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22 December 2010

The Chairman
Economic Regulation Authority
Level 6, Governor Stirling Tower
197 St George's Terrace
PERTH WA 6000

Attention: Lyndon Rowe/Senior Project Officer, Access

By email publicsubmissions@erawa.com.au

Dear Lyndon

Review of the Railways (Access) Code 2000

We refer to the Economic Regulation Authority's (**ERA**) draft report of 22 November 2010 in relation to its review of the Railways (Access) Code 2000.

We act for Roy Hill Infrastructure Pty Ltd in relation to the development of the Roy Hill Iron Ore Mine, the Roy Hill Railway and the Port Facilities to be constructed at Port Hedland. The Roy Hill Railway is to be constructed pursuant to the Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010.

We enclose submissions made on behalf of Roy Hill Infrastructure Pty Ltd on the ERA's draft report.

Please do not hesitate to contact us to discuss any aspect of the enclosed submissions.

Yours faithfully

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Submission to the Economic Regulation Authority (ERA) relating to the ERA's Draft Report on the Review of the Railways (Access) Code 2000

1. Introduction

1.1 This submission is made by Roy Hill Infrastructure Pty Ltd (**RHI**) in response to the ERA's invitation for written submissions on the ERA's Draft Report of 22 November 2010 (**Draft Report**) on the review of the *Railways (Access) Code 2000* (the **Code**). RHI thanks the ERA for the opportunity to make this submission. This submission is not confidential and may be made available on the ERA's website.

1.2 RHI's submission has not commented on each of the issues addressed by the Draft Report. This submission seeks to address some new issues and a number of material issues arising from both the Draft Report and submissions previously made by a third party in response to the ERA's Issues Paper on the Second Review of the Code.

1.3 On 16 September 2010, RHI made a submission (**NCC Submission**) to the National Competition Council (**NCC**) in relation to the State's application to have the *Railways (Access) Act 1998* (WA) (the **Act**) and the Code certified as an effective access regime for the purposes of Part IIIA of the *Trade Practices Act 1974* (Cth). Some of the submissions made by RHI to the NCC in the NCC Submission are relevant to the issues presently under consideration by the ERA and RHI will make reference to the NCC submission in this document. A copy of the NCC Submission is attached for the ERA's reference.

2. Part 3

Section 16(2)

2.1 RHI submits that the term "unfairly discriminate" in section 16(2) must be clarified. There are a number of instances in which, and a number of reasons for which, a railway owner should be able to treat prospective users or users or both differently. Whether this is fair or unfair is an emotive issue calling for a value judgement. This uncertainty should be replaced by a more developed test of what type of instances and reasons will give rise to permissible different treatment.

2.2 RHI refers the ERA to the definition of "discriminate" and regulation 23 of the *Gas Transmission Regulations 1994* (WA) (now repealed) for a well constructed and well drafted approach to the issue of permissible discrimination.

Section 9 and Schedule 4

2.3 RHI's submissions on section 9 of the Code extend also to the relevant provisions of Schedule 4. RHI supports an amendment to the Code which allows the incorporation of forecast expenditure for extensions, expansions and stay in business capital maintenance into floor and ceiling costs. RHI recognises that this will require a change to the pure GRV methodology set out in Schedule 4.

2.4 RHI supports the ERA applying a Building Block approach. However, RHI submits that the ERA should be constrained as at the date of calculation of the asset value or capital costs to applying either a GRV methodology with express recognition of the need to add future capital expenditure to the asset base during the relevant reset period, or a depreciated optimised replacement value. The ERA should, of course, require submissions on this issue and select the methodology which best reflects the railway owner's true capital costs of the particular railway infrastructure. In setting a ceiling cost, RHI considers that in most cases a GRV plus anticipated capital expenditure methodology would be appropriate.

3. Part 5

Competition in upstream and downstream markets – integrated rail operations

3.1 RHI supports the public submission made by Oakajee Port & Rail (**OPR**) on 3 February 2010 in regards to supply chain issues.

3.2 The ERA states at paragraph 131 of the Draft Report that it does not support OPR's submission that regulation of different infrastructure facilities on a supply chain should have regard to whole-of-supply issues particularly in relation to the regulatory framework for the treatment of capacity. The ERA's assessment was that it is not appropriate under the current WA rail access legislation for any considerations outside of rail network priorities to guide the application of the Code.

3.3 RHI submits that the ERA's assessment fails to have regard to the over-riding objective of the Code as set out in section 4(1) of the Act which establishes the Code. Section 4(1) of the Act requires that the Code is established to give effect to the CPA. Clause 6(5)(a) of the CPA provides that an access regime should promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.

3.4 RHI refers the ERA to paragraph 4.8 of the NCC Submission. This highlights substantial deficiencies in the Act and the Code. Under section 2A of the Act the main object of the Act is to establish a rail access regime that encourages the efficient use of, and investment in, relevant facilities by facilitating a contestable market for rail operations. This gives support for the ERA's limiting and constraining view expressed in paragraph 131 of the Draft Report that considerations outside of rail network priorities may not guide the application of the access Code under the current WA rail access legislation. However, this leads to the conclusion that the WA rail access legislation does not comply with the CPA in the most significant respect; it does not promote effective competition in upstream or downstream markets.

3.5 If the ERA is right about the narrow effect and operation of the WA rail access legislation, the exclusion of all factors other than those facilitating a contestable market for rail operations does not allow any weight to be given to the critical element of the CPA of promoting competition in upstream or downstream markets. The investment in railway facilities which are part of an integrated vertical mining, transport, handling, loading and shipping operation will promote new mines, creating competition in the upstream mining market and will introduce new product into the market for the relevant commodity, promoting competition in a downstream market. The plain economic reality is that these railway facilities will not be built unless they

are part of a vertically integrated operation. It is not economically efficient for a new mine of any significant size to rely on a separate, non-integrated "take your chances when available" railway operation.

3.6 The most efficient operation of, use and investment in railway infrastructure such as The Pilbara Infrastructure's railway, OPR's proposed railway, RHI's proposed Roy Hill railway and other 'greenfields' infrastructure for the transport of base metals ore or thermal or coking coal is a vertically integrated railway that operates as part of a whole supply chain integrating mining operations with transporting, loading and shipping operations.

3.7 The ERA acknowledges the commercial imperatives in operating a logistics chain and the operational efficiencies to be gained from an integrated whole-of-supply chain. In light of this, the failure of the WA rail access legislation to recognise supply chain issues would mean that the WA legislation fails to comply with the most significant requirement of the CPA, and it would also result in inefficiencies that would increase costs and charges for both infrastructure service providers and infrastructure users. RHI submits that the better view of the WA rail access legislation is that it complies with the CPA.

