as rail spans, sleepers, turnouts, culverts etc) of which only a fraction have an installation date (which informs the remaining life). Arc expects the work required to populate its database with the requisite information to establish remaining asset life would be an extremely time consuming and costly exercise. For the rail category for example, each piece of rail would require physical inspection to ascertain when it was installed (by reference to date markings on each individual rail span)."

Roy Hill will have to conduct the same analysis as the procedure outlined by Arc Infrastructure in this commentary.

It would appear that Synergies have not taken this commentary into account in suggesting that the cost of developing a DORC valuation of the railways would be $100,000 plus $250/km of railway for each railway owner and the same for the ERA plus 2.0 FTE for each railway owner for 6 months and 0.5 FTE for 6 months per railway owner. The costs would be significantly more than those estimates.

Synergies have suggested (at para 2.1.3 of the Synergies Report) that the cost of the annual asset roll forward would be a one off initial development cost of $100,000 plus $100/km of railway and 1 FTE for 3 months. No explanation has been provided for these estimated costs. The Draft Decision (in table 3) states that the process will require that Roy Hill submit a proposal about how the RAB will be rolled forward (which Roy Hill assumes

means a submission regarding the appropriate method and rate of depreciation to apply to each component of the railway), the ERA will release a draft decision paper, stakeholders may then make submissions, and the ERA will then release a final decision. As stated above, the Synergies Paper does not include any explanation for its $100,000 cost estimate. Roy Hill's experiences with the approval processes for its Part 5 Instruments would suggest that the estimate by Synergies that the process only has a one off initial cost of $100,000 (and in subsequent years will incur no costs) and will be completed in 3 months, is significantly overly optimistic.

Synergies have suggested that the costs of the 5 year reviews will be 1FTE for each railway owner and 0.5FTE for the ERA for a period of 3 months (para 2.2 of the Synergies Report). External consultancy costs are estimated to be double the internal costs. There is no explanation of these estimates. Synergies need to be asked to explain the basis of the estimates. They are quite inconsistent with Roy Hill's experiences with the approval processes for its Part 5 Instruments.

Standing Offers

Synergies have assumed that 4 standing offer tariffs will be mandated by the ERA for the 3 railway owners over a period of 6 years with each tariff corresponding to an actual or potential operator on the line. Railway owners must be advised of the basis of these assumptions. Why has Synergies assumed that 4 standing offer tariffs will be mandated by the ERA over the next 6 years?

Roy Hill had understood that the ERA would not require that Roy Hill produce a standing offer because the Draft Decision provides (at paragraph 3.3.3) that a standing offer "could usefully apply in any situation where there are one or more actual or potential operators on a route with similar freight tasks". There has never been more than one operator on the Roy Hill Railway, so it should be unlikely that Roy Hill would be required to develop a standing offer. However, in response to a series of questions asked by Roy Hill's solicitor, on 14 February 2019 Roy Hill was advised that "*… the ERA would be required to determine when a standing offer is required, using the criteria that one should be developed in any situation where there are one or more actual or potential operators on a route with similar freight tasks, with similarity in freight task assessed in relation to train length, axle load and freight type…. While there are no third party operators on the Pilbara Railways covered at this time, if there are other resource projects in close proximity in the future, the ERA could direct a railway owner to develop standing offer."*

Roy Hill's response to Draft Recommendation 2 below includes a requirement that the circumstances in which the ERA might require that a railway owner publish a standing offer should be clarified in the legislation. The cost incurred by a railway owner in developing a standing offer will be significant - Roy Hill has estimated that the cost will be $420,000. Roy Hill, or any other railway owner, should not be put to that significant expense unless there is a real expectation that a third party will require access to a railway – it should not be sufficient that there is merely "another resource project in close proximity".

Since the freight tasks required by operators on the Arc Infrastructure railway are not similar, the requirement to publish a standing offer also should not apply to Arc. It is therefore difficult to understand the basis of the assumption that there will be 4 standing offer tariffs for the 3 railway owners over the next 6 years.

Synergies have not explained the basis of the following assumptions regarding the additional costs imposed on railway owners by the changes:

(a) the costs of developing a standing offer tariff - 1FTE for 3 months. If the purpose of a standing offer is to calculate a price for access onto a railway, which can be accepted by an operator, the suggestion that the price can be calculated by one employee over a 3 month period is clearly incorrect. The price calculation would involve numerous employees in the supply chain (loading, unloading and transport) and could not be developed by one employee over a 3 month period. The process which would be required to calculate a standing offer is that numerous employees in the supply chain would provide information to a central collating employee who would take approx. three months to develop the

proposed standing offer, which would then be approved by senior management. In FTE terms, Roy Hill's best estimate is that it would take two FTEs a period of six months to finalise a standing offer; and

(b) the cost of developing, and the ERA approving, the standard terms and conditions to underpin the standing offer – 2 FTE for three months for each railway owner and 1FTE for three months for the ERA, and external consulting costs which are assumed to be double the internal costs. How has Synergies determined these costs? Roy Hill's experience would suggest that it will take more than 3 months to develop the standard terms and conditions of an access agreement, and will require input from a variety of areas within the business, and substantial input from external legal advisors to develop the appropriate document. In FTE terms Roy Hill's best estimate is that it would take 2 FTEs (one FTE from the commercial side of the business, and one internal legal resource) a period of six months to finalise the standard terms and conditions, and the best estimate of the costs of the external legal advisor would be $100,000.

Costs of a specific proposal

Synergies suggest (at para 2.3 of the Synergies Report) that the only new costs which arise as a consequence of the proposed changes to the Regime are new costs "… in developing and approving the maintenance, operating and future capex costs for a specific proposal over a forecast term". Synergies estimate these additional costs as follows:

(a) costs of demonstrating efficiency of forecast costs (estimated to be about $100,000 per proposal plus $100/km of railway); and

(b) consultancy costs to the ERA of assessing the efficiency of forecast costs (estimated to be $100,000 per proposal plus $100/km of railway); and

(c) internal resource of ERA and railway owner of 1FTE for 3 months.

It is not clear to Roy Hill what these additional costs are and how they arise from the changes to the Regime. At present if a railway owner receives an access proposal, the owner must determine the ceiling and floor price using the appropriate maintenance and operating costs necessary for a replacement railway. In contrast, the changes to the WA Rail Access Regime will require that maintenance and operating costs are determined by reference to the existing depreciated state of the railway.

