

11 February 2010

By email: publicsubmissions@era.wa.gov.au

FAO: Camelia Zota

Senior Project Officer, Access
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PO Box 8469
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Dear Ms Zota

REVIEW OF RAILWAYS (ACCESS) CODE 2000

In November 2010, the Economic Regulation Authority (**ERA**) issued a draft report in respect of its second review of the Railways (Access) Code 2000 (**Code**) (**Draft Report**) which applies, or will apply to, the rail networks of WestNet Rail (**WNR**), The Pilbara Infrastructure Pty Ltd (**TPI**), Public Transport Authority (**PTA**) and Oakajee Port & Rail (**OPR**).

The North West Iron Ore Alliance previously made submissions to the ERA in respect of the Code Review. However, please note that since our last submission, the North West Iron Ore Alliance has changed its business name to North West Infrastructure (**NWI**) and will be referred to as such in this submission.

Further to our previous submissions and in response to the ERA's request for public submissions responding to the Draft Report, NWI wishes to provide the additional comments and observations set out below.

ERA Recommendations

NWI has reviewed the ERA's Draft Report and, in particular, supports the following recommendations reached in the ERA's assessment of the Code:

- the publication of required information on the railway owner's website;
- the widening of the definition of disputes in section 25 of the Code;
- the inclusion of the costing principles and overpayment rules in section 45;
- periodic reviews under Part 5 of the Code;
- the revision of section 42 to only require public consultation for variations to segregations arrangements considered by the ERA to constitute a material change; and

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- the amendment of Item 52 of Schedule 1.

However, after analysing the Draft Report, NWI believes the following areas merit further consideration by the ERA:

- a requirement for the provision of working timetables by railway owners
- the sufficiency of information available under section 7
- negotiation in good faith
- the GRV methodology
- the Building Block approach
- the timeframe for submission of Part 5 instruments.

We have set out a more substantive analysis of these issues in the Annexure to this letter and we hope these further comments provide constructive contributions to the Draft Report and Code Review.

Should you have any wish to clarify any aspect of this submission, please contact Darryl Hockey on 08 9226 1776.

Yours sincerely



A.T. CONSIDINE
CHIEF EXECUTIVE OFFICER

Annexure

Parts 1 and 2A – Preliminary and Publication of Information

Provision of working timetables by railway owners

At paragraph 37 of the Draft Report, the ERA states that it considers the current information requirements on railway owners under sections 6(a) and 6(b) of the Code to be appropriate. It appears that in drawing this conclusion, the ERA has not considered the interlinking provisions contained in Schedule 2 of the Code.

Section 6 (b) of the Code requires the railway owner to make available information as detailed in Schedule 2 of the Code which includes “the running times of existing trains”. In response to the ERA's Issues Paper, NWI made quite lengthy submissions on this aspect aimed at clarifying the expression “the running times of existing trains”. The reason for requesting such clarification flowed from the ERA's Draft Determination regarding TPI's Train Path Policy on 9 March 2009 and the Final Determination on 18 August 2009. In between these dates, on the 24 June 2009, the Code was amended by dropping the former requirement imposed by Section 7(1)(c) that the railway owner provides “the working timetables for the route”. This requirement was not included in the amended Schedule 2.

However, the ERA's Draft Report has made no mention of the issues arising from the amendments to Schedule 2 in its discussion of the Section 6(b) provision and only partially treated the matter under the "Schedules" section of the Draft Report. The ERA limited itself to making comments regarding the WNR and ARTC submissions and concluded that the current information requirements on railway owners under section 6(b) are appropriate without consideration or cross reference to the concerns raised by NWI under Schedule 2.

When considering Schedule 2 of the Code, the ERA addressed the issue raised in NWI's submission that the June 2009 Code amendment deleted “the working timetables for the route” and replaced it with the “running times of existing trains”. NWI submitted that this definition is not adequate if it does not provide departure or arrival times and also provide information for trains operating outside the Code. In paragraph 150 of the Draft Report, the ERA agreed with NWI's submission that the “the running times of existing trains” required a clearer definition under clause 4(g) of Schedule 2 to ensure that adequate information is provided to the access seeker. The ERA also recommended that the clause be replaced with “relevant running information for all current scheduled trains or cyclical train movements, as appropriate”.