3.8 On this better view of the WA rail access legislation, the ERA may, and is in law required to, take into account the investment in and operation of railway facilities which are part of an integrated mining, transporting, loading and shipping operation. Unless railway facilities are able to be integrated with mines and ports, new development will not take place. This has the opposite result to promoting competition in upstream or downstream markets. Railway facilities which are an integrated part of a supply chain will in most cases inherently, or through economically efficient expansions, have the capacity to provide haulage services for third parties, which further promotes competition in upstream and downstream markets. This competition in upstream and downstream markets promoted by access to haulage services by third parties will obviously not occur if the railway facilities are not constructed in the first place. The provision of haulage services will accommodate both the requirements of the mine developer which constructs the railway as part of an integrated operation, and the requirements of the third party which will have its ore carried to port under efficient incremental pricing structures.

3.9 RHI refers the ERA to paragraphs 9.1, 9.2, 9.3, 9.4, 9.5 and 9.6 of the NCC Submissions in relation to the need for new railway facilities in the Pilbara to be part of an integrated operation. Third party access to a railway which is part of an integrated operation is most economically efficiently provided by offering a haulage service which can synchronise with the integrated operation. Haulage services can be offered under the Code, even though the Code provides access to rail access direct, by the railway owner (or a related party) providing the rolling stock for the haulage service offered to third parties. The ERA can and should facilitate this approach by recognising that the WA rail access legislation allows and requires considerations beyond rail network priorities to guide the application of the Code. If it is not appreciated that most new railway facilities will require to be built as part of an integrated operational process, then those railway facilities will not be built at all. The ERA can and should recognise this by ensuring that the Code allows the ERA to approve relevant instruments relating to third party access, such as the Part 5

instruments, which accommodate the railway owner operating the railway facilities as part of an integrated operation.

Train Path Policy

3.10 The ERA recognises at paragraph 132 of the Draft Report the need for unscheduled use of TPI's railway in order for operators to take advantage of opportunities to utilise port facilities. The ERA states that it has sought to address this by allowing in the TPI's Train Path Policy the use of cyclic traffic train paths in an operator's service entitlements, in addition to timetabled train paths.

3.11 The use of cyclic traffic train paths, in addition to timetabled train paths, will still lead to significant inefficiencies. A railway which is to operate as part of an integrated operation must be able to respond in a timely fashion to the demands of supply from mining production, and the availability of port facilities and vessels. As submitted in paragraph 3.9, in the absence of assurance of that ability to respond in a timely fashion, particularly through appropriate Part 5 instruments, and as submitted below, segregation arrangements, investment in new mines, railways and ports will not be made.

Functional separation

3.12 The competition principles set out in the CPA, which provide the framework for the requirements under the Code, recognise the legitimate benefits that can be achieved through a vertically integrated access provider. The existing functional segregation requirements go well beyond the requirement under the CPA for separate accounting arrangements for the elements of a business which are covered by the access regime.

3.13 The functional separation of an integrated organisation will result in significant additional costs and operational inefficiencies. This would be in direct conflict with the principles for regulation of access prices which:

(a) are to provide incentives to reduce cost and improve productivity;

(b) acknowledge that concepts such as multi-part pricing and price discrimination are allowable when they aid in efficiency; and

(c) envisage the existence of vertically integrated service providers while also being able to preventing discrimination in favour of their upstream or downstream operations.

4. Schedules – Schedule 4

4.1 RHI has made submissions which relate in part to the need for amendments to the content of Schedule 4 in paragraphs 2.3 and 2.4 and does not repeat those here.

4.2 RHI submits that the amendments to the definitions of operating costs under clause 1 of Schedule 4 and capital costs under clause 2 of Schedule 4 should specifically include incidental costs of or relating to the acquisition of the right to use land or of the purchase of land. These incidental costs should include investigatory access costs, surveying costs, costs of environmental assessments, reports and plans, land management assessments, reports and plans, native title and aboriginal heritage

investigations, aboriginal heritage clearances, native title negotiations and land use agreements, engineering consultants, legal advisors and all other necessary or appropriate consultants and advisors.

National Competition Council

SUBMISSION COVER SHEET

APPLICATION FOR CERTIFICATION OF THE WA RAIL ACCESS REGIME

Please complete and submit this form along with your submission by no later than 5.00pm on 16 September 2010 as follows:

1. **By email to:** warail@ncc.gov.au

AND

2. **In hard copy to:**
Submissions
National Competition Council
GPO Box 250
Melbourne VIC 3001

Individual/ Organisation/ Company:	Roy Hill Infrastructure Pty Ltd
Address:	HPPL House, 28-42 Ventnor Avenue
Suburb/town:	West Perth **State:** WA **Postcode:** 6005
Principal contact:	Cheryl Edwardes
Position/title:	Executive General Manager - External Affairs, Government Relations and Approvals
Telephone:	(08) 9429 8222 **Fax:** (08) 9429 9266
Email address:	cheryl_edwardes@hancockprospecting.com.au

Declaration

I declare that, to the best of my knowledge and belief, the information provided in the submission is true, correct and complete, that complete copies of supporting materials or evidence have been provided and/or clearly identified, and that all estimates are identified as such and are the best estimates of the underlying facts and that all the opinions expressed are sincere.

Signature of authorised person

Executive General Manager - External Affairs, Government Relations and Approvals
Office held/title/position

Cheryl Edwardes
(Print) Name of authorised person

16 September 2009
Date

Note: If the submitting party is a corporation or organisation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the submitting party, this fact must be stated.

Confidential information

Please indicate if your submission:

- [X] contains NO confidential material
- [ ] contains SOME confidential material (in which case please provide two copies of the submission – one with all of the confidential information removed and this copy with the confidential information clearly identified and marked)

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Roy Hill Infrastructure Pty Ltd (**RHI**) – Submission to the National Competition Council (**NCC**) Relating to the Possible Certification of the WA Rail Access Regime

1. Introduction

1.1 This submission is in response to the NCC's invitation for written submissions on the NCC's draft recommendation of 17 August 2010 that the Railways (Access) Act 1998 (WA) (**Act**) and the Railways (Access) Code 2000 (WA) (**Code**) (**WA Rail Access Regime** or **Regime**) be certified as an effective access regime. RHI thanks the NCC for the opportunity to make this submission.