Base Case Costs

Synergies state that the Base Case Costs incurred in developing a proposal under the existing arrangements are estimated to be:

(a) consultancy costs to the railway owner for assessing GRV (approx $100,000 per proposal plus $100/ km of railway) and for assessing the efficient whole of life operating and maintenance costs (approx. $50,000 per proposal plus $50 per km of railway);

(b) consultancy costs to ERA for assessing GRV (approx. $100,000 per proposal plus $100 per km of railway) and for assessing the efficient whole of life operating and maintenance costs (approx. $50,000 per proposal plus $50/km of railway); and

(c) internal resource costs for ERA and the railway owner of 1 FTE for 3 months.

Roy Hill queries the basis of these estimates, given that Roy Hill has never received an access proposal and Roy Hill understands that FMG/TPI has only ever received the one access proposal from Brockman Resources, which could not be used as an example to estimate the base costs of an access proposal as it was disputed in

the Courts and has never been finalised. Therefore Roy Hill queries how Synergies has arrived at these estimated amounts?

Implementation costs

Roy Hill queries how Synergies determined these estimated costs of implementing the changes to the Regime specified in paragraph 2.4 of the Synergies Report. Synergies has first assumed "policy and regulatory amendment costs for government" of $165,000 (comprising 2FTEs for 6 months at a salary of $165,000 per annum). Roy Hill queries whether it is appropriate to include in the costs calculation the costs of drafting the appropriate legislation – that is a cost of governing, not a cost of the changes to the Regime.

Synergies have assumed that the costs to each railway owner of familiarisation with the Regime will be 0.5FTE for one month plus legal advice of $50,000. Roy Hill queries the basis of these assumptions. Roy Hill questions the suggestion that implementation costs would be relatively low "given consistency of proposed frameworks with approaches used nationally" (para 2.4 of the Synergies Report). Since Roy Hill does not operate railways on a national basis the fact that the new Regime may be consistent with the national approach to regulation will not reduce the implementation cost to Roy Hill. This would apply equally to FMG/TPI.

4.3 Incorrect Assumptions - Benefits

Synergies identifies 5 main types of benefits:

(a) lower negotiation costs under the Code;

(b) lower costs of disputes, due to fewer disputes under the Code;

(c) a bring forward of projects, through less protracted negotiations;

(d) lower risk of good projects not coming to fruition; and

(e) increased durability of negotiated prices.

Lower negotiation costs

Synergies have estimated that negotiation times could be reduced by on average 1.5 years for each access agreement that is negotiated under the Code. Table 3 refers to the number of proposals per year inside the Code increasing from 0.33 to 1.333 and the number of proposals outside the Code per year decreasing from 3 to 2. Negotiation time per proposal is reduced from 2.5 years to 1 year inside the Code and from 1 year to 0.5 years outside the Code. The Report does not explain the basis of these assumptions.

The assumptions would appear to have no application whatsoever to the Pilbara railways as there has only ever been one access application under the Code, which has not progressed. The suggestion that in relation to the Pilbara railways there might be a portion of the 1.333 applications inside the Code each year and a portion of the 2 applications outside the Code is not consistent with the historical situation that the only access application received by either FMG/TPI and Roy Hill is the one application submitted by Brockman Resources, which has not progressed. Roy Hill has not received any applications outside the Code, and Roy Hill understands that similarly FMG/TPI has not received an application outside of the Code. Therefore the assumptions by Synergies regarding the number of applications which might be received by Roy Hill and FMG/TPI in any year either inside or outside of the Code would appear to be quite unrealistic and have no application whatsoever to the Pilbara railways. The number of applications both inside and outside the Code which have been used in the modelling by Synergies appears to be quite arbitrary. The Department has advised Roy Hill's solicitor (in the letter received 14 February 2019) that the assumptions *"… are based on Synergies' experience and understanding of rail access arrangements and negotiations across all lines covered by the WA Rail Access Regime and in other regimes that use a building block with DORC methodology with more extensive pricing guidance. Synergies have used information on the average time taken to complete*

negotiations for access to railways that are subject to undertakings under the Queensland Rail Access Regime and National Access Regime to form their assumptions on what may happen if similar arrangements are introduced in WA."

In relation to the number of applications for access used in the modelling, Roy Hill would dispute that the appropriate comparison is the number of applications which have occurred inside and outside the Code in Queensland. The number of applications which may have occurred in Queensland is irrelevant to the number of applications which might occur in WA. The only relevant factor is the number of projects which may exist in proximity to the Roy Hill Railway and the TPI/FMG railway. As stated above, there has only ever been one application for access to either the Roy Hill Railway or the TPI/FMG Railway and Roy Hill is not aware of any potential application which might arise. Therefore any modelling to assess the financial benefits of the proposed changes to the WA Access Regime cannot assume that there will be any applications for access either inside or outside the Code.

Roy Hill addresses the suggestion that negotiation times would be reduced on average by 1.5 years for each agreement negotiated under the Code below under the heading "Bring forward of Projects".

Lower cost of disputes

The Synergies Report suggests that the new Regime will "…result in lower incidence of costly disputes for every proposal that is negotiated under the Code." There is no explanation for the basis for this suggestion.

Bring forward of Projects

Synergies suggest (at paragraph 3.3 of the Synergies Report):

"…faster negotiation timeframes will, on average, mean that the commencement date of new projects can be brought forward. This will deliver economic gains to the access seeker through the bring forward in commercial revenues for the project and reduced capital holding costs. It will also bring forward the timing of a new revenue stream for the access provider in terms of payments for access to infrastructure."

Synergies claim that this is the most material benefit of the proposed pricing mechanism and which can be quantified relatively easily. For the purposes of their modelling, Synergies assume:

(a) projects will be brought forward by 1.5 years;

(b) one third of projects are new projects;

(c) 80% of proposals negotiated under the Code reach agreement; and

(d) an average project value of $300m of which 20% is contingent on a rail access agreement being secured.

The first point Roy Hill makes in relation to this alleged benefit (which Synergies suggest is the "most material benefit" of the proposed pricing mechanism) is that it has no application to the Pilbara railways. No project in the Pilbara has ever been delayed as a consequence of the existing rail access regime. An inability to negotiate access onto a railway in the Pilbara has never caused a delay of any type to any project. This conclusion is unequivocal and cannot be disputed. Roy Hill has never received an approach from an access seeker for access to its railway, so Synergies cannot suggest that the existing Regime has ever caused any delay. Further Roy Hill is not aware of any potential project which may be delayed as a consequence of the existing WA Rail Access Regime. In fact for the reasons specified in the next paragraph, Roy Hill can state that the WA Rail Access regime would not be the cause of any delays to any such project.

