OPR
oakajee port & rail

ABN 25 117 240 007

Economic Regulation Authority
Attention: Senior Project Officer, Access
PO Box 8469
PERTH BC WA 6849

11 February 2011

Dear Ms Zota

Re: Further Submission on the Review of the Railways (Access) Code 2000

Oakajee Port and Rail Pty Ltd (**OPR**) made a submission dated 3 February 2010 (**First Submission**) on the Economic Regulation Authority's (**ERA**) issues paper on the review of the Railways (**Access**) Code 2000 (**Code**).

OPR welcomes the opportunity to make this further submission to the ERA on its draft report (**Draft Report**) on the review of the Code. OPR's submission is attached. The submission is not confidential and can be made available on the ERA website.

The OPR submission provides comments on the material issues arising from the Draft Report. OPR also provides comments on closely related issues which OPR considers are important to the future effectiveness of the WA rail access regime.

If you have any queries raised in regard to the submission, please don't hesitate to contact Mike Jansen on (08) 9486 0715.

Yours sincerely

Phil McKeiver
General Counsel & Company Secretary
Oakajee Port and Rail Pty Ltd

Attachment: OPR Further Submission on the Review of the Code

1 Bases for OPR's submission

Greenfields project, integrated supply chain

1.1 OPR has carefully considered the likely effect of the Code in the context of OPR's own infrastructure development project. Relevantly, when development is complete, the OPR infrastructure will be a 'greenfields' operation and operated as an integrated supply chain.

1.2 OPR is undertaking greenfields infrastructure development that will provide transport infrastructure for iron ore from mid-west mines to a deepwater port at Oakajee, 25km north of Geraldton. Planned rail infrastructure totals about 570km of rail track and includes a main line to Crosslands Resources Jack Hills Expansion Project and spurs for potential connection to Karara Mining's Karara Iron Ore Project and Sinosteel Midwest Corporation's Weld Range Project.

1.3 OPR notes that the WA rail access regime was initially established to regulate an established ('brownfields') railway, the WestNet Rail network. However the WA Government has subsequently mandated that the regime also apply to certain greenfields railways, one of these being the Midwest rail network that, together with an iron ore port terminal at Oakajee, will form the Midwest supply chain.

Efficiency

1.4 OPR recognises that the broad underlying policy imperative of access regimes is economic efficiency. This efficiency imperative is underlined when an access regime applies to infrastructure used for the bulk export of minerals, given the importance of bulk minerals to the WA (and Australian) economy. The efficiency imperative is recognised in the WA rail access regime through section 2A of the *Railways (Access) Act 1998* (**Act**) and through incorporation of the COAG Competition Principles Agreement (**CPA**) by section 4(1), 12(2) of the Act and section 29 of the Code. The CPA requires economic efficiency to be specifically taken into account in certain circumstances and generally, in interpreting its provisions, where the CPA calls:[1]

> (a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or

[1] CPA, clause 1(3).

> (b) for the merits or appropriateness of a particular policy or course of action to be determined; or
>
> (c) for an assessment of the most effective means of achieving a policy objective;
>
> the following matters shall, where relevant, be taken into account:
>
> …
>
> (j) *the efficient allocation of resources*.
>
> [emphasis added]

1.5 OPR's submission has endeavoured to give precedence to the imperative of economic efficiency. OPR submits that the Code review should also give precedence to economic efficiency.

Non Code Issues

1.6 The Draft Report notes that some of the issues raised in submissions received by the ERA were outside the scope of the ERA's review as that review is set out in the Act. The Draft Report has not referred to these issues (Draft Report, para 24). OPR accepts that the scope of the ERA's review may be constrained by the Act but submits that issues that impact on the effectiveness of the rail access regime should be brought to the attention of the Minister irrespective of whether they come within the constraints of the ERA's statutory function.

1.7 OPR understands that a separate report addressing non Code issues was prepared for the Minister during the 2004 review of the Code. OPR submits that non Code issues identified in the current review, including any issues in OPR's submission that the ERA considers are non Code issues, should similarly be brought to the Minister's attention.

2 Summary of Submission

2.1 OPR submits that the following issues need to be addressed to ensure the future effectiveness of the WA rail access regime:

2.1.1 **Operations:** Regulatory decisions under the Code should not derogate from, or be contrary to, efficient operation of infrastructure. To that end the ERA should be required to accept the operating procedures developed or amended by a rail owner unless the operating procedures are shown to be inefficient or to have a discriminatory purpose. Section 3 addresses the potential impact of the Code on rail and supply chain operations.

2.1.2 **Supply chain context:** The ERA or arbitrator should consider the rail infrastructure in the context of the supply chain. Therefore the ERA should be required to consider and give significant weight to supply chain issues generally in its functions under the Code and in particular in approving or determining the Part 5 instruments such as the Train Path Policy (**TPP**) or Train Management Guidelines (**TMG**). Arbitration under the Code should also be required to consider and give significant weight to supply chain issues. Section 4 addresses the need for the Code to recognise supply chain context.

2.1.3 **Protection of existing entitlements, reasonably anticipated requirements:** Arbitrations should not have the effect of depriving existing users of entitlements or their reasonably anticipated requirements. Therefore, an arbitration determination under the Code should be of no effect if it would have the effect of depriving existing users of entitlements or their reasonably anticipated requirements. Section 5 sets out the reasons for OPR proposing this amendment.

2.1.4 **Distortionary pricing:** Regulated pricing should reflect efficient costs and not distort users' incentives. Therefore the regulatory asset base under the Code should reflect the cost of regulated use and exclude costs of unregulated use. Section 6 describes an issue in the current drafting of the Code that is likely to distort regulated prices and proposes a drafting change to address the issue.

2.1.5 **Risk allocation under access agreements:** The Code should expressly provide that the allocation of risks between a railway owner and an access holder is properly the subject of negotiation under the Code and that the allocation of risks can only be determined by a regulator or arbitrator where a proposed allocation of risks is demonstrably discriminatory and inefficient. Section 7 describes the issue in the current practice of the ERA and proposes an approach that would address the issue.

2.1.6 **Cost recovery:** Regulated pricing should provide a railway owner with certainty that it will be able to recover all efficient costs of constructing and operating the railway and providing access. The current Code provisions do not do so, as they expressly exclude the capital costs of acquiring land and previous ERA decisions have prevented recovery of lease payments. In addition, the current Code provisions do not provide any guidance as to the recoverability of associated costs such as costs relating to native title and Aboriginal heritage, legal, regulatory and compliance costs and feasibility and rehabilitation costs.