Concerns with non compliance

1.2 This submission seeks to address RHI's concerns with the NCC's draft recommendation and is structured to respond to the issues in the draft recommendation in the order in which the NCC deals with them. RHI has not commented on each issue addressed by the NCC but this does not signify that RHI considers that the WA Rail Access Regime complies with or is consistent with the requirements of Part IIIA of the Trade Practices Act 1974 (Cth) (**TPA**) (**Part IIIA**) and the Competition Principles Agreement (**CPA**) on issues not commented on. On many issues RHI considers that the WA Rail Access Regime fails to comply with the requirements of Part IIIA and the CPA. It is recognised that the requirements of the CPA are guidelines which are to be applied by the NCC in assessing whether an access regime is an effective access regime. However, RHI considers there are such a large number of issues on which the WA Rail Access Regime is materially inconsistent with the requirements of Part IIIA and the principles of the CPA that the NCC cannot conclude that it is an effective access regime. Some of these issues and the reasons for non compliance with the requirements of Part IIIA and the CPA are perhaps more technical than substantive, but many, in RHI's submission, go to the fundamental objectives of the CPA and Part IIIA. The WA Rail Access Regime does not promote the economically efficient operation of, use of and investment in infrastructure by which services are provided (and is likely to be repugnant to investment in railway infrastructures), and does not promote, or is not needed to promote, effective competition in upstream and downstream markets.

Lack of analysis

1.3 In many cases the draft recommendation lacks sufficient, or any, analysis of the context, and particular characteristics of, the relevant railway networks or railway lines covered by the WA Rail Access Regime. In many cases the NCC's conclusion has been reached on what appears to be abstract economic reasons without any application to the circumstances of the relevant railways and the services provided by them, the services likely to be sought by users and the upstream and downstream markets relevant to those railway networks or railway lines. There is also no real analysis of the likely effect of the WA Rail Access Regime on proponents for the construction of new railway networks or lines that are faced with that network or line being subject to the Regime. These deficiencies will be identified in relation to each relevant issue in this submission.

2. Executive Summary

RHI submits as follows:

2.1 As a matter of law, not policy or guideline, the WA Rail Access Regime covers a number of significantly distinct services provided by means of different, discrete, stand alone facilities. The WA Government must apply separately for certification in respect of each distinct service.

2.2 The NCC has provided no analysis of whether the different, discrete, stand alone facilities, or the route sections covered by the WA Rail Access Regime, are significant infrastructure.

2.3 It is likely to be economically feasible to duplicate at least 2 of the different, discrete, stand alone facilities.

2.4 Access to the services provided by means of the facilities covered by the WA Rail Access Regime is likely to be entirely neutral in relation to competition in upstream and downstream market.

2.5 The objective of the WA Access Regime is to facilitate a contestable market for rail operations, which is the same market as the market for the service provided by the facilities and is not an upstream or downstream market.

2.6 Future declaration of routes under the WA Rail Access Regime may not comply with the requirements of Part IIIA and the CPA.

2.7 The WA Rail Access Regime provides no mechanism for the periodic reset of critical elements of the Regime.

2.8 The influence of the WA Rail Access Regime extends beyond the jurisdictional boundaries of the State and is duplicative and ineffective.

2.9 The WA Rail Access Regime is prescriptive on key elements of access which significantly displaces the right to negotiate access and have an independent dispute resolution body resolve disputes in accordance with the CPA principles. Section 4A of the Code does not save this displacement.

2.10 The matters on which the right to negotiate and to have the CPA principles applied to resolve disputes are displaced by prescription under the WA Rail Access Regime go to the issues of efficient investment in, and efficient operation of, railways.

2.11 The only service to be provided under the WA Rail Access Regime is a use of rail service which will prevent or hinder the efficient investment in, and operation of, railways for the transport of iron ore in the Pilbara. A haulage service is likely to encourage economically efficient investment in, and operation of, railways for the transport of iron ore in the Pilbara.

3. Fundamental legal and policy issue

3.1 Before turning to deal with each of the issues raised in the NCC's draft recommendation upon which RHI wishes to comment, RHI makes a submission on a fundamental legal and policy issue arising in respect of the WA Rail Access Regime.

What is the facility?

3.2 The "service" defined in section 44B of the TPA is one provided by means of a facility. Clause 6(3) of the CPA requires that the regime must apply to services provided by means of significant infrastructure facilities. This raises the obvious question of what is the facility the subject of the WA Rail Access Regime, by the means of which the service is provided.

5 different facilities

3.3 In RHI's assessment there are 5 different, discrete, stand alone facilities covered by the WA Rail Access Regime for the purposes of Part IIIA and the CPA. The different facilities are:

(a) urban – mostly passenger network;

(b) non-urban narrow gauge freight network – intrastate freight;

(c) non-urban standard gauge freight network – intrastate freight;

(d) Perth/Kalgoorlie standard gauge line – interstate freight;

(e) TPI railway line in the Pilbara.

3.4 RHI submits that both Part IIIA and the CPA, on the basis of the clear words of the relevant provisions, require a regime to be for access to one service to be provided by means of one facility. In *BHP Billiton Iron Ore Pty Ltd v NCC* 236 CLR 145 the High Court mentioned with approval that the NCC considered that since the Mount Newman railway line and the Goldsworthy railway line were "two services provided to (sic) two separate facilities each of which is owned by a different group of operators" the application should be treated as two separate applications for the declaration of two specified and distinct services provided by means of the two railway lines, respectively referred to as "the Mount Newman Railway Line Service" and "the Goldsworthy Railway Line Service". The NCC should adopt the same approach to the WA Government's application for certification of the WA Rail Access Regime.

3.5 Each of the different railway networks or lines identified in paragraph 1.2 above have, to a greater or lesser extent, different geographical locations, different owners, different ages and conditions, different safety considerations, have significantly different upstream and downstream markets and most importantly provide different services. For example, the service provided by means of the use of the TPI railway is a fundamentally different service to that provided by means of the urban passenger network, or the non urban narrow gauge freight network.

3.6 RHI considers that the WA Rail Access Regime purports to cover at least 5 different, discrete, stand alone railway networks and railway lines which provide fundamentally difference services in a way which is not intended by Part IIIA and the CPA and cannot be regarded as an effective access regime for the service provided by each of those different, discrete, stand alone networks or lines.