The second fundamental point is that an infrastructure project is an enormously complex series of transactions involving exploration, geological and mining analysis, numerous approvals (Government and native title), construction, financing, power generation, and marketing of the product. To suggest that a project can be

accelerated by 1.5 years by (allegedly) simplifying the pricing mechanisms in the rail access regime displays a fundamental lack of understanding of the complexity of an infrastructure project. The letter to Roy Hill's solicitors received on 14 February 2019 states that "*Synergies have used information on the average time taken to complete negotiations for access to railways that are subject to undertakings under the Queensland Rail Access Regime and National Access Regime to form their assumptions on what may happen if similar arrangements are introduced in WA ".* This statement confirms that Synergies have used an incorrect basis for its assumption that projects will be brought forward by an average of 1.5 years – the fact that negotiation of an access agreement may be accelerated by an average of 1.5 years if the negotiation is governed by an access undertaking under the Queensland Rail Access Code or the National Access Regime (if true, and Roy Hill has no evidence to support the claim or otherwise) does not mean that in Western Australia "projects will be brought forward by an average of 1.5 years." Completion of an infrastructure project is dependent upon many factors, and the suggestion that altering the pricing mechanisms in the WA Rail Access Regime will accelerate completion of a project by 1.5 years is clearly incorrect and cannot be relied upon to support any claim around the financial consequences of the changes to the WA Rail Access Regime.

Roy Hill's solicitors raised this issue with the Department in their letter to the Department of 5 February 2019. Roy Hill's solicitors commented that the modelling appeared to be based on the assumption that rail access is the only issue which might delay a project. The Department responded that "*Synergies has only included the possible effects of the rail access regime on delaying a project in the costs benefit analysis because other sources of project delay would not be caused by the rail access regime, and therefore cannot be attributed to changes in the Regime".* Although the response is difficult to interpret, it would appear to confirm that the modelling is a purely theoretical analysis and is of no practical relevance as it fails to consider the many issues which must be addressed in the development of an infrastructure project. Roy Hill repeats that a project has never been delayed only by difficulties with rail access. Delays will be caused by other factors (finance, approvals), not by problems with rail access.

The third point is that the assumptions in paragraphs (a), (b) and (c) have no historical basis. On what basis can Synergies suggest that projects will be brought forward by 1.5 years? As stated in the previous paragraph the assumption shows a lack of understanding of large scale infrastructure projects. Why have Synergies assumed that one third of projects are new projects and 80% of proposals negotiated under the Code reach agreement? Those assumptions have no historical basis.

The final point is that the assumption in paragraph (d) that each project has an average value of $300m of which 20% is contingent on rail access is allegedly based on six "committed" resource projects referred to in the October 2017 data from the Commonwealth Department of Industry, Innovation and Science. Those six projects are completely irrelevant to the Pilbara railways (and the Arc Infrastructure railway network), and cannot be relied upon to suggest that any benefit will arise to any access seeker onto the Pilbara railways or the Arc Infrastructure network. The Department has confirmed (in the letter to Roy Hill's solicitor received 14 February 2019) that the six projects are:

(e) the Browns Range project owned by Northern Minerals for dysprosium, located 160 kms south west of Hall Creek;

(f) the Guyere Gold Project located 740 kms east of Laverton;

(g) the Dalgaranga Gold Project owned by Gascoigne Resources located 70 kms north west of Mt Magnet;

(h) the Karlawindi Project owned by Capricorn Metals located 70 kms by road west of Newman; and

(i) the Pilangoora Lithium Project owned by Pilbara Minerals located 120 kms south east of Port Hedland; and

(j) the Nova Nickel project owned by Sirius Resources located 160 kms north east of Norseman or 360 kms south east of Kalgoorlie.

The Karlawindi Project and the Pilangoora Lithium Project are the only projects located in any proximity to the Roy Hill Railway or the FMG/TPI Railway and which could access either the Roy Hill Railway or the FMG/TPI Railway. However, neither of those mines could usefully access a bulk haulage railway as they produce gold and a spodumene concentrate respectively.

Therefore none of these six projects referred to by Synergies could use either the Roy Hill Railway or the FMG/TPI railway as they are either or both geographically distant from the Pilbara railways or they do not involve the transportation of bulk commodities which would be appropriate for the Roy Hill Railway or the FMG/TPI railway.

In the letter to Roy Hill's solicitors received 14 February 2019 the Department has sought to justify the use of these six projects although they *"… were not chosen for their proximity to existing rail infrastructure (either in the Pilbara or the South West) or the ability to benefit from an improved rail access regime, but rather as indicative of the value of resource projects in WA to form a reasonable assumption about the scale of benefits."* This comment concedes that the six projects are not projects which would benefit from the proposed changes to the WA Rail Access Regime. Accordingly, it is not appropriate that Synergies use these six projects, which are of no relevance to the WA Rail Access Regime, and of no relevance to the Pilbara railways, to support any modelling which might incorrectly conclude that the proposed changes to the WA Rail Access Regime create financial benefits to the State.

Finally in relation to this "bring forward of projects assumption", it is also incorrect to assume that 20% of the value of a project is contingent on rail access. Project finance is simply not divisible in that way – project finance for a project as a whole will become available when all the conditions precedent for finance have been satisfied. Those conditions precedent may include the resolution of a rail infrastructure solution, or some other transportation alternative becoming available. However, it is incorrect to think that 20% of the finance will not become available if a rail infrastructure solution does not become available.

Lower risk of good projects not coming to fruition

Synergies "suspect" that there is a proportion of good projects that are commercially viable, but which do not proceed because the protracted time frames and associated transaction costs mean that they miss the investment window. Synergies state that the benefit is difficult to quantify.

There is no evidentiary basis for Synergies' suspicion that such a benefit may arise.

Increased durability of negotiated agreements

Synergies suggest that access agreements negotiated under the Code are likely to be more "durable" and more "robust" in being able to address a range of future circumstances. Synergies state (at paragraph 3.5 of the Report):

" … having established a firm price guidance and a systematic process for reaching a negotiated agreement under the new arrangements, subsequent negotiations are less likely to involve a reopening of issues that have previously been dealt with. There will be established precedent in how the issues are to be best addressed and resolved. In turn this will result in cost savings from not having to re-negotiate on those matters."

There is no basis on which to make these assumptions. An access agreement negotiated between a railway owner and a third party should be "durable" and "robust". Roy Hill would suggest that the best agreement most likely to reflect the wishes of the parties would be one negotiated from the start, rather than from a standard document which bears no relevance to the particular circumstances of the access seeker or the negotiated arrangement. It is often more difficult to negotiate a document from a starting basis which is some distance from the actual deal which has been struck between the parties, rather than starting from scratch.

4.3 Quantification of costs and benefits

Synergies state that a "… key factor underpinning the assessment of costs and benefits of the proposed change to pricing mechanism is the number of negotiations that will occur under the Access Code."