The Code should be amended to provide certainty that these costs can be recovered, provided that they are efficient. The issue is discussed in section 8.

2.1.7 **Merits review:** OPR considers that merits review of regulatory decisions under the WA rail access regime would provide greater confidence in the regime. That greater confidence would likely increase the incentives to invest in rail infrastructure in Western Australia. Accordingly OPR submits that there is a strong case for regulatory decisions under the WA rail access regime to be made subject to merits review. Section 9 sets out OPR's views in further detail.

2.1.8 **Asset valuation, depreciation:** DORC and straight line depreciation should be available to infrastructure owners. This is discussed at section 10.

2.1.9 **Greenfields regulation:** careful and specific provision should be made for greenfields projects under the Code. OPR's First Submission highlighted and explained a number of aspects of the Code that needed attention to adequately provide for greenfields projects. OPR's views on how the Code should best provide for greenfields projects are reiterated in summary form in section 11.

3 Impact of the Code on Operations

3.1 OPR considers that regulatory decisions under the Code should not derogate from, or be contrary to, efficient operation of infrastructure. To that end the ERA should be expressly required by the Code to accept the operating procedures developed or amended by a rail owner unless the operating procedures are shown to be inefficient or to have a discriminatory purpose.

3.2 OPR considers that under the Code as currently drafted there is the potential for regulation to negatively affect and derogate from the efficient operation of infrastructure.

3.3 A rail owner is required to prepare TMG and have these approved by the regulator under section 43 of the Code. The matters addressed in the TMG are principles and rules that the rail owner must comply with in performing its functions in relation to the rail and providing access. These principles and rules are operational in nature and previously approved TMGs have included:[2] scheduling principles; the real time management of services; management of infrastructure issues such as repairs and maintenance; and control and management of access to the rail network.

3.4 In approving or determining a TMG the ERA is required to take into account the matters at section 20(4) of the Act which include the economically efficient use of the railway infrastructure (section 20(4)(g)). Nonetheless it is not at all clear that a TMG under the approach currently taken will not impact on (and derogate from) efficient supply chain management through a simple lack of knowledge or misunderstanding of rail and supply chain management on the part of the ERA or its advisors.

3.5 The Australian Competition Tribunal (**Tribunal**) recently considered access to iron ore railways in the Pilbara under Part IIIA of the *Trade Practices Act 1974* (**TPA**)[3] and recognised the significant planning and scheduling work required by dedicated teams in operating a modern bulk commodity rail line (*In the matter of Fortescue Metals* [2010] ACompT 2 paras 227 - 234), concluding that '[f]lexibility is required for optimal performance in the current operating environment and is necessary to allow for changes to maximise system performance' (*Fortescue* para 234, see also paras 348 - 350).

[2] See The Pilbara Infrastructure's TMG, approved 22 February 2010.

[3] The TPA has subsequently been amended and is now the *Competition and Consumer Act 2010*.

Relevantly the Tribunal found that 'delayed or sub-optimal changes to … operating practices may cause significant harm to the incumbents and to the public interest generally' (*Fortescue* para 1243).

3.6 OPR notes that in its 2009 report prepared for the ERA, Price Waterhouse Coopers recommended a number of changes to The Pilbara Infrastructure's TMG in order to be consistent with or facilitate effective and efficient real time management of the services provided to access holders.[4] The ERA accepted these recommendations.[5] However, OPR considers that the development of, and ongoing adjustment to, effective and efficient operational principles and rules for a railway or supply chain is best left in the hands of supply chain specialists. There is a non trivial and, in OPR's view, unacceptable risk that supply chain efficiency will be impacted through non supply chain specialists (for example the ERA or its advisors) formulating operational rules and principles.

3.7 OPR considers that the issue is with the breadth of section 43 of the Code. The TMG is 'a statement of the principles, rules and practices … that are to be applied and followed by the railway owner in the performance of … its functions' in relation to the railway subject to the Code (sections 43(1) and 43(3)(a)). This is limited to performance of functions related to requirements imposed on the rail owner under the Act and the Code (section 43(3)(b)) but nonetheless gives the ERA discretion to consider and modify rail operating rules within that limit. This allows parties making submissions on the TMG (to which the ERA must have regard under section 41(b)(i)) to take the inquiry outside the scope of economic regulation and into the realm of rail and supply chain management.

3.8 Accordingly OPR considers that the issue would be addressed by narrowing the scope of ERA discretion under section 43 such that the ERA can only require changes to operating rules and procedures in certain prescribed circumstances. OPR proposes therefore that the ERA should be required to accept the operating procedures developed or amended by a rail owner unless the operating procedures are clearly shown:

3.8.1 to be inefficient; or

3.8.2 to have a purpose of discriminating against access holders.

---

[4] PWC, *Final Report: Review of Proposed Part 5 Instrument of The Pilbara Infrastructure Pty Ltd: Train Management Guidelines*, August 2009 at pages 6 and 7.

[5] ERA, *The Pilbara Infrastructure Pty Ltd Draft Determination on the proposed (Revised) Train Management Guidelines*, April 2009 at paras 168, 185 and 202 and *The Pilbara Infrastructure Pty Ltd Final Determination on the Proposed (Revised) Train Management Guidelines*, 18 September 2009 at Required Amendments 8 and 9.

4 Supply chain context

4.1 OPR considers that the ERA and an arbitrator should consider the rail infrastructure in the context of the supply chain where appropriate. Therefore the Code should be amended to expressly require the ERA and an arbitrator to consider and give significant weight to supply chain issues generally in its functions under the Code and in particular in approving or determining a TPP or TMG.

4.2 A rail owner is required to prepare a TPP and have this approved by the regulator under section 44 of the Code. The TPP is a statement of policy that must be observed by a rail owner in allocating rail capacity (in the form of train paths) and providing access to capacity that has ceased to be used. The ERA has previously stated that a TPP should only address the railway component of an integrated supply chain and should make no reference to other elements of the supply chain, in particular, the port.[6] The ERA has taken a similar position in assessing a TMG, that all references to the provider's port or supply chain should be removed from the TMG.[7]

4.3 In the current review, the Draft Report expressed a view that it was not appropriate for non rail considerations to guide application of the Code (Draft Report para 131).