NWI believes that the ERA's recommended revision of clause 4(g) could be further improved by:

- articulating that the relevant running information include departure and arrival times;
- expressly requiring running information to be published in relation to all existing and scheduled future train paths and movements, whether established inside or outside the Code; and
- clarifying that cyclical train movements include “run when ready” options.

Part 2 – Proposals for Access

Sufficiency of Information available under section 7

The purpose of the NWI Submission to the ERA's Issues Paper was to demonstrate that if reliable information regarding capacity of the network and pricing was publically available, access seekers could calculate the capacity, likely capital expenditure for an extension or expansion and an estimated access charge for modelling purposes prior to submitting an access proposal. This was also the purpose of NWI's previous submissions with regard to the TPI Draft Determinations for Train Path Policy and Train Management Guidelines. This level of transparency:

- provides the access seeker with more meaningful information;
- would enable the access seeker to assess the commercial and technical viability of a proposal prior to seeking a request for more detailed information from the railway owner; and
- is critical for modelling both within and between networks without the onerous need on both parties to seek and provide information under an access application.

NWI accepts the ERA's comment at paragraph 58 of the Draft Report that "all railway owners come under the same regime"¹ and urges the ERA to ensure that all railway owners make available publically the same information, either on the railway owner's or the ERA's web site.

NWI refers to the ERA's comment at paragraph 42 that the ERA notes that WNR already publishes on its web site "the majority of information required as set out under sections 6(a) and 6(b) of the Code"². However, NWI wishes to highlight that the WNR gross tonne kilometre (GTK) data (a vital piece of data in calculating capacity) is not available on the WNR web site. It was, however, previously published by the ERA but is no longer available on the ERA's web site. The availability of this data should be reinstated.

NWI agrees with the ARTC Issues Paper submission as to the type of information that it makes available on its web site and refers to the ARTC's Code Review Issues Paper submission which stated

"ARTC currently publishes a lot of this information (detailed in the submission).

However, it can be quite specific to the nature of the access being sought, and would rely on some understanding of the access being sought. ARTC would expect that this information would be provided as part of an initial exchange of information prior to the applicant submitting a formal application for access.

¹ Economic Regulation Authority, Draft Report, Review of the Railways (Access) Code 2000, November 2010, para 58, page 9.

² Economic Regulation Authority, Draft Report, Review of the Railways (Access) Code 2000, November 2010, para 42, page 7.

Section 7 requires the network manager to provide current available capacity, likely pricing and terms and conditions and path availability prior to receiving an access application”.³

NWI submits that information should be available for calculating capacity and likely access charges and sets out these information requirements below.

The Ceiling Price is comprised of Capital Costs and Non-Capital Costs including Maintenance Costs, Operating Costs and Overheads. In order to be able to model/verify access charge calculations i.e. the Ceiling Price, all information is required to be provided by route section:

In order to determine Capital Costs using the GRV model, information required includes:

- a listing of all asset types and for each asset type, a description of the assets included the quantity of the asset type and the individual costs or units rates used, whichever is applicable;
- for each asset type, the economic life must be stated;
- any design construction and management fees and any financing charges during railway infrastructure construction.

In order to calculate the \$ per GTK value, the total GTKs by route section must be provided.

In order to determine Non-Capital Costs, a breakup of the following costs must be provided by route section:

- maintenance costs;
- operating costs;
- overheads.

Provision should be made for a full description of what these costs include and if any costs are allocated, the allocation method must be clearly defined and supported by data e.g. if allocation is done by, say, train numbers, the train number breakup by route section should be provided.

Finally, to facilitate network capacity calculations, train pooling diagrams should be provided to access seekers.

Part 3 Negotiations

Negotiation in good faith

NWI notes the ERA's comments in paragraph 85 of the Draft Report that the submissions received have not indicated that an access seeker cannot undertake the route capacity analysis or that the Code requirements for the railway owner to provide information to access seekers

³ ARTC Submission to the Economic Regulation Authority Issues Paper Review of the Railways (Access) Code October 2010, 29th January 2010, Page 5 paras 3, 4 and 5.

pursuant to sections 6 and 7 are insufficient. NWI wishes to emphasise that more information is required under sections 6 and 7 in order for a capacity analysis under section 15 of the Code and submits that the additional information which NWI has advocated to be provided under Schedule 2 should resolve this difficulty.