They make the following assumptions (which Roy Hill has mentioned above) which have no historical basis or are quite contrary to past experience:

Number of Proposals	**Base case**	**New Arrangements**
Average per year	10	10
Negotiations within Code	1 proposal every 3 years	1 1/3 proposals per year
Negotiations outside Code	3 proposals per year	2 proposals per year
Negotiation Timeframes		
Under the Code	2.5 years	1.0 year per proposal
Outside the Code	1 year per proposal	Half a year per proposal
Number of Access Agreements		
% of proposals within the Code that reach agreement	30%	80%
Standing Offer Tariffs		
Number	Not applicable	4 standing offers to be developed

As stated above Roy Hill submits that there is no basis for any of these assumptions and they cannot be relied upon to form the basis of the quantification of the costs and benefits of the changes to the WA Rail Access Regime.

4.4 Application of costs/benefits analysis to Pilbara Railways

Roy Hill has attempted to quantify the cost/benefit analysis of the proposed changes to the WA Rail Access Regime in so far as they apply to the Pilbara railways. Roy Hill is able to attribute costs and benefits to the proposed changes in so far as they apply to the Pilbara railways, because Roy Hill has practical experience as to the application of the WA Rail Access Regime to the Roy Hill railway. Roy Hill does not have practical experience of the application of the WA Rail Access Regime to the railway owned by Arc Infrastructure, so Roy Hill cannot complete the costs/benefit analysis in so far as the changes may affect that railway.

A table which sets out the best estimate by Roy Hill, based on its actual practical experience in dealing with the ERA of the cost/benefit analysis of the implementation of the changes to the WA Rail Access Regime for the Pilbara Railways is as follows:

COSTS		**BENEFITS**	
Upfront Costs			
Amending Costing Principles	**Each Railway Owner –** 1FTE for 25% of his time	**Lower Negotiation costs**	**Nil –** Historically, no access agreements have

	over a one year period ($40,000) External consultants costs - $50,000 **ERA -** 1FTE for one year ($160,000).
Calculating RAB/ORC base of railway	**Each Railway Owner –** 2FTE (or the equivalent thereof) for six months ($160,000) **ERA –** 2FTE for six months
Determine appropriate Depreciation Rate	**Each Railway Owner –** 1FTE for 25% of his time for period of one year ($40k) **ERA –** 1FTE for one year ($160,000).
Drafting Standard form Access Agreement	**Each Railway Owner –** 1FTE for 25% of his time over a one year period ($40,000) External consultants costs - $100,000 **ERA -** 1FTE for one year ($160,000).

Annual/Ongoing Costs

Annual review	**Each Railway Owner –** One off initial system development costs $100,000 plus $100 per km. 1FTE over period of three months ($40,000) **ERA -** nil
	been negotiated under the Code. Cannot assume that any agreement will be negotiated under the Code in the future. RHI is not aware of any proposal. Any suggestion that lower negotiations costs will result from Regime changes in the absence of any past access agreements, and any anticipated access agreements is purely theoretical and of no practical relevance. Even if there were anticipated access agreements, RHI would dispute that the proposed changes to the pricing regime result in lower negotiation costs. Delivery risk and operational risk are major negotiation issues, not price.
Lower costs of disputes	**Nil –** There is no reason to assume that the costs of any dispute under the new Regime will be less than the cost of a dispute under the previous regime. RHI has not been involved in any dispute under the existing Regime.
Bring Forward of Projects	**Nil –** no projects have been delayed in the past as a consequence of the existing rail access regime. Given the complexity of a mine/rail/port project it would be incorrect to assume that changes to

Provision of Service Quality information	**Each Railway Owner –** 1FTE for 50% of his time on an ongoing basis ($80,000) **ERA -** nil

Five yearly Costs

	Each Railway Owner – for each railway owner 1FTE for 6 months ($80,000) **ERA –** 1FTE for 6 months ($80,000)

Costs of Preparing Standing Offer

Calculation of Standing Offer	**Each Railway Owner –** would involve number of FTE, but equate to 2FTE for six months ($160,000). **ERA –**assessing when standing offer required 1FTE for 3 months (query how many times?)
Drafting Standard Terms and Conditions	**Each Railway Owner –** would involve number of FTE, but equate to 2FTE for six months ($160,000). External Consultancy costs -$100,000. **ERA** – nil, document not to be approved by ERA (para 3.3.3 Draft Decision).
	the Regime would accelerate the development of new projects.
Risk of good projects not coming to fruition	**Nil –** Synergies did not attribute a value to this alleged benefit. RHI is not aware that the existing Regime has prevented any "good project" coming to fruition and RHI would dispute basis on which it might be assumed that it will occur in future.
Durability of negotiated agreements	**Nil –** Synergies did not attribute a value to this alleged benefit. There are no agreements negotiated within the existing Regime so the comparison is difficult. Evidence would be required to substantiate any claim that agreements negotiated under the new Regime will be more "durable" and "robust" than agreements negotiated under the existing Regime, between independent third parties. RHI would dispute that conclusion.

Therefore in relation to the Pilbara railways the best estimate of the cost benefit analysis is that the proposed changes will have a net initial estimated cost of $530,000 for each railway owner (totalling $1,060,000) and the estimated costs to the ERA will be $640,000.

On an annual ongoing basis the net annual additional cost will be $120,000 for each railway owner (totalling $240,000).

Each five years a further additional $80,000 will be incurred by each railway owner (totalling $160,000) and $80,000 for the ERA.

If a standing offer is required to be provided by a railway owner the additional costs would be $420,000 for each railway owner. The ERA would also incur additional ongoing costs to assess whether a railway owner should be required to publish a standing offer.

5 Re-Certification as an Effective Regime

The Department has suggested in the Draft Decision that it has "… *considered whether any of the proposed changes to the Regime could affect the likelihood that the Regime will be re-certified as an "effective" access Regime by the Commonwealth Treasurer in accordance with the 1995 Competition Principles Agreement. Although the Regime was certified from 2011 to 2016, this certification expired. The Government will consider applying for re-certification once this review is complete* " (para 1.1 of the Draft Decision). In particular:

(a) at paragraph 2.3.1 one of the costs of the GRV approach is suggested to be that "… *the GRV approach is not consistent with other access regimes and may create additional regulatory burden for parties operating across jurisdictions*";

(b) at paragraph 2.3.2 one of the benefits of the proposed DORC methodology is expressed to be that it offers "… *consistency with other rail access regimes and extensive regulatory precedent to guide the application of the methodology*"; and

(b) at paragraph 13.3.3 the Department has suggested that "*it is likely that the similarity between the declaration criteria in the WA Regime and the National access regime will be considered by the National Competition Council in any application for certification of the Regime as an effective regime."*

The background to the previous certification of the WA Rail Access Regime is that on 13 December 2010 the National Competition Council (**NCC**) recommended that the Commonwealth Minister not certify the Regime as effective. The NCC's view was 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." (paragraph 1.2 of the Final Recommendation paper dated 13 December 2010 (**Final Recommendation**)). However, the Minister rejected that recommendation and on 11 February 2011 the Minister decided that the WA Rail Access Regime is an effective access regime under section 44N of the Competition and Consumer Act 2010.