Unworkable generic application of guidelines

3.7 This conclusion is strongly supported by the results of seeking to apply the guidelines required to be applied by the NCC under section 44M of the TPA to the service provided by the five different, discrete, stand alone railway networks and railway lines in the same way, or even loosely in the same way. The guidelines do not sensibly apply to the service provided by the five railway networks or railway lines in a generic manner, or in aggregate. Many of the guidelines can only sensibly be applied to each of, or some groupings of, the railway networks and railway lines. Some specific instances of the unworkability of applying the guidelines generically to the service provided by the five different, discrete, stand alone railway networks and railway lines are identified in the following submissions.

4. Scope of the WA Rail Access Regime: CPA clauses 6(3)(a) and 6(4)(d) - Part 5 of the NCC's Draft Recommendation

4.1 RHI submits that compliance with CPA clauses 6(3)(a) and 6(4)(d) are assessed at a too high and generic level.

Significant infrastructure

4.2 The NCC assumes that the facility is "significant infrastructure" without any consideration of the issue. Taken over all there is no doubt that the railway networks and railway lines covered by the WA Rail Access Regime are in aggregate significant infrastructure. However, the approach to coverage under the WA Rail Access Regime, largely set out in section 5 of the Act, is that individual routes specified in the Code, or later selected by the Minister are, or may be, the subject of coverage. Are each of those specified routes "significant infrastructure"? RHI considers the TPI railway line to be one facility for the reasons identified in section 3 of this submission. Is the TPI railway line "significant infrastructure"? It is simply assumed that they are significant infrastructure because they are a part of the aggregate of the railway networks and railway lines controlled by the WA Rail Access Regime.

4.3 RHI submits that it is inappropriate to assess the aggregate of the railway networks and railway lines covered by the WA Rail Access Regime as one facility. Both the different, discrete, stand alone nature of the relevant railway networks and railway lines covered by the WA Rail Access Regime, and the potentially fragmented nature of coverage under the WA Rail Access Regime (which results in coverage of routes, or parts of railway facilities), make it untenable to seek to apply the Part IIIA and CPA guidelines to those aggregate networks and lines as one facility, which is the approach of the WA Government and is accepted by the NCC. There is no basis for concluding that each of the routes covered by the WA Rail Access Regime, or each of the different, discrete, stand alone railway networks or railway lines comprising the "facility" is significant infrastructure as is required by Part IIIA and the CPA.

Economically feasible duplication

4.4 The NCC accepts that the railways to which the WA Rail Access Regime applies are unlikely to be economically feasible to duplicate. There is no analysis given for this conclusion. It is certain that it is economically feasible to duplicate the TPI railway. This is exactly what RHI has been mandated by the State of Western Australia (**State**) to do under the Railway (Roy Hill Infrastructure Pty Ltd) Agreement 2010 (**State Agreement**). It is possible that a full duplication of the Perth/Kalgoorlie line may be economically feasible. RHI understands that train paths on the Perth/ Kalgoorlie line are, or are nearly, fully contracted and the provision of further services will require significant capital expenditure to develop additional capacity to enable further train paths to be allocated. At some point in the medium or short term it is likely to be economically feasible to duplicate the Perth/Kalgoorlie line.

4.5 RHI submits that it is likely to be economically feasible to duplicate at least 2 of the different, discrete, stand alone facilities covered by the WA Rail Access Regime.

Competition in upstream and downstream markets

4.6 The NCC also concludes that access to the railway infrastructure services that are subject to the WA Rail Access Regime will very likely have the effect of improving the conditions for competition in upstream and downstream markets. There are several issues with this statement. Firstly, it is not addressing the guideline required to be addressed under Part IIIA and the CPA. CPA clause 6(3)(a)(iii) provides that the regime should apply to services provided by means of a significant infrastructure facilities where...access to the service is necessary in order to permit effective competition in a downstream or upstream market. "Permit" is not the same as improving the conditions for competition in upstream or downstream markets, nor is "permit" the same thing as promoting competition in upstream and downstream markets. The reference to "permit" signifies that without access to the particular service there is no effective competition in an upstream or downstream market. The NCC provides no analysis of this issue in reaching its conclusion. It is likely that there is already significant or sufficient existing competition in the upstream and downstream markets of a number, and probably all, of the different, discrete, stand alone railway networks and railway lines covered by the Regime. For example, the urban passenger railway network has competition provided by passenger motor vehicles and the intrastate and interstate freight networks have competition provided by road transport using large trucks. RHI further submits that in the Pilbara, for example, there is effective competition already existing in both the

upstream and downstream markets. There is effective competition in the exploration and mining of base minerals in the Pilbara and there is effective competition in the marketing, transporting, shipping and selling of base metals from the Pilbara. RHI also submits that there is significant existing competition in the upstream and downstream markets of each of the other different, discrete, stand alone railway networks and railway lines covered by the WA Rail Access Regime. The NCC concludes that access to the particular services provided by each of the different, discrete, stand alone railway networks and railway lines is necessary to permit effective competition in an upstream or downstream market without any analysis or support for that conclusion except in an abstract, theoretical economic sense.

4.7 RHI understands that no formal proposal has been made for access by an entity under the WA Rail Access Regime in the nine years in which that regime has existed. This indicates the absence of the requirement of the CPA in this respect and that effective competition exists in upstream and downstream markets without regulated access to the services to be provided under the Regime. RHI submits that access to the services covered by the WA Regime is likely to be absolutely neutral as regards permitting, promoting or adding to competition in upstream or downstream markets.

Regime facilitates contestability in the wrong market

4.8 Secondly there is also a significant issue in relation to the nature of the services which must be provided under the WA Rail Access Regime. The objective of the Regime, clearly enunciated in section 2A of the 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. The market which is the focus of the Regime is the market for rail operations. Rail operations are one and the same as the use of the railway infrastructure, which is the relevant service. Section 44G(2)(a) of the TPA (in the context of the NCC making a declaration under Part IIIA) requires the NCC to exclude the market for the services provided by the facility in assessing whether access would promote a material increase in competition in at least one market. RHI submits that it is incumbent upon the NCC to form the view that access to the service to be provided by means of the railway infrastructure covered by the Regime will permit effective competition in upstream or downstream markets other than the market for rail operations. There is no analysis in the draft recommendation that justifies any conclusion on this, and as RHI submits in paragraphs 4.6 and 4.7 such competition, or any increased competition, is unlikely to result from access to the relevant services.