4.4 However it is clear that the efficient operation of an integrated supply chain crucially depends on the interoperation of all supply chain components. Indeed, the Draft Report acknowledged the potential for operational efficiency gains resulting from the coordination of different elements of a supply chain (Draft Report para 131). As noted above, efficiency is the underlying policy imperative of access regulation and so from a policy perspective, there should be consideration of rail in the context of a supply chain in circumstances where this is appropriate. Appropriate circumstances include rail that is developed and operated as part of an integrated supply chain.

4.5 In the context of assessing rail capacity for purposes of third party access (and so particularly pertinent to considerations in the TPP), the Tribunal in *Fortescue* was pressed to ignore 'end effects', end effects being those 'variables off the line (generally at mine and port) which affect utilisation of the line' (*Fortescue* at para 642). The Tribunal's clear

[6] ERA, *The Pilbara Infrastructure Pty Ltd (TPI), Final Determination on TPI's Proposed (Revised) Train Path Policy*, 18 August 2009 at Amendment 1.

[7] ERA, *The Pilbara Infrastructure Pty Ltd, Final Determination on the Proposed (Revised) Train Management Guidelines*, 18 September 2009 at Required Amendment 1.

finding of fact was that end effects, including operations at port and mine terminal facilities, 'cannot be ignored' (*Fortescue* paras 682 - 689) in assessing rail capacity for purposes of third party access. The Tribunal gave 'significant probative weight' to the work of simulation modelling that recognised the interdependence of mine, rail and port systems (*Fortescue* paras 642, 706).

4.6 Therefore OPR submits that the Code should be amended to require the ERA to consider and give significant weight to supply chain issues generally in its functions under the Code and in particular in approving or determining a TPP or TMG.

4.7 For the same reasons of efficient use of infrastructure OPR submits that an arbitrator should also be required to consider and give significant weight to supply chain issues in a determination under the Code.

4.8 OPR notes that there is a threshold question as to whether the Code can be amended by the Minister or reviewed by the ERA taking into account a supply chain context. This threshold question is considered (and answered in the affirmative) in the breakout below, '*Can the Code be amended to take account of a supply chain context?*'

Can the Code be amended to take account of a supply chain context?

1. The question arises as to whether the Code can be amended to recognise and provide for a railway being part of an integrated supply chain. OPR considers that the Code can (and arguably should) be amended to expressly recognise and provide for a railway being part of an integrated supply chain[8]. In particular, OPR considers that:

    a. the ERA has the power in reviewing the Code to expressly recognise and provide for a railway being part of an integrated supply chain; and

    b. the Minister has the power to amend the Code to expressly acknowledge and take account of the integrated nature of port, rail and mine

[8] OPR considers, for the same or similar reasons as those set out in this breakout, that under the current drafting of the Code (and the Act) the ERA or an arbitrator is able to (and should) recognise and provide for a railway under the Code being part of an integrated supply chain. However this is not *expressly* provided for in the Code. Given that the ERA has, as a matter of practice, not recognised the supply chain context of railways under the Code, OPR considers that the amendment is required to clarify the position.

operations where this is appropriate.

Relevant provisions of the Act and CPA

2. OPR considers that the following provisions of the Act and CPA are relevant to the question of whether the Code can be amended to recognise and provide for a railway being part of an integrated supply chain:

   a. Part 2 of Act gives the Minister the function and power to establish and amend the Code. Subsection 4(1) relevantly provides:

      The Minister is to establish a Code in accordance with this Act to give effect to the Competition Principles Agreement in respect of railways to which the Code applies.

   b. Section 12 of the Act provides for the ERA to periodically review the Code and report to the relevant Minister. Subsection 12(2) relevantly provides:

      The purpose of a review is to assess the suitability of the provisions of the Code to give effect to the Competition Principles Agreement in respect of railways to which the Code applies.

   c. Subsection 20(4) of the Act stipulates that the ERA needs to take into account a number of matters in performing its functions. In particular, subsection 20(4) relevantly provides:

      In performing functions under this Act or the Code, the Regulator is to take into account —

      (a) the railway owner's legitimate business interests and investment in railway infrastructure;

      (b) the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;

      …

      (g) the economically efficient use of the railway infrastructure;

d. The object of the Act set out in section 2A states:

> The main object of this Act is to establish a rail access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations.

e. The CPA states:

> 6(4) A State or Territory access regime should incorporate the following principles:
>
> …
>
> (i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:
>
> (i) the owner's legitimate business interests and investment in the facility;
>
> (ii) the costs to the owner of providing access, [… ;and]
>
> (vii) the economically efficient operation of the facility;

Discussion

3. The Minister must establish or amend the Code *to give effect to the CPA*. OPR considers that the effect of this is to import the relevant provisions of the CPA into the Act such that the Minister must give effect to the relevant provisions of the CPA in establishing or amending the Code. Relevant provisions of the CPA are contained in subclause 6(4) of the CPA which provides that a State access regime should incorporate certain principles.

4. The first question therefore is whether the principles in 6(4) of the CPA would allow for an access regime to recognise and provide for a railway being part of an integrated supply chain (**First Question**).

5. The Minister must establish or amend the Code to give effect to the CPA *in respect of railways to which the Code applies*. The effect of this is to restrict the scope of the Code such that it is in respect of railways to which the Code applies. The Code applies only to those parts of the railways network that are listed in Schedule 1 of

the Code.

6. The second question therefore is whether, or the degree to which, an integrated supply chain which includes a railway to which the Code applies would be something that is *in respect of the railway* (**Second Question**).

7. If the answer to both the First Question and the Second Question is in the affirmative then the Code can recognise and provide for a railway being part of an integrated supply chain. It will also be the case that a review of the Code by the ERA under subs 12(2) can recognise and provide for a railway being part of an integrated supply chain.

First Question - give effect to the CPA

8. Subclause 6(4)(i) of the CPA provides that in deciding on the terms and conditions for access, a dispute resolution body should take into account certain matters that include:

    a. 6(4)(i)(i): the owner's legitimate business interests and investment in the facility;

    b. 6(4)(i)(ii): the costs to the owner of providing access; and

    c. 6(4)(i)(vii): the economically efficient operation of the facility.