The commentary in the Draft Decision fails to acknowledge the substantive reason why the NCC recommended that the WA Rail Access Regime not be certified. At paragraph 10.17 of the Final Recommendation, the NCC specifically refers to the fact that Western Australian railways are subject to a variety of access regulation. The status of the regulatory regime at that time meant that within the Pilbara Region there were "… at least three different forms of regulation that apply, two regulators and two railways that are not subject to any regulation."

At paragraph 10.20 of the Final Recommendation the NCC states that:

" 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 access regulation outside of the Regime, or potentially structure arrangements such that there is no access regulation will not continue."

Paragraphs 10.22 and 10.23 of the Final Recommendation conclude:

"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 111A of the TPA, having regard to the consistency limb of the objects of Part 111A the Council considers that the WA Rail Access Regime cannot be certified as an effective access regime."*

The reason why the NCC decided not to recommend that the WA Access Regime be certified was "*the lack of consistency in the regulation of railways in Western Australia and that such a lack of consistency is not purely an historical legacy"* and suggested that *"the 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 "* (paragraph 2.10).

The NCC's view on other issues referred to by the Department in the Draft Decision and in respect of which the Department has justified proposing changes to the Access Regime (such as national consistency in regulation, which is used by the Department as a reason for proposing the change from a GRV method of calculating the value of a railway to the DORC method (see paragraph 2.3.2 of the Draft Decision), and differences in prescribed negotiation procedures and dispute resolution) was that the divergence from the requirements for certification did not preclude certification of the WA Rail Access Regime. These other issues were not as important as the lack of consistency in the regulation of the Pilbara railways.

The Department has sought to address these ancillary issues (which in fact do not preclude certification) in the Draft Decision, but it has not addressed the fundamental issue raised by the NCC – a lack of consistency in the regulation of the Pilbara railways.

Roy Hill submits that this "lack of consistency" issue should be addressed by excluding the Pilbara railways from regulation by the Access Regime.

6 Cost Recovery

As part of the Department's review of the WA Rail Access Regime, the Department has recommended the implementation of a cost recovery mechanism for the WA Rail Access Regime.

Although it is not a part of the Draft Decision, Roy Hill understands that the Department's recommendation is that the core function costs of the ERA's regulatory functions in relation to the regulation of railways under the *Railways (Access) Act 1998* and the *Railways Access Code 2000* will be shared equally by the payment of a standing charge by each railway owner. The Workshop Paper distributed by the Department in September 2018 suggests that the amount of the annual standing charge has been $400,000 (or $100,000 for each of the existing four railway operators) but the amount is budgeted to increase over the next 5 years to an amount in the range from $551,000 to $557,000 per annum. In addition, a railway owner will pay a specific charge which is a pass through of the costs of specific activities undertaken by the ERA for individual owners.

Roy Hill (and all other railway owners) disagree with the implementation of costs recovery.

Any costs regime must impose stringent accountability obligations on the ERA. Budgets and expenditures must be approved by railway owners.

If a cost recovery regime is to be implemented, the cost of a specific application for access onto a railway should be recovered from the access seeker. Access seekers should pay a set fee equal to the estimated cost of the ERA to review the proposal and make a cost determination, with specific remaining charges related to access proposals being charged to the relevant railway owner. Roy Hill has previously refuted each of the alleged disadvantages expressed by the Department of charging an access seeker an application fee which is equal to the estimated costs of the ERA for processing the application as follows:

(a) Discourage access seekers – the proposal will not discourage genuine access seekers because the proposed application licence fee will be only a small amount compared with the infrastructure costs involved in implementing the access proposal. The fee (which is only a "costs recovery" amount) will only discourage non genuine access seekers who could not afford to finance the cost of the access proposal. If the application fee of a mere cost recovery amount discourages the access seeker, the access seeker would clearly have no possibility of implementing the access proposal if the application were successful.

(b) Contrary to Regime objectives – The objective of the Regime is to promote competition. The railways in the Pilbara which are subject to the rail access regime are in direct competition with railways owned by BHPB and Rio Tinto which are not burdened by this impost. That creates a competitive imbalance. The railway access seekers are only being asked to pay a licence fee which equates with the estimated costs of the application.

(c) Inefficient as railway owners are in better position to influence ERA costs – The option involves an access seeker paying only the base costs associated with and assessing and processing an application. Any additional costs incurred by the ERA as a result of the actions of the railway owner will be paid by the railway owner. The access seeker will only pay a fixed amount, which will be the estimated base costs of assessing a standard application.

(d) Administratively complex –It is not administratively complex. The application fee will be a best estimate of the administrative costs of assessing an application. The same application fee should apply to all applications.

(e) Risk that ERA may over-recover – Roy Hill would suggest that this is unlikely. However, the risk can be minimised by the ERA ensuring that its estimated costs calculation is accurate and is not greater than the actual amount.

(f) Risk that ERA may not recover costs from access seeker – The application fee will be paid when the application is submitted, so this is not a real risk whatsoever. This is not a reason not to implement the option.

In summary, Roy Hill objects to the implementation of a costs recovery mechanism because it will impose another competitive disadvantage on Roy Hill (and FMG/TPI) as against BHPB and Rio Tinto which conduct a similar business in the same market servicing the same customers.

Further, if a costs recovery mechanism is to be implemented (which Roy Hill objects to in principle), the Regime must impose an obligation on an access seeker to pay an application fee of an amount equal to the base costs of the ERA in assessing a standard application. Those costs should not be passed onto the railway owner.

7 Draft Recommendations

Roy Hill's response to each of the Draft Recommendations is set out below.