NWI agrees with the ERA that there are provisions in the Code requiring a railway owner to use all reasonable endeavours to negotiate, in good faith, an access agreement under the Code. However, due to the potential information imbalance between the parties, NWI submits that it is difficult for an access seeker to reliably determine whether the proponent is negotiating in good faith. It remains difficult for an access seeker to challenge a proponent in these circumstances.

GRV Methodology

As part of its review of the Code, the ERA raised the following issues:

- whether review periods for floor and ceiling cost calculations should be extended to five years; and
- whether the Gross Replacement Value (**GRV**) methodology under clause 2 of Schedule 4 of the Code should be amended to include the provision for floor and ceiling cost calculations to take into account forecast expenditure.

In relation to the first issue, NWI agrees that the review periods for floor and ceiling cost calculations should not be extended to five years.

In relation to the second issue, it appears that the ERA has given consideration to a possible change to Section 9 of the Code in order to require the railway owner to provide a proponent with a modified ceiling cost which includes the cost of upgrades required as a result of the proponent's proposal. However, in NWI's view much of the consideration in paragraphs 160 to 163 of the Draft Report is based on the premise that the GRV relates only to existing infrastructure and does not allow for budgeted expenditure for future assets to be included in the GRV.

NWI believes that the Code has already catered for forecast expenditure. NWI is supportive of forecast expenditure being taken into account in the GRV methodology and sets out below further information to clarify the points raised in relation to this issue.

Schedule 4, Section 2 (4) (c) of the Code states that:

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

(i) have the capacity to provide the level of service that meets the actual and reasonably projected demand;

and

(ii) are, if appropriate, modern equivalent assets;”

The above, states clearly that GRV is not based on existing assets but on assets which have the capacity to meet actual and reasonably projected demand.

Also, Schedule 4 Section 12 (Review and redetermination of costs) of the Code states that:

“This clause applies if the Regulator considers that there has been, or may have been, a material change in any of the circumstances that existed at the time when he or she approved or determined costs under clause 9 or 10 in respect of a proposal.

(2) Where this clause applies the Regulator may —

(a) carry out a review of the costs in question; and

(b) if he or she considers that there is justification for doing so, make a fresh determination of those costs.

(3) The Regulator may, in such manner as he or she thinks

(a) give public notification of a proposed review under subclause (2); and

(b) give persons an opportunity to make submissions on the determination of the costs in question.”

This allows the Regulator to review the Ceiling Price in between the 3 yearly reset times, if a material change has occurred.

In addition to the wording in the Code, it must be also be acknowledged that more is said on the GRV in the “WestNet Rail Costing Principles April 2009”. Chapter 2.3 of the Costing Principles entitled Gross Replacement Values, states that:

“Capacity of Infrastructure

The infrastructure is required to be optimised to meet current and reasonably projected demand. WestNet believes the existing network can meet the current and reasonably projected demand for all users taken together. If WestNet sought to include the costs of additional infrastructure to meet projected demand it would need to demonstrate:

· the basis of the demand projection, and

· a commitment to the capital expenditure.”

The above statement from the WNR Costing Principles allows WNR to include in their GRV the costs of future additional infrastructure provided certain conditions are met.

Building Block approach

NWI notes the ERA's comments in paragraphs 160-162 of the Draft Report and its request for further submissions in relation to the introduction of a Building Block approach. Based on the arguments advanced by the ERA, NWI agrees with the statements made by WNR, as noted in paragraph 163 of the Draft Report, which express caution about the use of the Code review mechanism to change the provisions of the Code without sufficient evidence that existing arrangements are not effective.

As to the ERA's exploration of changing from a GRV approach to a building blocks approach, NWI does not wish to express any preference for or against such a change. NWI simply notes such change would not appear to disadvantage any railway owner and may lead to a methodology more in line with other regulatory regimes.

Certain Approval Functions of the Regulator

Since NWI's last submission was made to the ERA in January 2009, we have had further experience with access issues under the Code and wish to make certain further observations in relation to the approvals functions of the Regulator.

Timeframe for submission of Part 5 Instruments

NWI submits that the timelines prescribed for access to railways under the Code is too open-ended to produce timely access solutions.