9. OPR considers that:

    a. where a railway is part of an integrated supply chain, that it will form part of the railway owner's legitimate business interests and investment in the rail facility that the railway is part of an integrated supply chain;

    b. because there will be cost synergies arising from integrated operation of supply chain assets, the costs to the owner arising from providing access to the rail facility in isolation are likely to be greater than the costs of the

integrated operation of the supply chain; and

c. it is likely to be more economically efficient to operate the railway as part of the integrated supply chain than separately.[9]

10. Therefore, in OPR's view, the principles in 6(4) of the CPA would allow for, and indeed arguably CPA compliance should provide for, an access regime to recognise and provide for a railway being part of an integrated supply chain. The First Question is satisfied.

11. OPR notes further that the ERA, in performing its functions under the Act or Code, is required by section 20(4) of the Act to take into account matters that are not materially different to subclauses 6(4)(i)(i), 6(4)(i)(ii) and 6(4)(i)(vii) of the CPA set out above. One such function the ERA has under the Act is to conduct a review of the Code under section 12 of the Act.

Second Question - in respect of the railway

12. The term 'in respect of' clearly indicates that there must be a connection with the railway to which the Act applies. The Courts have held that the term 'in respect of' is of broad import[10] and requires no more than a relationship, whether direct or indirect, between two subject matters.[11] The words are among the broadest which can be used to denote a relationship between one subject and another.[12]

13. OPR considers that there clearly is a relationship between a railway and many aspects of the supply chain of which the railway forms an integral part. Therefore aspects of the integrated supply chain that have a relationship with the rail can be said to be something that is in respect of a railway to which the Code applies. This would include the operational interactions of the rail with port and mine terminals, the allocation of common costs and the integrated operation of the supply chain. The Second Question is satisfied.

[9] This is consistent with views expressed by the Australian Competition Tribunal that the concept of economic efficiency in access legislation is to be construed broadly, as social and not private economic efficiency - see Application by Telstra (2009) ATPR ¶42−286 at [16]-[17].

[10] *O'Grady v Northern Queensland Co Ltd* (1990) 92 ALR 213 at 226.

[11] *O'Grady v Northern Queensland Co Ltd* (1990) 92 ALR 213 at 228.

[12] *Nordland Paper AG v Anti-Dumping Authority* (1999) 161 ALR 120 at 126.

Conclusion - Code can be amended, reviewed to provide for a railway being part of an integrated supply chain

14. On the basis of the above OPR submits that the Code can (and arguably should) be established and amended by the Minister and reviewed by the ERA to recognise and provide for a railway under the Code being part of an integrated supply chain.

5 Protection of existing entitlements, reasonably anticipated requirements

5.1 Arbitrations should not have the effect of depriving existing users of their entitlements or their reasonably anticipated requirements. Therefore, the Code should be amended to expressly provide that an arbitration determination under the Code is of no effect if it would have the effect of depriving existing users of their existing entitlements or their reasonably anticipated requirements.

5.2 An arbitrator making a determination under the Code has a degree of discretion. The arbitral determination may deal with any matter relating to use of the rail by the third party and make any direction to the rail owner for that purpose (s33(2)). However the arbitrator must (s29): give effect to the Act, the Code and matters determined by the ERA; and take into account certain matters in the CPA. The matters in the CPA that the arbitrator is required to take account of include: the interests of all persons holding contracts for use of the facility (CPA, cl6(4)(i)(iv)); firm and binding contractual obligations of the rail owner and others using the facility (CPA, cl6(4)(i)(v)); and whether (and how much) compensation is appropriate where existing rights have been impeded (CPA, cl6(4)(l)).

5.3 However a requirement for an arbitrator to only take account of these matters is likely to give insufficient certainty to an infrastructure developer who must bank a project on the basis of contracts for use of the infrastructure. The Federal Parliament's response to the CPA in Part III of the TPA provided a greater degree of certainty to infrastructure owners. It provides for substantive protections for those holding pre existing entitlements at s44W(1). An arbitral determination is of no effect if it contravenes s44W(1) (s44W(3)).

5.4 The Code should provide the same level of contractual certainty. By providing increased certainty for infrastructure developers who must bank a project on the basis of contracts for use of the infrastructure, infrastructure investment would be promoted. Therefore, an arbitration determination under the Code should be of no effect if it would have the effect of depriving existing users of entitlements.

5.5 The Federal Parliament also recognised that existing users of infrastructure might reasonably have requirements for use of the infrastructure that exceeded their usage at the time of a dispute under Part IIIA. This would provide a level of commercial certainty to an existing user who reasonably anticipated that it would grow its existing business. The Federal Parliament addressed this genuine concern by protecting users' 'reasonably anticipated requirements' (s44W(1)(a)). An arbitral determination under Part IIIA is of no

effect if it has the effect of preventing an existing user obtaining a sufficient amount of the service to meet the user's reasonably anticipated requirements (s44W(3)).

5.6 OPR submits that the Code should provide the same level of commercial certainty as is provided in Part IIIA. An existing user's reasonably anticipated requirements of use should be protected. Therefore, an arbitration determination under the Code should be of no effect if it would have the effect of preventing an existing user obtaining a sufficient amount of the service to meet the user's reasonably anticipated requirements. Such a provision would also prevent an opportunistic access seeker from unreasonably stymieing the growth prospects of existing users by capturing ostensibly unused rail capacity through the Code.

6 Distortionary pricing

6.1 Regulated pricing should reflect efficient costs and not distort users' incentives. Therefore the Code should be amended to provide that the regulatory asset base under the Code reflects the cost of regulated use and excludes costs of unregulated use.

6.2 Current drafting in the Code relating to pricing distorts prices through what OPR terms a 'waterbed' effect. The waterbed effect is that revenue cap price regulation under clause 8(3) of the Code is based on all revenues from a route, including revenue from unregulated use. This ties regulated prices to unregulated prices.

The waterbed effect

6.3 Schedule 4 of the Code regulates prices for access under the Code. A railway owner's prices for access under the Code must be not less than the floor price determined under clause 7 and not more than the ceiling price determined under clause 8.

6.4 Clause 8(3) provides for a revenue cap. That is, clause 8(3) imposes a constraint on charges for regulated access such that the total revenues that the railway owner receives from the route are not greater than the total costs attributable to that route. A similar provision is contained in the floor price test in clause 7(2) of Schedule 4 which imposes a floor for total revenue.