Future coverage of routes

4.9 RHI also submits that the provisions of sections 4 and 5 of the Act do not comply with and are inconsistent with the requirements of the CPA. The provisions of the Act apply to routes, not the services provided by use of a facility. The Minister under the WA Rail Access Regime can cherry pick which routes or parts of a railway facility are to be available. The NCC has no such discretion in certifying a regime for a service provided by means of a facility. The tests are not materially the same. In section 5(3) of the Act the Minister must address issues which may or may not be of relevance to the NCC in its assessment of the significance or otherwise of a facility. Section 5(4) of the Act removes any appeal from, or judicial review of, the Minister's decision. Despite what the NCC says in paragraphs 5.15 to 5.18 of the draft recommendation RHI considers that the NCC can have no confidence that new routes covered by the Regime in the future, following the process in sections 4 and 5, will comply with CPA clause 6(3)(a) principles. The NCC cannot approve the regime as an effective access regime on that basis.

Regime lacks an effective periodic reset

4.10 CPA clause 6(4)(d) is manifestly not complied with in the WA Rail Access Regime. The requirement for the Minister to call for public comment on proposals to amend or appeal and replace the Code, and for the Economic Regulation Authority (**ERA**) to review and report on the Code to the Minister periodically is not a lapse of a right to negotiate and a renewal of that right to negotiate. The right to negotiate continues unabated unless the Minister, following public comment takes a deliberate and affirmative decision to cancel and replace the Code.

The WA Rail Access Regime operates in substantially the opposite manner than that required by CPA clause 6(4)(d). Many other regimes meet this guideline by providing for an access arrangement to apply for a specified period, mostly 5 years. Each 5 years the approved access arrangement effectively lapses and the infrastructure owner must propose a new (or amended) access arrangement. Submissions from all interested parties are made and the full analysis and approval process operates every 5 years. The WA Rail Access Regime does not, but should be required to, operate in this fashion. This is an important issue because the lack of regulatory resets in the WA Rail Access Regime perpetuate key repugnant elements of that Regime. These elements are identified later in this submission.

5. Interstate Issues: CPA clause 6(2) and 6(3)(p) - Part 5 of the Draft Recommendation

5.1 The Perth/Kalgoorlie railway line transports significant quantities of interstate freight. The WA Rail Access Regime which governs the Perth/Kalgoorlie line is different to the access regime which covers that railway line east of Kalgoorlie; the Australian Rail Track Corporation access undertaking. Rail operators must comply with two different access regimes. Accordingly, the influence of the facilities (or one of them) the subject of the WA Access Regime extends beyond the jurisdictional boundaries of the State.

5.2 The fact that rail operators must deal with two different access regimes renders the WA Rail Access Regime ineffective. The requirements of the WA Rail Access Regime relating to tariffs, train paths, train management guidelines are different to those applying under the ARTC access undertaking applicable to the railway line east of Kalgoorlie. The intention of Part IIIA in situations like this is that the NCC may not recommend that the State Regime is an effective access regime, with the result that the other provisions of Part IIIA (a Commonwealth regime) are to apply. This will allow a consistent regime to apply to a facility the influence of which extends beyond State boundaries. The NCC refers to various economic thresholds relating to the costs of implementing a uniform national access and pricing regime also covering the Perth/Kalgoorlie line, which may, in its opinion, justify the present duplicative approach applying in the short to medium term. However, this does not seem to address the problem which exists at present resulting from a State regime and a federal access undertaking applying to the one facility. The NCC must assess whether the WA Rail Access Regime complies with the requirements of Part IIIA and the CPA at present. The possibility of future policy outcomes and the promise of governments working together in the future to achieve a uniformity in rail access regimes does not satisfy the guidelines the NCC is required to apply now. This is a significant failure of the WA Rail Access Regime and it is exactly what CPA clause 6(2)(a) was designed to prevent.

5.3 The NCC refers to a dispute resolution process established by the WA Rail Access Regime that confers a jurisdiction to deal with disputes under both regimes. This also does not resolve the problem. The regimes are different in many areas. Even if the two regimes were broadly consistent (with which conclusion RHI disagrees and points out that no analysis of the two regimes is undertaken by the NCC in reaching that conclusion) this is not sufficient to relieve rail operators of the burdens of complying with two regimes. There is not a single process, a co-operative legislative regime, a single body nor a single forum, as is required by CPA clause 6(4)(p). The fact that the WA Rail Access Regime purports to confer jurisdiction to resolve disputes under both regimes does not make the regime comply with any element of CPA clause 6(4)(p).

6. The Negotiation Framework: CPA Clauses 6(4)(a)-(c), (e), (f), (g), (h), (i), (m), (n) and (o) - Part 7 of the Draft Recommendation

Negotiated Access

6.1 RHI submits that the WA Rail Access Regime does not comply with the requirements of Part IIIA and the CPA in relation to the negotiation of access, enforceable rights to negotiate and dispute resolution. The key elements of the CPA requirements in this respect are that:

(a) access terms and conditions are to be agreed between the owner of the facility and the person seeking access;

(b) there is to be an enforceable right to negotiate;

(c) if agreement on access cannot be reached the parties are required to appoint and fund an independent body to resolve the dispute;

(d) the dispute resolution body must take into account certain prescribed matters in resolving the dispute, set out in CPA clause 6(4)(i).

6.2 The WA Rail Access Regime requires the negotiations to be conducted within a number of parameters and with a number of predetermined elements of access which are prescribed by that Regime. The parties are not free to negotiate the terms and conditions of access as required by Part IIIA and the CPA. The NCC mentions section 4A of the Code. Section 4A is a superficial and ineffective attempt to comply with the requirements of CPA clauses 6(4)(a)-(c) but only serves to create confusion. There must be considerable doubt as to whether section 4A of the Code is valid. Section 4 of the Act requires a Code to be established and for the Code to include certain specified matters. Power is given for the Code to exclude its application to interstate services, however, no power is given to exclude any service which is covered by the WA Rail Access Regime and is not an interstate service. Section 43 of the Interpretation Act 1984 (WA) does not save section 4A of the Code as the requirements of section 4 of the Act are mandatory rather than being a provision which generally empowers the Minister to make subsidiary legislation.

6.3 However, even assuming section 4A is valid, the NCC's approach in assessing the relationship between section 4A and the rest of the WA Rail Access Regime is to allow section 4A to be used selectively. That cannot be the case. Either the railway owner and the entity are negotiating for, and entering into an agreement outside the Code and its relevant requirements (because they have not agreed otherwise, in which case none of those requirements apply and must be disregarded in assessing whether the WA Rail Access Regime complies with Part IIIA and the CPA), or the railway owner and the entity are negotiating under the Code (in which case the prescriptive nature of the WA Rail Access Regime means that it does not comply with the requirements of Part IIIA and the CPA). We identify some of the more prescriptive elements of the WA Rail Access Regime in the following paragraphs.