Pricing Mechanisms	**1A**	**Change the asset valuation methodology to a building block based on an initial DORC valuation and align the floor and ceiling costs calculations with the DORC method.**
		From the perspective of a railway owner the consequences of the change from GRV to DORC would be to: *(a) impose an initial additional cost burden on the owner as it will be necessary to calculate the initial ORC value of the railway, and amend the owner's Costing Principles to reflect the change; and* *(b) impose an ongoing annual additional cost burden on the owner because it will be necessary to calculate the DORC value of the railway each year, regardless of whether an access application is made,* *for very limited benefit (if any) in the case of the Pilbara railways which are subject to the Code. The work that will be required by Roy Hill and the ERA if the recommendation is implemented is set out in some detail in Table 3 on page 17 in the Draft Decision. The work is significant and should not be underestimated – Costing Principles are to be updated, a proposal is to be submitted on the ORC value of the railway and the appropriate depreciation, how the RAB will be rolled forward, and forecast RAB and forecast efficient operating maintenance and capital expenditure costs are to be submitted to ERA annually, all of which are assessed by ERA and some of which are put out for public comment.* *The ERA has previously conceded that the change is intended to impact on the routes in Schedule 1 of the Code which are tier 3 routes, and not the Pilbara railways (para 135 of 2015 ERA Review).* *In the case of the Pilbara railways the High Court has suggested that the appropriate comparison Is not DORC but instead is the replacement cost of the railway (TPI v ACCC). The High Court concluded in The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal that for the purposes*

		of Part 111A of the Competition and Consumer Act 2010 (C'th) and in interpreting the requirement that for a service (such as a railway) to be declared " that it would be uneconomic for anyone to develop another facility to provide the service" (section 9 (b)), that the decision maker is to be satisfied that there is no one whether in the market or able to enter the market for supplying the relevant service who would find it economical in the sense of profitable to develop another facility to provide that service. It follows that for the purposes of Competition Law, the appropriate comparison is the replacement cost of duplicating the service (the GRV value) not the written down value of the existing infrastructure. *Therefore in the case of the Roy Hill railway the change from GRV to DORC will impose additional costs on to Roy Hill, and impose significant additional work on Roy Hill and ERA all for no benefit, and in fact move the calculation of the ceiling price away from that which the High Court has suggested is the most appropriate.*
	1B	**Allow for flexibility in the assessment of historical depreciation to manage transitional impacts on existing railway owners**
		Roy Hill's view is that any change from GRV to DORC must not adversely affect owners who have made investment decisions on the basis of the continuation of the GRV valuation. Since the Roy Hill railway is relatively new, the application of straight line depreciation under a DORC methodology would most likely be acceptable.
	2	**Require railway owners to publish a standing offer for defined rail tasks when required by the ERA.**
		The proposal that a railway owner may be required to publish a standing offer has not canvassed before – it is not included in the Initial Issues Paper (July 2017), the "Prototype of an Improved Access Regime" (August 2018), nor the Rail Access Review – Pricing Mechanisms Options " . *The proposal therefore requires significantly more consideration. For example – what is the status of a "Standing Offer"? Is it an offer which can be accepted by an access seeker to form a contract?* *The previous papers did canvass the proposal that a railway owner be required to publish an Indicative Tariff. Roy Hill advocated against that proposal on the basis that it conflicted with the CPA, which encourages a negotiate /arbitrate approach. Arc Infrastructure and FMG/TPI also advocated against the proposal. The Decision Paper suggests that the "Standing Offer" proposal is preferable to the "Indicative Tariff" because it involves a lesser regulatory burden. However, it does not impose a lesser burden on a railway owner.* *The circumstances in which the ERA might require a railway owner to publish a standing offer must be clarified in the legislation. The Government papers (for example page 26 of the Draft Decision) suggest that it would be appropriate in circumstances where:* *(a) where there are one or more actual or potential operators on a route with homogenous freight tasks (as there is less need for negotiation to meet the circumstances of a particular access seeker);*

		(b) where the railway owner's revenue is close to total costs for that route (as the potential for regulatory error is lessened); and *(c) there is less incentive for the infrastructure owner to negotiate for access to the rail network (eg due to vertical integration).* *Roy Hill had been advised that the requirement is not intended to apply to it and FMG/TPI as there are not access seekers seeking access to their railways. It would appear that Arc Infrastructure also does not consider that the requirement would apply to it (as it is not a vertically integrated business) (see para 4.4 of its submission).* *These conclusions by Roy Hill, TPI and Arc infrastructure may be incorrect as the Draft Decision now suggests (at paragraph 3.3.3) that the requirement to develop a "Standing Offer" could usefully apply "in any situation where there are one or more actual or potential operators on a route with similar freight tasks". The Department has also now suggested (in a letter to RHI's legal advisor) to Roy Hill that the requirement may apply " …. if there are other resource projects in close proximity in the future, the ERA could direct a railway owner to develop a standing offer". Roy Hill has estimated that the costs of preparing a standing offer are significant – the calculation in paragraph 3.4 of this Submission is $420,000. Roy Hill submits that it should not be asked to incur these significant expenses merely "…if there are other resource projects in close proximity in the future…". A standing offer should only be required if a potential access seeker can be identified and it can be established that the access seeker has the financial and managerial capability to pursue an access proposal.* *The ambiguity and uncertainty about the circumstances in which a railway owner may be required to prepare a standing offer emphasise the point that if the Department intends to impose such a requirement on a railway owner, the circumstances in which the railway owner may be asked to publish a standing offer, must be identified in the legislation.* *Railway owners must know the circumstances in which the ERA may require the railway owner to develop a Standing Offer – the circumstances must be set out in the legislation.*
	3	**Introduce a competitive imputation pricing principle as a part of the pricing principles set out in clause 13, schedule 4 of the Code.**
		Roy Hill accepts the principle that the access price should be negotiated with regard to the price of another mode of transport for transporting similar freight, adjusted for service quality differences between rail and the competitive alternative. The principle may be included in clause 13 schedule 4 to the Code.
Ability to Opt Out	**4**	**Extend the requirement in section 16 (1)(b) of the Code to not unfairly discriminate between proponents to access agreements made outside the Code.**
		The concept of "unfair discrimination" must be clarified. All submissions made to the ERA in the 2015 Review of the Code agreed that section 16 should be clarified. In the 2011 Review of the Code the ERA recommended that section 16 should be amended to provide a non-exclusive list of considerations a