6.5 The issue, what OPR terms the waterbed effect, is that the revenue cap price regulation under clause 8(3) is based on all revenues from a route, including revenue from unregulated use. This effectively ties regulated prices to unregulated prices.

6.6 As a result, charges for non-regulated access affect the prices that can be charged for regulated access. In simple terms, if non-regulated charges increase, then, all else equal, regulated charges must decrease. Clause 8(3) could conceivably require the railway owner to provide regulated access under the Code at a price that includes no capital component if the revenue received for non-regulated access exceeded the total costs of the route.

6.7 The fact that charges for non-regulated access impacts on charges for regulated access gives rise to:

6.7.1 inconsistency with clause 6(5)(b) of the CPA; and

6.7.2 a distortion of regulated prices in unpredictable ways, providing erroneous market signals to users.

Inconsistency with clause 6(5)(b) of the CPA

6.8 Clause 6(5)(b) of the CPA provides that:

> (b) Regulated access prices should be set so as to:
>
> (i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;
>
> (ii) allow multi-part pricing and price discrimination when it aids efficiency;
>
> …
>
> (iv) provide incentives to reduce costs or otherwise improve productivity.

6.9 In contrast, as outlined above, the waterbed effect:

6.9.1 may result in regulated prices including no return on investment or is otherwise likely to result in a return that has no relationship with the regulatory and commercial risks involved;

6.9.2 will effectively impose arbitrary price discrimination between regulated and unregulated users that has no relationship to efficiency (given the different dynamics in commercial and regulatory price formation); and

6.9.3 will provide a disincentive to improve productivity through providing regulated access if regulated charges are lower than the cost of providing the service.

Distortion of regulated prices in unpredictable ways, providing erroneous market signals to users

6.10 Regulated prices reflect an intention to address price distortions created by a lack of competition. However, the waterbed effect causes regulated prices to be arbitrarily distorted through the linkage with unregulated prices. This will have unpredictable effects on regulated prices and so provide incorrect market signals to users.

6.11 In particular, unregulated users may in effect cross subsidise regulated users, leading to demand for regulated use exceeding regulated supply. It is also possible that regulated users could cross subsidise unregulated users.

6.12 The Code provides a fallback position in commercial negotiations outside the Code. On this basis the Code can have a salutary effect even when it is not expressly invoked. However, the effect of the Code as a fallback in commercial negotiations will be unpredictable where regulated prices are linked to unregulated prices through the waterbed effect.

Proposed approach to addressing the waterbed effect

6.13 OPR considers that the issues arising under the waterbed effect could be easily addressed by adapting a precedent from Schedule C of the 2006 *Dalrymple Bay Coal Terminal Access Undertaking*. This, in effect, would bifurcate the asset base, splitting it between regulated and non regulated users.

QCA approach

6.14 In setting the pricing principles for the Dalrymple Bay Coal Terminal the Queensland Competition Authority (**QCA**) favoured a revenue cap pricing regime for 'reference' tonnage passing through the terminal but recognised that a portion of terminal costs were attributable to non-reference tonnage.[13] The approach adopted by the QCA was to set the revenue cap by scaling a figure incorporating all relevant terminal costs by the proportion of reference tonnage to total contracted tonnage.[14]

Adaptation of QCA approach

6.15 This QCA approach could be adapted to regulated and unregulated use under the Code by setting a revenue cap in the following way. The revenue cap would be the 'total costs' as defined in Schedule 4 of the Code scaled by the proportion of contracted regulated usage to contracted total usage (**Adapted QCA Approach**). The Adapted QCA Approach would:

6.15.1 remove the waterbed effect;

6.15.2 preserve the flexibility of revenue cap pricing;

6.15.3 be compliant with the pricing principles in the CPA by giving effect to clause 6(5)(b) of the CPA;

[13] The issue is explained and discussed at QCA, *Draft Decision: Dalrymple Bay Coal Terminal Draft Access Undertaking*, October 2004 at page 115.

[14] *Dalrymple Bay Coal Terminal Access Undertaking*, 2006, Schedule C.

6.15.4 avoid the unpredictable distortion of regulated prices and erroneous market signals described above; and

6.15.5 require a minor change only to the Code and the ERA's assessment of the ceiling price test in clause 8 of Schedule 4 of the Code.

Proposed amendments

6.16 OPR proposes that the waterbed effect be removed by amending the Code to incorporate the Adapted QCA Approach into clause 8 of Schedule 4 of the Code. The Adapted QCA Approach is an approach based on regulatory practice to apportioning total costs between regulated and unregulated use on a rail route. OPR has prepared draft amendments to Schedule 4 of the Code that use the Adapted QCA Approach. These amendments are set out in the Appendix to this submission.

6.17 In support of its proposal to address the waterbed effect, OPR notes that the new clause 7A of Schedule 4 of the Code requires a cost apportionment exercise to be performed for use of expansions and extensions on the basis of use of the expanded of extended facility. The Adapted QCA Approach will be broadly consistent with the cost / use apportionment in clause 7A. Therefore the Adapted QCA Approach cannot be said to depart materially from the current Code.

6.18 A corresponding and consistent change would be made to provisions relating to floor costs in clause 7(2) of Schedule 4 of the Code. In practice, OPR considers that the waterbed effect is not likely to be seen under clause 7(2). However, on its terms, the current clause 7(2) could unnecessarily result in regulatory scrutiny of unregulated revenue.

7 Risk allocation under access agreements

7.1 OPR submits that the Code should expressly provide that the allocation of risks between a railway owner and an access holder is properly the subject of negotiation under the Code and that the allocation of risks can only be determined by a regulator or arbitrator where a proposed allocation of risks is demonstrably discriminatory and inefficient.

7.2 The ERA has consistently provided in its TPPs that a regulated user may cancel train paths in certain circumstances with no penalty for reasons that are beyond the reasonable control of the regulated user (**ERA risk allocation**).[15] OPR considers that the somewhat arbitrary and 'one size fits all' ERA risk allocation for cancelled train paths has the potential to be highly inefficient.[16]

An efficient contract allocates risk to the party that can bear it at least cost

7.3 By way of recap OPR notes that an economically efficient contract allocates a given risk to the party that can bear that risk at least cost (**efficient risk allocation**).[17] Efficient risk allocation is a particular instance of the more general economic principle of comparative advantage. A comparative advantage held by one party to a contract means that the party has a lower opportunity cost of bearing a particular contractual obligation than another party to the contract. The result of such a contract is gains from trade and a concomitant increase in allocative economic efficiency.[18] Allocative economic efficiency describes an allocation of resources that maximises the total gains from trade.[19] OPR notes that the efficient allocation of resources must, where relevant, be taken into account where the CPA calls for certain assessments or determinations (CPA, clause 1(3)).