6.4 Section 17 of the Code significantly constrains the parties in their negotiations because they must ensure that in negotiating an access agreement provision is made in detail for the matters specified in Schedule 3 to the Code and they must give effect to the provisions of Schedule 4 to the Code. There is also a requirement in sections 6 and 7A of the Code that the railway owner have, and provide, a standard access agreement.

6.5 The railway owner is also required to have approved by the ERA the Part 5 instruments. The Part 5 instruments deal with detailed matters concerning the regulation and operation of a covered railway, being the train management guidelines, the statements of policy, the costing principles and the overpayment rules. Section 40(2) of the Code provides that the Part 5 instruments are binding on the railway owner. It is impossible to rationalise the Part 5 instruments being binding on the railway owner, as is required by section 40(2), but those Part 5 instruments not being taken into account by him in negotiating an Access Agreement unless both parties agree, as is required by section 4A(1)(c). If during the negotiations the railway owner contemplates operating, maintaining etc the railway inconsistently with the requirements of the Part 5 instruments and agrees to do so, how he will comply with the Part 5 instruments which bind him for the purposes of other access agreements and section 40(2)? This is one of many examples of the confusion created by the superficial nature of the addition of section 4A to the WA Rail Access Regime.

6.6 The only manner under the WA Rail Access Regime in which an access proposing entity can enforce its rights to negotiate and to have an access agreement is by reference to arbitration under Division 3 of Part 3 of the Code. In determining a dispute the arbitrator must give effect to the provisions of the Act, the Code and the matters determined by the Regulator. Section 4A provides a complete exclusion from the provisions of the Code for negotiations outside the Code, and any consideration as to compliance with the CPA guidelines on this issue must

examine how the right to negotiate and the right to have an access agreement is enforced and the matters which must be given effect to in that enforcement. The WA Rail Access Regime is prescriptive and requires the railway owner and access proposing entity to negotiate within a number of parameters and with a number of predetermined elements of access determined by the ERA or specified in the Regime itself. These preordained or predetermined matters or parameters are not ancillary or marginal issues. They go to the very core of the access regime and are inconsistent with the fundamental requirements of the CPA. In paragraph 7.17 of the draft recommendation the NCC concludes that the WA Rail Access Regime establishes an appropriate balance between the interests of the railway owners and access seekers. RHI submits that the requirements have not been met. On the contrary the Regime is prescriptive on matters which are critical to a prospective railway owner, particularly a person proposing to construct and operate a new railway line. Matters which should be left to the parties to negotiate, and which should be left to the independent dispute resolution body to resolve if the parties cannot agree, are prescribed by the Regime or are dependent upon ERA approved instruments and other determinations made by the ERA. These matters are identified in paragraphs 6 below and RHI does not repeat them here. The Part 5 instruments are not just information requirements. They define and inform important aspects of the service.

6.7 In the NCC's "Guide to Certification under Part IIIA of the Trade Practices Act 1974 (Cth)" the NCC indicates that some regulatory intervention may be warranted to create an environment conducive to effect negotiations in accordance with the principles in CPA clauses 6(4)(a)-(c). The regulatory intervention must derive from independent, transparent and consultative processes. RHI submits that the NCC should not conclude that the regulatory intervention reflected in the WA Rail Access Regime results from such processes. Firstly some of the most repugnant aspects of the regulatory intervention are mandated by the Regime, such as the asset valuation methodology and the lack of regulatory resets to allow future capital expenditure over the next reset period to be rolled in. Secondly the matters upon which the ERA is authorised to pre-determine go beyond establishing an environment for effective access negotiations. They to a large extent displace effective access negotiations. They may be transparently pre-determined following a submission process, but once pre-determined they bind the railway owner and oust negotiation on those issues for an undefined period. Section 4A of the Code does not resolve this issue as negotiations entirely outside the Code have no enforced rights of negotiation and no rights of dispute resolution.

Reasonable Endeavours

6.8 The CPA requirement in this paragraph is that the access regime provides for a service provider to use all reasonable endeavours to facilitate the requirements of access seekers. The WA Government and the NCC refer to sections 13 and 16 of the Code. Sections 13 and 16 indicate a different duty on the part of the railway owner. Under section 13 his duty is to negotiate in good faith with a view to making an access agreement. He could do this by endeavouring to facilitate only his requirements. Section 16 requires the use of reasonable endeavours to meet the requirements of a proponent who has complied, and whose proposals comply, with the Code. An access proposing entity who is negotiating outside the Code will not have the benefits of section 13 and section 16. This is clear by virtue of section 4A. If the access proposing entity complies with the Code and makes proposals complying with the Code then he is clearly negotiating within the Code and is constrained by the prescriptions and parameters of the Code: CPA clause 6(4)(a)-(c) principles are not complied with. This is an instance where the use of section 4A cannot be selective. If the NCC concludes that section 4A assists in satisfying the requirements of CPA clause 6(4)(a)-(c) then it must be the case that the railway owner and access seeking entity are negotiating outside the Code and sections 13 and 16 have no application. The railway owner has no obligation to provide any of the information which remedies the information asymmetry, or to comply with any of the requirements that constrain monopoly power.

Access Need Not Be On Exactly The Same Terms

6.9 Section 37 of the Code, upon which the NCC bases its conclusion on this issue, indicates that an access agreement must comply with the Code. Other than that, it need not contain the same provisions as another access agreement. RHI submits that the Code contains

provisions which ensure that to a material and sufficient extent access will be on exactly the same terms. Section 4A can have no application if the access agreement complies with the Code so is irrelevant to this consideration. The Code requirements in relation to access agreements include:

(a) that the railway owner must have a standard access agreement which it can provide (sections 6 and 7A of the Code);

(b) access agreements must deal with in detail the matters outlined in Schedule 3 (section 17(1)(a) of the Code);

(c) the access agreement must provide for the matters set out in Schedule 4 (section 17(1)(b) of the Code); and

(d) the railway owner must at all time comply with the Part 5 instruments (section 40(2) of the Code).