		railway owner should be allowed to take into account when discriminating between operators. *For example, if one access seeker contracts for access for a term of one year, should the terms and conditions of access be the same as a contract for access for a term of 5 years? Should the terms and conditions be the same for an ASX listed company and for a non ASX listed company? To what extent can the risk associated with an operator be taken into account?* *Roy Hill does not agree with the proposal because the consequence of the proposal is that the objectives of clauses 6(4)(a) and (b) of the CPA would be undermined. The intention of clause 6(4) is that parties should be free to negotiate commercially, only where parties cannot agree, then clause 6(4) applies.* *The Department has stated in the Draft Decision that one of the benefits of this recommendation is that it "will ensure vertically integrated operators cannot unfairly discriminate against third party access seekers in favour of their own operations." (at paragraph 5.3.1). This statement merely emphasises that it is necessary to specify what constitutes "unfair discrimination" so that a railway owner is aware of what is permitted.*
	5	**Allow access seekers who have begun negotiations outside the Code to fast track the process to arbitration under the Code.**
		If the proposal were implemented, the Code must be amended to ensure that all steps necessary to proceed to an arbitration under the Code had been completed before any issue was referred to arbitration within the Code. The access seeker must have satisfied all requirements imposed by the Code prior to the negotiation step. The procedure cannot be used by an access seeker to avoid the requirements of the Code which would otherwise have arisen prior to the negotiation. *At present, the Code imposes an obligation only on the railway owner to negotiate in good faith (section 13(1)). The same "good faith" obligation must be imposed on the access seeker in any negotiation.*
Capacity Extensions and Expansions	**6A**	**Make both parties responsible for assessing whether an expansion is required to facilitate an access request when a proposal for access is made.**
		Roy Hill accepts that both parties should be responsible for assessing whether an expansion is required to facilitate an access request. Each party should be responsible for providing the information which it is aware of to the negotiation – the railway owner can provide information regarding the capacity of the existing track and the access seeker can provide information about its transport requirements.
	6B	**Place responsibility on the railway owner for demonstrating if an extension or expansion is technically feasible.**
		The obligation to demonstrate that an extension or expansion is technically feasible should be imposed on the railway owner only if the access seeker has first provided all information necessary for the owner to make the assessment. The access seeker must be required to provide complete details

		as to its requirements – details of proposed rolling stock and tonnage required. *The Draft Decision suggests (at paragraph 6.3.1) that the railway owner would be able to recover the efficient costs incurred in assessing whether the expansion or extension can be carried out in a technically feasible way. The mechanism by which the railway owner can recover these costs should be set out in the legislation. The railway owner should not be obliged to perform the task without first recovering the cost from the access seeker.*
	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.**
		Technical feasibility must be a condition precedent to the commencement of negotiations. If the proposal is not technically feasible there is no point to start or continue any negotiations.
Improve Efficiency of the Regulatory Process	**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.**
		The proposal is completely inadequate. *The legislation must put some meaning around the term "frivolous". The Department should refer to paragraph 1.6 of the original Roy Hill submission which states that the Code should impose on a proponent:* *(a) a duty of good faith to the railway owner in making an access proposal;* *(b) a requirement that the proponent have a genuine intention to enter into an access agreement with the railway owner; and* *(c) a requirement that the proponent identify when access is required, not merely a time from which access might possibly be required.* *Also the requirements of sections 14 and 15 are threshold issues and should be established when the application is made or soon thereafter:* *(a) namely that the proponent has or will be able to engage the services of another entity which has the necessary experience to carry on the proposed rail operations;* *(b) it has the financial resources to carry on the proposed rail operations and to pay its share of any expansion or extension costs; and* *(c) that the route can accommodate the proposed exit times to which the proposal relates and the length and speed of the proposed rolling stock.* *The proposal in Recommendation 7 does not adequately address the issue. The efficiency of the Regime can only be improved if access seekers are required to satisfy basic requirements regarding their ability to perform if the access application is successful. There has already been a practical example (Brockman's application for access to the TPI/FMG railway), and the previous submissions to the Department by railway owners that obligations should be*

		imposed on access seekers in relation to the validity and bona fides of their application received judicial support. It is disappointing that the Department's recommendations appear to have ignored the quite valid concerns and submissions of railway owners. The submissions by Roy Hill in paragraph 1.6 of its original submission are repeated: "*Roy Hill's concerns in this respect arise from the specific example which was the subject of the litigation in TPI v Brockman Iron Pty Ltd (Brockman) [2016] WASCA 36. In that case the Court decided that Brockman had made a valid access proposal under section 8 of the Code. The Supreme Court reached that decision despite the facts that:* *"when the Proposal was made Brockman had not obtained required approvals and access rights to develop the Marillana Project including as to port infrastructure; Brockman had no finance for the multi-billion dollar project-its parent had only about $4million; Brockman had no bankable feasibility study for the project, which itself would cost about $50million and take between 3-4 years to prepare; Brockman had no port solution - it was estimated that port access would be available only by 2019; Brockman had no buyer for any iron ore which it might mine; and no final investment decision had yet been made to develop the project – such decision could take between two to four years after completion of any bankable feasibility study." (at page 49 of the judgment)* *The Court recognised the futility of Brockman's proposal. At first instance Edelman J, after having confirmed the validity of Brockman's proposal, suggested:* *"although I have concluded that Brockman Iron made a valid proposal within the meaning of the Code, this litigation raises real questions concerning when Brockman Iron can realistically engage in good faith negotiations for an agreement to provide it with access to TPI's rail infrastructure. The costs associated with rail access are likely to be measured in terms of billions of dollars. The expert evidence at trial was that the funds available to Brockman Iron's ultimate parent to commit to the Marillana Project on 15 May 2013 were just over $4million. No external finance had been obtained. Brockman Iron has no bankable feasibility study. TPI's duty to negotiate under the Code is subject to matters including questions of finance. This consequence cannot be left without comment in my conclusion to these reasons.* *From the perspective of Brockman Iron, although it had a legal entitlement to make a proposal, and although I have concluded that its proposal was valid, this costly litigation might have been avoided by the withdrawal of its proposal and submission of a new proposal if and when finance for the project was obtained. But the decision to conduct this litigation is not before the Court. It is sufficient to observe that Brockman's desire for negotiations could turn out to be entirely futile if it is unable to show that it has the managerial and financial ability to carry on the proposed rail operations to which TPI's duty to negotiate is subject."* *Roy Hill understands that Brockman's proposal to TPI is the only formal access proposal which has been submitted to a railway owner under the WA Access Regime. Therefore, in the only proposal which has been lodged under the Regime, the Courts have suggested that the conditions precedent for the submission of a valid proposal have been inadequate – there is nothing to be gained if the legislation allows a valid proposal to be submitted, but the proposal may never lead to access, or indeed an access agreement, because the proponent cannot obtain the most basic requirements for the project (such as management, approvals, finance).* *The Access Regime should not allow a proponent to make a valid proposal unless and until the basic requirements for a project have been obtained. Otherwise, there is a*