---

[15] See for example: *WestNet Rail Train Path Policy*, April 2009 at 2.7; and *The Pilbara Infrastructure Train Path Policy*, 22 February 2010 at 3.4.

[16] OPR notes that there is nothing in the Code that expressly or impliedly prohibits a different allocation of risks to that in the ERA risk allocation. However OPR is concerned that the ERA risk allocation is in danger of becoming entrenched in the access regime through the ERA's consistent practice.

[17] See for example Robert Cooter, Thomas Ulen, *Law and Economics* (Pearson Addison Wesley, 4th ed, 2004) 6; also Paul Milgrom, John Roberts, Economics, Organization & Management (Prentice Hall, 1992) 213-214.

[18] See for example the discussion at Joshua Gans, Stephen King, N Gregory Mankiw, *Principles of Microeconomics* (Thomson, 2nd ed, 2003) 52-54.

[19] Joshua Gans, Stephen King, N Gregory Mankiw, *Principles of Microeconomics* (Thomson, 2nd ed, 2003) 144.

Differing costs of risk between parties make negotiations the most appropriate forum for risk allocation

7.4 It follows from what will almost certainly be differing levels of ability (costs) to bear risk by parties to access agreements under the Code that an ex ante, one size fits all, determination of risk allocation is inappropriate and will almost certainly result in inefficiency. Therefore OPR considers that the most appropriate forum for achieving efficient risk allocation in access agreements is in the course of negotiations between an access provider and access seeker.

Proposed test: allocation of risks is demonstrably discriminatory and inefficient

7.5 It is not OPR's submission that the ERA or an arbitrator under the Code should have no involvement in determining a risk allocation under an access agreement. It may that a proposed risk allocation is discriminatory and inefficient. In such a case, and where there is failure to reach agreement in negotiations between the rail owner and access seeker, the ERA or arbitrator should become involved.

7.6 However OPR notes that different levels of the ability to bear risk will make a clear assessment of a proposed risk allocation difficult. A clear assessment of the proposed risk allocation will be made more difficult by what is likely to be a significant number of different contractual obligations and benefits negotiated in an access agreement.

7.7 Therefore OPR proposes the following bright line test: the allocation of risks in an access agreement can be determined by the regulator or arbitrator where a proposed allocation of risks is 'demonstrably discriminatory and inefficient'.[20]

[20] OPR considers that the risk allocation should be both discriminatory *and* inefficient before the ERA or arbitrator becomes involved. This reflects that contractual obligations and benefits, including risk allocations, are likely to be reflected in access charges. The CPA provides that access charges should allow price discrimination when this aids efficiency (clause 6(5)(b)(ii)). Different risk allocations and price discrimination are evident in competitive markets and these are efficient. An efficient, competitive market example is the different prices paid for air travel where a customer will pay significantly less than other customers well in advance for a ticket that cannot be refunded or changed. That customer bears the risk that they cannot travel at the date on that ticket.

8 Cost recovery

8.1 Regulated pricing should allow the recovery of all the efficient costs of constructing and operating the relevant assets and providing access. In order to facilitate investment, the access regime should also provide a potential railway owner with certainty, before it incurs the costs, as to what costs can be recovered. Without that certainty, the access regime has the potential to deter investment in new infrastructure.

8.2 The Code was designed for existing Government-owned railways and several key aspects of the cost recovery regime are not suited for greenfields projects. In particular, the Code expressly excludes land acquisition costs from the capital costs that can be recovered through access charges. In its decision on TPI's Costing Principles, the ERA determined that rental payments under a lease also cannot be recovered. As the ERA acknowledges in the Draft Report, land costs were not incurred by WNR and were not relevant for the existing railways. However, land acquisition costs will be a very large expense for a new railway owner like OPR and should be recoverable.

8.3 In addition to direct land acquisition costs, a greenfields operator will also incur significant related costs that are not currently addressed by the Code. A greenfields railway owner should be able to recover all of its efficiently incurred costs from those who will benefit from the construction and operation of the railway, ie the users. A railway owner cannot reasonably be expected to incur these costs and then not be able to recover those costs in the charges for the services it provides to users.

8.4 To the extent that a railway owner is not able to recover its costs in the charges for services it provides to users, there will be inconsistency with clause 6(5)(b) of the CPA. Clause 6(5)(b) of the CPA relevantly provides that '[r]egulated access prices should be set so as to […] generate expected revenue for a regulated service or services that is *at least sufficient to meet the efficient costs of providing access* to the regulated service' (emphasis added).

8.5 Examples of key types of costs that will be incurred in developing a greenfields railway and that should be recoverable from users are:

8.5.1 capital costs of acquiring land and lease or licence payments for land, including land on which the railway is constructed and additional land that it is prudent or necessary to acquire, for example due to severance of land parcels or to act as a noise buffer to comply with environmental approvals;

8.5.2 costs related to Aboriginal heritage and native title, including costs related to obtaining Aboriginal heritage approvals or providing compensation to native title claim groups (including indirect forms of compensation such as payments for community infrastructure, projects and training programmes), costs of conducting Aboriginal heritage surveys, and reimbursements of other parties' costs;

8.5.3 costs associated with prefeasibility, feasibility and rehabilitation works, including rail corridor definition and environmental investigations;

8.5.4 compliance costs, including legal and other advice related to approvals and consents, and costs of providing environmental offsets that are necessary or prudent to obtain environmental approvals; and

8.5.5 overhead costs, including costs incurred in the pre-operational phase of the project.

8.6 An infrastructure developer requires certainty as to the costs that it can recover before it commences land acquisition and construction and starts incurring significant costs. Under the current Code provisions, a developer will not obtain any certainty as to what costs are recoverable until the ERA issues its Costing Principles determination for the railway, which will not occur until a considerable time after construction is complete and the railway is operational. Accordingly, the Code should be amended to provide greater certainty as to the types of costs that are recoverable. The ERA would retain its discretion to refuse recovery of any costs that are not efficient.