RHI submits that these provisions, read sensibly, will result in access agreements for the same service made under and in accordance with the WA Rail Access Regime being on exactly the same terms so far as all, or most of, the core issues relating to access and pricing are concerned. This is reinforced by the fact that the arbitrator under clause 29 is compelled to apply the Act, the Code and all of the "matters determined by the Regulator". The Code requires the asset valuation methodology to be the gross replacement value. The other requirements of Schedule 4 require costing principles and prices to be determined for route sections and for undefined periods. The matters determined by the Regulator include the WACC and the costs under clause 9 or clause 10(3) of Schedule 4. In paragraph 8.24 of the draft recommendation the NCC notes that the access agreements must make provisions for the resolution of disputes. This is one of many elements of the access and pricing arrangements which are extremely likely to be on the same terms and conditions under the WA Rail Access Regime. Generally RHI submits that the WA Rail Access Regime does not offer the flexibility for railway owners and access seeking entities to negotiate and agree the terms and conditions of an access agreement within a reasonably accommodating framework that is contemplated by CPA clause 6(4)(f). The entirely in or entirely out concept of Section 4A does not assist this position.

Dispute Resolution

6.10 CPA clause 6(4)(i) sets out a number of criteria which the dispute resolution body should take into account. As we have previously pointed out, section 29 of the Code requires the arbitrator to apply the Act and the Code and the matters determined by the Regulator. It is only in certain situations identified in sections 25(2)(a) and (c) that the arbitrator is to apply the provisions of CPA clauses 6(4)(i), (j) and (l) of the CPA. These situations are limited to a refusal to negotiate and a failure to agree an access agreement; they do not extend, for example, to a disagreement about a matter determined by the Regulator. There is no guidance in section 29 as to whether the Act, the Code and the matters determined by the Regulator prevail over CPA clauses 6(4)(i), (j) and (l) in the event of any inconsistency. If the arbitrator's obligation is to apply the Act, the Code and the matters determined by the Regulator then there is every likelihood that the WA Rail Access Regime does not comply with CPA clause 6(4)(i). The matters under the Act, the Code and matters determined by the Regulator create a prescriptive regime. The arbitrator must apply the specified valuation methodology, the gross replacement value, and must apply the WACC determined by the ERA. He must also apply operating costs determined by the ERA under paragraphs 9 or 10(3) of Schedule 4. These matters as prescribed by the WA Access Regime may or may not reflect the owner's legitimate business interests and investment in the facility, and the costs to the owner of providing access in any particular situation of a particular railway. However CPA clause 6(4)(i) requires the dispute resolution body to take these actual things for the particular railway and railway owner into account in context, not proxies for them determined by, or under, the WA Rail Access Regime. The CPA requirement cannot be regarded by the NCC as being met in every situation, or even an estimable number of situations.

6.11 RHI submits that the WA Rail Access Regime prevents the arbitrator from applying certain key elements of CPA clause 6(4)(i). These key elements are in fact the elements which reflect the objectives of Part IIIA and the CPA; i.e. the economically efficient investment in, and operation of, infrastructure facilities.

Hindering Access

6.12 The WA Government and the NCC refer to section 34A of the Act and section 16 of the Code in relation to the prohibition on hindering access. Section 34A(3) provides that the prohibitions on hindering or preventing access do not apply to conduct that the railway owner or an access proposing entity is entitled to engaged in under the Act or the Code, or some other written law. The railway owner and the access seeking entity are entitled to ignore the Code altogether under section 4A of the Code unless they otherwise agree. Accordingly unless they otherwise agree, each of section 34A of the Act and section 16 of the Code have no application. This is one of many instances where the general application of section 4A to exclude compliance with the Code is confusing and unworkable.

Separate Accounting

6.13 This provision of the CPA requires only that separate accounting arrangements should be required for the elements of a business which are covered by the access regime. The requirements of the WA Rail Access Regime go well beyond the requirements of the CPA. Part IIIA and the CPA of course allow provisions additional to the requirements of Part IIIA and the CPA to be included in effective access regimes, but provisions additional to those requirements must not be inconsistent with those requirements. RHI agrees with and endorses the previous submissions made by BHP Billiton Iron Ore to the NCC on this requirement. The additional requirements of the WA Rail Access Regime in this respect are unnecessary and will result in administration and compliance costs which are in the themselves inefficient.

7. The Dispute Resolution Procedure: CPA clauses 6(4)(a)-(c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c) - Section 8 of the Draft Recommendation

Dispute Resolution

7.1 RHI submits that the WA Rail Access Regime does not satisfy the requirements of CPA clauses 6(4)(a)-(c) for the reasons previously addressed in this submission. The statement by the NCC in paragraph 8.17 of the draft recommendation that apart from the Act, the Code and the matters determined by the Regulator there are no other restrictions placed on the arbitrator by either the Act or the Code is not illuminating. The matters that the arbitrator must apply deriving from the Act, the Code and the matters determined by the Regulator are numerous, prescriptive, are at the heart of the WA Rail Access Regime and place significant restrictions on the arbitrator. As mentioned in paragraph 6.11 of this submission, these matters go to the economic efficiency of the investment in and operation of railway networks and railway lines, particularly the investment in new railway lines, and are inconsistent with the fundamental objective of Part IIIA.

7.2 RHI also points out that under section 29 of the Code the arbitrator is only required to have regard to CPA clauses 6(4)(i), (j) and (l) in the circumstances set out in section 25(2)(a) or (c). These situations are limited to a failure to negotiate or a failure to agree on an access agreement. If an access proposing entity does not agree with the outcome of a prescriptive provision of the Code (such as the mandatory application of the gross replacement value) or any of the matters pre-determined by the Regulator (such as the WACC), the arbitrator has no jurisdiction to resolve that dispute. This is not independent dispute resolution.

Material Change in Circumstances

7.3 The NCC appears to base its decision for considering that the WA Rail Access Regime complies with the requirement of CPA clause 6(4)(k) on the requirement in Schedule 3 that an access agreement must provide for variation and termination. The NCC concludes that the

parties will provide for the variation or termination of an access agreement to respond to a change in circumstances. In fact RHI considers that the contrary is likely to be the case. The parties are likely to vary or terminate an access agreement because of default, insolvency, prolonged force majeure and perhaps some particular anticipated change in circumstances such as the introduction of a carbon tax or a change in the tax regime. There is no basis upon which to conclude that the parties will include a general change in circumstances as the trigger for a variation or termination of an access agreement. It is hard to discern a basis on which CPA clause 6(4)(k) is complied with.

Merits Review of Arbitration Determination

7.4 RHI submits that a judicial review, as is provided in the CAA, from an arbitrator's award, is not a merits review and in no sense can the WA Rail Access Regime be said to include a merits review. However, as it is not a requirement of Part IIIA or the CPA that an effective access regime contain a merits review RHI makes no further comment on this issue.