Part 5 of the Code states that railway owners are to comply with certain Part 5 Instruments which are to be approved by the ERA. Section 40(3) of the Code defines Part 5 Instruments as:

- train management guidelines;
- train path policy;
- costing principles; and
- over-payment rules.

Each individual owner of a railway covered by the Code is obliged to submit the above-mentioned Part 5 instruments to the ERA for approval. However, the Code does not specify a definitive timeframe for submission to the ERA of the relevant documents. Rather, the Code requires that the information be provided to the ERA "*as soon as is practicable after the commencement*" of the Code.

NWI submits that the terminology used to determine the timeline for submission of documents to the ERA for approval is sufficiently vague to hamper the objective of the Code to provide timely access to the prescribed railway routes in Western Australia. The absence of a definitive timetable undermines the effectiveness of the Code.

In addition, the Code provides for the ERA to approve, or make alternative determinations in regard to, a railway owner's submitted documents in order to constitute them as ERA approved documents, which triggers their 'in force' status under the relevant sections. However, there is no time limit for this ERA approval process.

Whilst it is always open to an access seeker and a railway owner to commence negotiations outside the scope of the Code, NWI is concerned as to the viability of this alternative, given that the previous history of access requests to rail infrastructure in the Pilbara reveals that railway owners are generally unwilling to provide access to third parties. It is therefore imperative to have in place a robust and well regulated access regime in order to facilitate the access process.

NWI submits that the Code be amended to:

- (a) require all Part 5 instruments to be provided to the ERA in a single package "as soon as is practicable after commencement of the Code and no later than 6 months after construction of the railway commences"; and
- (b) require the ERA to approve, or make alternative determinations, in regard to all of the Part 5 Instruments no later than 3-6 months after they have been lodged with the ERA.

An additional flaw in the Code is that it does not appear possible to make an application to commence negotiations for access under the Code until all Part 5 Instruments have been completed and approved by the ERA. Once a final determination has been made by the ERA in respect of a Part 5 Instrument, there appears to be no timeframe for the final "approval" to be made by the ERA. Therefore, an access seeker does not have access to the final form document upon which to base its negotiations until this approval has been granted. This highlights the need to have a definitive timetable for the submission of Part 5 instruments to the ERA and both their final determination and ultimate "approval" by the ERA.

In addition, NWI believes that an incongruous relationship exists between the right granted an access seeker to make a proposal under section 8 of the Code and the provisions regulating the determination of floor and ceiling prices.

With respect to the determination of floor and ceiling prices, section 9 of the Code provides that once an access proposal is received by the railway owner, it must provide the access seeker with the following within seven days of the receipt of the access proposal:

- the floor and ceiling costs for the proposed access;
- the cost of each route section on which those prices have been calculated; and
- a copy of the costing principles that are in effect.

Clause 10 of Schedule 4 provides that where a proposal has been made, the floor and ceiling prices provided to an access seeker by the railway operator are to be approved and/or determined by the ERA within 30 days.

However, it is a curious feature of the Regime that under Clause 9 of Schedule 4, the Regulator may pre-empt the process under Clause 10. If the Regulator considers it likely that a proposal will be made to the railway owner in respect of a route, he or she may determine the floor and ceiling costs that apply to the relevant route. Again, there is no specific timetable attached to this determination process which may significantly delay the ability of an access seeker to submit a proposal and the parties to reach an agreement

As a matter of logic, if the ERA initiates its process for the determination of floor and ceiling costs, until that process is completed, no floor and ceiling prices would be readily available. This would render submitting any form of proposal by an access seeker pointless as a railway owner would be unable to comply with its obligations under section 9 to provide floor and ceiling prices within 7 days of receipt, given that they would not have received approval from the ERA for those prices.

NWI believes that determination of the floor and ceiling prices be considered and determined immediately after the determination of the Costing Principles under Part 5 of the Code as the provisions under Schedule 4 are not sufficiently determinative as to the correct process or a specific timetable to be implemented in order to determine the relevant prices and put a railway owner in a position to enable it to comply with its obligations under section 9(c)(i). In the interim and lengthy period of ambiguity, access seekers are hampered in their ability to request access or make use of the Code's provisions beyond requesting preliminary information.

Therefore, NWI urges the ERA to bring forward the timetable for the submission and approval of Part 5 instruments, as well as the railway owner's floor and ceiling prices in order to create a more certain regulatory environment for access seekers and railway owners.