8.7 The Draft Report states that the ERA considers that it is appropriate for the Code to be amended to allow railway owners to recover land acquisition costs as capital costs and to recover lease or rental costs as operating costs. OPR supports that view.

8.8 However, the Draft Report does not provide any detail on how the Code would be amended to allow recovery of these costs and does not address other related costs. In its submission on the ERA's Issues Paper, the Department of Treasury and Finance (**DTF**) set out draft wording for amendments to Schedule 4 of the Code to allow the recovery of land acquisition and rental costs. OPR considers that DTF's proposed amendments are too narrow and do not provide sufficient clarity as to the recovery of costs that are related to land acquisition, such as those discussed in paragraph 8.5 above.

8.9 OPR has prepared draft amendments to Schedule 4 of the Code that are set out in the Appendix to this submission. These draft amendments are similar to DTF's draft

wording, but expand on that wording to provide greater clarity as to the tests for recovery and the treatment of related costs. OPR's proposed wording seeks to strike a balance between certainty for railway owners and an appropriate level of discretion for the ERA. OPR's wording leaves the ERA with discretion to consider each specific type of cost and ensure that the railway owner can only recover costs that are sufficiently related to the construction, operation or maintenance of the railway and are efficient.

8.10 The Draft Report states that the Code should be amended to provide for a return on the value of any land but not depreciation of the value of the land on the basis that land is a 'non-depreciating' asset (at paras 182-188). A railway owner should be compensated for all of its efficient costs, including the full capital costs of acquiring land. It is likely that land used for a rail corridor for a period of 50 years would have only a marginal value for subsequent uses and the railway owner would not be able to recover its investment if the land ceased to be used for a railway and the land was sold. It is therefore appropriate for access charges to include both a return on and a return of the capital costs of acquiring land. Otherwise, the railway owner would still have a liability, which is the value of the land, on its books at the conclusion of its rail project or concession period.

9 Merits review

9.1 OPR considers that the availability of merits review of a regulatory decision is an important element of a balanced and fair regulatory regime. The availability of merits review will assure or improve the quality of regulatory decision making. A high quality of regulatory decision making will engender greater confidence in a regulatory regime which will increase incentives to invest in regulated infrastructure. OPR submits that there is a strong case for regulatory decisions under the WA rail access regime to be made subject to merits review.

9.2 OPR submits that merits review will allow recourse to review the facts, law and policy of a decision in circumstances where the regulator has made an error in its decision. This will enhance the confidence of potential rail infrastructure providers that their legitimate business interests will be protected through recourse to a fair and equitable review process. This confidence will be a crucial factor for those making decisions to invest in large rail projects that are crucial to the economy of Western Australia.

Merits review yields best decision, improves long term quality of decision making

9.3 In support of its submission, OPR notes the views of the Commonwealth Administrative Review Council (**ARC**). The ARC describes the principal object of merits review is that an administrative decision is correct and is the best decision that could be made on the basis of the relevant facts:[21]

> 1.3. The principal objective of merits review is to ensure that those administrative decisions in relation to which review is provided are correct and preferable:
>
> correct - in the sense that they are made according to law; and
>
> preferable - in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.

9.4 OPR considers that rail infrastructure is crucial to the economy of Western Australia. Therefore regulatory decisions should be the best decisions that can be made on the relevant facts.

9.5 The ARC also notes that a broader, long term objective of merits review is to improve the quality and consistency of decisions by primary decision makers.[22] OPR submits that a high and consistent quality of decision making must be a desirable objective for the WA rail access regime. This will lead to greater confidence in the regime which in turn will create a more conducive environment for investment in crucial rail infrastructure.

Regulatory decisions under the WA access regime should be subject to merits review

9.6 The ARC considers that 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:[23]

> 2.4. The Council prefers a broad approach to the identification of merits reviewable decisions. If an administrative decision is likely to have an effect on the interests of any person, in the absence of good

[21] ARC, *What Decisions should be Subject to Merit Review?*, 1999 at 1.3.

[22] ARC, *What Decisions should be Subject to Merit Review?*, 1999 at 1.5.

[23] ARC, *What Decisions should be Subject to Merit Review?*, 1999 at 2.4.

> reason, that decision should ordinarily be open to be reviewed on the merits.

9.7 OPR notes that regulatory decisions under the WA access regime are almost certain to affect the interests of an infrastructure provider as well as other stakeholders and so should be subject to merits review.

9.8 OPR considers that, at the very least, a limited form of merits review should apply under the WA rail access regime. An example is Part XIC of the *Competition and Consumer Act 2010* which provides for access in the telecommunications sector. Merits review is limited under Part XIC by restricting the evidence in a review to the evidence that was before the original decision maker.

Productivity Commission: a 'strong case' for extending merits review under Part IIIA of TPA

9.9 In a review of Part IIIA of the TPA (the provisions that implement the Commonwealth access regime) the Productivity Commission noted that declaration, certification and arbitration decisions were all subject to merits review. The absence of a similar right of review for undertakings was considered by the Productivity to be an 'apparent anomaly'.[24]

9.10 The Productivity Commission proposed that merits review also should apply to undertakings. The proposal received widespread support from parties making submissions on the proposal:[25]

> Not surprisingly, this proposal received widespread support. Typifying these views, the Network Economics Consulting Group (NECG) stated:
>
> > In our view, review rights impose a significant discipline on arbitrary and poorly founded decisions. In doing so, such rights reduce the very risk of such decisions occurring. Over time, then, the mere existence per se of such review rights may be seen to increase the level of regulatory certainty.
> >
> > Indeed, in our view, the existence of full merits review is so fundamentally important it is difficult to conceive of any proper justification for failing to have such a process in place. (sub. DR76, p. 46)

[24] Productivity Commission, *Review of the National Access Regime: Inquiry Report*, 28 September 2001 at 389.

[25] Productivity Commission, *Review of the National Access Regime: Inquiry Report*, 28 September 2001 at 390.

9.11 The Productivity Commission noted the single objection to the proposed application of merits review to undertakings but concluded that there was a 'strong case' for extending merits review to such regulatory decisions.[26]

9.12 Similarly, OPR considers that there is a strong case for regulatory decisions in the WA rail access regime to be subject to merits review.