		real possibility that the party's resources (time and money) will be wasted in both making and responding to the access proposal."
	8	**Insert timeframes for obligations under the Code where these do not already exist**
		Roy Hill is supportive of this change as it will impose timeframes on the obligations of an arbitrator (under part 3 of division 3) and an access seeker (under section 18).
	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.**
		The consequence of this proposal is that a railway owner will incur a substantial cost in developing the standard access agreement, and the regulatory burden on the ERA will be increased (through the approval processes). The bases on which the ERA will approve a standard access agreement need to be known to a railway owner. *The risk profile of each access seeker will be different. The risk profile will include an assessment of financial, operational and managerial risk. Therefore the circumstances in which the standard access agreement will be applicable will be assessed by a railway owner. There are circumstances in which the standard access agreement will not be appropriate.* *Further, the standard terms and conditions and information regarding track diagrams, length of track, location and length of passing loops, maximum axle loads, maximum running times and other information regarding the running of trains will be made available to third parties who have not made an access application. At present, the form of agreement and the track information is to be made available to an access seeker, but the changes will require that they are placed on the railway owner's website so that they are available generally. Roy Hill questions why is it necessary to disclose information to people who are not genuine access seekers?* *The amendment must not require the disclosure of any confidential information. The Draft Decision suggests that the information required to be disclosed will include the running times of existing trains, gross tonne kilometres, nameplate capacity and operational capacity. There are circumstances in which some or all of that information would be confidential.* *Roy Hill is of the view that the proposal is unnecessary and costly – it will impose an additional cost burden on a railway owner and only have the effect that relevant (non confidential) information will be made available to additional persons who do not require the information (as access seekers already have an entitlement to the information).* *Roy Hill does not accept that the information (including the standard access agreement) should be placed on its website so that it is available to everyone (including its competitors). If it is necessary to make the standard access agreement and information available, it should be made available only to genuine access seekers. Why is it necessary to make the standard access agreement and the information available to competitors?*

	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.**
		Roy Hill accepts that the Required Information may be updated annually. The 2015 ERA Report suggested that the term "available capacity" should be defined and explained. Roy Hill agrees with that suggestion. In the context of a "Run when Ready" rail operation, "available capacity" cannot be explained in terms which require train scheduling. The Required Information (as detailed in schedule 2) must reflect the operation of a "Run when Ready" operation. *Roy Hill does not accept that the information should be published on Roy Hill's website. The information may be made available to genuine access seekers rather than the world at large.*
	10	**Standardise section 8 and 14 requirements**
		Roy Hill is supportive of the proposal to standardise the information requirements imposed on an access seeker by section 8 when making an access request. Also, Roy Hill is supportive of the proposal to standardise the information which may be required by a railway owner from the proponent in relation to its managerial and financial capacity to carry on the proposed rail operations. The information must establish that the proponent has the financial resources to meet its obligations under the access agreement.
	11	**Standardise consultation across Part 5 Instruments**
		Roy Hill is supportive of this change. To clarify, the initial segregation arrangements proposed by a railway owner should be subject to public consultation and any material variations, and all the Part 5 instruments should be subject to the same public consultation.
	12	**Require the ERA to develop and maintain a model set of Part 5 Instruments**
		The change is not necessary and relies on a misunderstanding of the Part 5 instruments. The segregation arrangements for each railway owner will be quite different as they will reflect the internal structures of each organisation. Similarly the Train Path Policy (TPP) and the Train Management Guidelines (TMG) will reflect the train operations of the owner. If there is a foundation customer, the TPP and the TMG will reflect the priority that might be conferred on the foundation customer. This change will only increase the regulatory burden imposed on the ERA.
	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.**
		Although Roy Hill is supportive of this change, it should be subject to a time limitation – for example the arbitrator's decision may only apply for a maximum period of 3 months. Both the access seeker and the owner must have an incentive to finalise negotiations. If there were no time limit, ether party may be content to rely on the arbitrator's decision indefinitely.
Railway owner accountablity	**14**	**Include requirements to publish service quality indicators**
		Roy Hill has previously stated that this additional regulatory requirement is costly, unnecessary and is not useful (see para 2.4 of Roy Hill's original submission).

		The requirement will impose a significant and ongoing cost burden on railway owners. *The relevant information is required to be disclosed elsewhere (for example to the Office of Rail Safety). The obligations which are now proposed to be imposed on railway owners are even more burdensome than those originally contemplated in the Issues Paper – the Issues Paper referred to annual reporting (see para 3.2.2 (c) of the Issues Paper) while the draft decision refers to quarterly reporting (see page 60 of Draft Decision). The draft decision does not adequately address the additional regulatory burden to be imposed on railway owners by requiring quarterly reporting on the service quality issues specified.*
Regulator accountablity	**15**	**Improve up front guidance for the regulator and require additional expert advice to inform decision making where appropriate**
		The proposed change is completely inadequate. *Regulator decisions should be subject to a "merits based review". An administrative decision that is likely to affect the interests of a person should in the absence of a good reason be subject to review (see Commonwealth Administrative Council, What Decisions should be subject to Merit Review? 1999 at para 2.4, referred to in the initial Roy Hill submission at paras 2.5 and 2.6). The one access application which has required judicial assistance to date (the decision of the Supreme Court of WA in the TPI/FMG case) has highlighted in the most obvious way why a "merits based" review procedure is necessary – the Regulator's decision contained an error which could have caused a loss of $2b dollars to TPI. Further the Regulator sought to prevent of a review of that decision on the basis that TPI had to establish "… the category of inferred error involving a decision that is so unreasonable that an inference of some other error must be drawn (bias, no evidence, irrelevant factors) (para 149 of decision).* *In the 2015 ERA Review, the ERA accepted that "the adoption of an EAB approach to determining capital costs would require the incorporation of procedures for merits review in the Code, to allow the Regulators' decisions on capital additions and depreciation to be tested if the parties require it." (para 140 of the ERA 2015 Review). Since the basic principle that a merits based review should be introduced if an EAB valuation approach is adopted (which is not dissimilar to the DORC approach proposed by the Department in the Draft Decision) has been accepted by the ERA, a "merits based review" structure should be introduced into this recommendation.* *The Department suggests that " it is unclear whether merits review would provide substantial benefits" (para 9.3.1 of the Draft Decision). The experience of TPI/FMG and the arguments put forward by the ERA to prevent the correction of a significant error by the ERA provides the most obvious reason why the introduction of a merits based review is necessary.*
Greenfields Development	**16**	**Amend the Code to explicitly allow for differential treatment of foundation customers as a form of "fair" discrimination.**
		Roy Hill supports the amendment, which would clarify that foundation

		customers may receive preferential treatment. It is important that the amendments to the Code should not restrict the form which the preferential treatment of the foundation customer make take. The preferential treatment may take the form of priority in train scheduling (to satisfy the requirements and concerns of financiers) or in pricing.