Merits review is consistent with regulation in other WA industries

9.13 OPR understands that various forms of merit reviews exist in other regulated industries around Australia such as for gas pipelines and electricity networks. OPR notes that the ERA administers access regimes which cover gas pipelines and distribution networks and electricity transmission and distribution networks where there are provisions for merits review. Therefore OPR considers that merits review should also apply in the WA rail access regime. This would ensure consistency of regulatory approach across industries regulated by the ERA.

[26] Productivity Commission, *Review of the National Access Regime: Inquiry Report*, 28 September 2001 at 391.

10 Asset valuation, depreciation

10.1 OPR considers that DORC valuation and straight line depreciation should be available to rail infrastructure owners as it is the common methodology used for regulating infrastructure around Australia.

10.2 Under Issue 5 of the Draft Report, the ERA considered the issue of whether the GRV methodology under Clause 2 of Schedule 4 of the Code should be amended to make provision for forecast capital expenditure to be included in floor and ceiling costs calculations for the upgrading of rail lines.

10.3 In its discussion on the issue, the ERA considered (Draft Report, paras 162 - 164) there was merit in adopting a different asset valuation methodology to the current GRV based methodology due to that methodology not giving recognition for forecast expenditure to allow for capacity expansions. The Building Block approach, which encompasses the depreciated optimised replacement cost (DORC) methodology, is favoured by the ERA as this approach allows for forecast expenditure and is consistent with regulatory practice in other access regimes within Western Australia and around Australia.

10.4 Consistent with OPR's First Submission, OPR supports the ERA's proposed approach in the Draft Report. In further support of the ERA's proposed approach in the Draft Report, OPR considers that the DORC methodology represents a more realistic approach to the determination of access charges for greenfields infrastructure as it is more representative of the construction costs of the infrastructure than a hypothetical GRV methodology. A further benefit of the DORC methodology is that once the initial asset value is agreed with the regulator together with the appropriate amortisation method, there is greater certainty in the determination of asset values in subsequent resets than if the GRV methodology was adopted as, under the GRV methodology, the rail owner is less certain of the asset value at each reset.

10.5 OPR further submits that the amortisation methodology should be straight line depreciation which is also consistent with regulatory practice. To this end, OPR contends that the Code should be amended to expressly allow that straight line amortisation methodology is adopted in the calculation of the floor and ceiling costs. OPR considers that the use of straight line depreciation may be apt for greenfields infrastructure because the depreciation profile results in earlier recovery of the bulk of capital costs. This is apt for greenfields projects because of higher levels of uncertainty regarding

economic life of assets and the risks of asset stranding in such projects. This approach is also likely to be consistent with the requirements of financiers of greenfields projects.

10.6 OPR also notes that, with the annual determination of the WACC, the floor and ceiling costs would need to be adjusted annually.

11 Greenfields regulation

11.1 As set out in OPR's First Submission, careful and specific express provision should be made for greenfields projects. OPR's First Submission highlighted and explained a number of aspects of the Code that needed attention to adequately provide for greenfields projects. In summary (and in addition to the issues addressed elsewhere in this submission) OPR's view is that the Code should be amended to provide for greenfields projects through:

11.1.1 a light handed regulation option allowing greater 'upside' returns in exchange for taking greater risks;

11.1.2 less invasive Functional Segregation requirements to allow for the legitimate benefits of vertical integration to be realised in the critical early years of construction and operation (or at least until there is a bona fide access application);

11.1.3 a 9 month delay in requiring Costing Principles to be provided to the ERA following commissioning to allow the operator to gain experience of actual costs and what drives these costs;

11.1.4 a longer carry-over period for the over-payment rules to address uncertainty for a greenfields operator in its costs and revenues in the early years of operation due to lack of practical experience of the operation.

Appendix

Proposed Code amendments to address the waterbed effect

(1) Delete clause 7(2) of Schedule 4 and insert the following new paragraph:

(2) The total of the payments to the railway owner by all operators that are provided with access to a route, or part of a route, and associated railway infrastructure (**the *route***) must not be a sum that is less than

(a) the total of the incremental costs resulting from the combined operations on the route of all operators and other entities and the railway owner

multiplied by

(b) the total contracted capacity of all operators divided by the total committed capacity of the route.

(2) Delete clause 8(3) of Schedule 4 and insert the following new paragraph:

(3) The total of the payments to the railway owner by all operators that are provided with access to a route, or part of a route, and associated railway infrastructure (**the *route***) must not be a sum that is more than:

(a) the total costs attributable to the route

multiplied by

(b) the total contracted capacity of all operators divided by the total committed capacity of the route.

(3) Delete clause 5 of Schedule 4 and insert the following new paragraph:

5. Definitions

In clauses 7(2) and 8(3) -

other entities means entities to which access is provided otherwise than under this Code.

total committed capacity of a route means the total of:

(a) the total contracted capacity of all operators using the route;

(b) the total contracted capacity of all other entities using the route; and

(c) the total capacity that the railway owner requires for use in its own operations on the route.

Proposed Code amendments to address cost recovery issues

(1) In the definition of ***operating costs*** in clause 1 of schedule 4:

(i) delete 'and' after subparagraph (a);

(ii) insert "; and" after subparagraph (b); and

(iii) insert the following new paragraph:

"(c) lease or licence payments in connection with any interest in land held by the railway owner or an associate of the railway owner (other than land to which clause 2(5) applies), as determined by the Regulator but only to the extent in each case that the interest in land is held for the purpose of constructing, maintaining or operating railway infrastructure."

(2) Delete clause 2(2) of schedule 4.

(3) Delete clause 2(2a) of schedule 4.

(4) In schedule 4, insert after clause 2(4) the following new paragraph:

"(5) The following costs are capital costs but will not be subject to subclause (3) or subclause (4):

(i) amortisation of any costs incurred by the railway owner in connection with the acquisition of interests in land;

(ii) amortisation of any costs incurred in connection with aboriginal heritage and native title issues (including indirect forms of compensation, such as contributions to community infrastructure, training or development); and

(iii) amortisation of any transaction costs, legal, regulatory and compliance costs, and costs of feasibility or investigative studies, which in each case are incurred in connection with the matters referred to in paragraphs (i) or (ii) or are otherwise incurred for the purpose of, in connection with, or in order to facilitate, constructing, maintaining or operating the railway infrastructure,

as determined by the Regulator, but only to the extent in each case that those interests in land are acquired, or those costs are incurred, after the commencement of this Code for the purpose of, in connection with, or in order to facilitate, constructing, maintaining or operating the railway infrastructure."