8. Efficiency Promoting Terms and Conditions – Part 9 of the Draft Recommendation

8.1 As we have previously pointed out, the objective of the WA Rail Access Regime set out in section 2A of the Act, indicates that the only market to which the Regime is directed is the contestable market for rail operations. That market is the market for the services provide by the facilities and not what Part IIIA and the CPA regard as upstream and downstream markets.

8.2 RHI submits that the WA Rail Access Regime does not contain a complying objects statement as is required by CPA clause 6(5)(a).

8.3 RHI has also previously explained that the upstream markets and the downstream markets of the different, discrete, stand alone railway networks and railway lines covered by the WA Rail Access Regime are in many cases fundamentally different. The NCC has provided no analysis of whether, and if so why, access to the services provide by means of the railways covered by the WA Rail Access Regime is necessary to permit competition in those separate and different upstream and downstream markets, or that such access will increase competition in those markets.

8.4 RHI submits that the conclusions reached by the NCC in paragraphs 9.12 – 9.15 of the draft recommendation are not supported. The relevant provisions of the WA Rail Access Regime are inconsistent with the requirements of Part IIIA and the CPA, for the reasons already explained in this submission.

8.5 The discussion by the NCC in paragraphs 9.17 to 9.26 of the draft recommendation highlights a significant departure of the WA Rail Access Regime from the requirements of Part IIIA of the CPA because of its prescriptive nature. The WA Rail Access Regime requires the gross replacement value valuation methodology to be adopted in all circumstances. It requires the WACC determined by the Regulator for the relevant route to be applied in all circumstances. The nature of infrastructure assets is that these prescriptive requirements will not produce an efficient outcome in all circumstances, and possibly in many circumstances. There is no permission for the incorporating of future stay in business capital expenditure over a defined regulatory reset period. This does not encourage investment in rail infrastructure, efficient or otherwise. A much less prescriptive approach would allow an efficient result in all cases and all circumstances.

8.6 The NCC has to assess whether the WA Rail Access Regime as enacted now complies with the requirements of Part IIIA and the CPA. The NCC does not have a watching brief under Part IIIA to examine whether the commitment to these prescriptive elements of the WA Rail Access Regime in the future is resulting in inefficient access pricing or is generating an unreasonable number of disputes. Nor can the NCC wait and see whether the prescriptive elements of the WA Rail Access Regime is preventing or hindering efficient investment in railway infrastructure. If the NCC considers that these are possible outcomes, because of the prescriptive nature of the WA Rail Access Regime, it should not recommend certification of the WA Rail Access Regime as an effective access regime.

9. Objects of Part IIIA - Part 10 of the Draft Recommendation

9.1 RHI submits that the NCC's acknowledgement in paragraph 10.7 of the draft recommendation is without foundation. For the reasons already discussed in paragraph 2.8 of this submission; the stated objective of the WA Rail Access Regime does not reflect the objects of Part IIIA.

Pilbara specific considerations

9.2 There is another dimension to the issue of whether the WA Rail Access Regime satisfies the objects of Part IIIA. This dimension is the issue of the economic and operational efficiency of railways in the Pilbara. The relevant objects of Part IIIA are to promote the economically efficient operation of, use and investment in the infrastructure by which services are provided thereby promoting effective competition in upstream and downstream markets. RHI refers to BHPBIO's submissions to the NCC in this respect. The most efficient operation of, use and investment in railway infrastructure in the Pilbara for the transport of base metals ore is a vertically integrated railway integrated with an upstream mining operation and a downstream loading, shipping and transporting operation. The law is that the service provided by means of such a railway line is not part of a production process, however this does not detract from a conclusion that a vertically integrated railway most effectively promotes the economically efficient operation of, use and investment in railway infrastructure for the transport of iron ore in the Pilbara. To accommodate access that promotes further competition in upstream and downstream markets and allows the most economically efficient operation of, use and investment in railway infrastructure in the Pilbara, RHI submits that the services to be provided should be haulage services and not the use of the railway facility.

9.3 Access to the services provided by the use of railway lines is likely to result in the railway owners being kept at the lowest common denomination in terms of the technical characteristics of a new railway line, and in applying technical developments to that railway. Either rail operators have to invest in the technological advancements, or the railway owner is denied the opportunity to take the benefits of the latest and efficient technical advancements. Examples of the type of advancements which would require capital expenditure by railway operators are moves to in cab signalling, virtual block and autonomous operations. These capital expenditure requirements do not arise if the service to be provided is a haulage service. The railway owner undertakes all the enhancements and meets all capital expenditure. The entity accessing the haulage service benefits from the increased efficiencies and pays a capital contribution towards the network improvements or an increased haulage tariff determined in accordance with widely accepted asset valuation and pricing principles.

PRAIC

9.4 Four years ago the WA Government established in a interdepartmental working group and study (the Pilbara Rail Access Interdepartmental Committee) to deal with the issue of third party access and pricing for railway infrastructure in the Pilbara. BHPBIO, RIO and other relevant non-government parties also participated in this working group and study. This exercise resulted in a report to government, and a draft access and pricing regime for railway infrastructure in the Pilbara generally referred to as the PRAIC Regime. The key aspect of PRAIC Regime was that it obliged railway owners to provide access to haulage services rather than access to a service provided by use of the railway. The report and the PRAIC Regime have not been acted on by the WA Government to date.

9.5 In negotiations with the WA Government for the State Agreement, RHI submitted that the WA Rail Access Regime produced inefficient outcomes for a new railway line in the Pilbara constructed for the purposes of transporting iron ore from an inland Pilbara mine to a port. The most efficient service having regard to the requirements of the railway owner and third parties seeking access for the carriage of iron ore was a haulage service. RHI proposed to the State Government that it would offer third parties a haulage service on the Roy Hill Railway based on the PRAIC Regime in terms of the nature of the service to be offered and the role of the ERA as regulator of the regime but with a broad variety of pricing principles and methodologies which would allow the ERA the flexibility to approve the most efficient asset valuation methodology, capital roll in approach and tariff setting approach in each particular

circumstance and also take into account the interests of the railway owner or prospective investor. Other departures from the PRAIC Regime were contemplated by RHI to overcome concerns expressed in this submission where the terms of the PRAIC Regime are identical to the WA Rail Access Regime. These departures were not expected to be of such nature or extent as to fundamentally change the PRAIC Regime (because the PRAIC Regime appears to be drafted with an eye on the requirements of Part IIIA and the principles of the CPA whereas the WA Rail Access Regime does not), but it would not be the same. The WA Government indicated that it did not want to support or endorse the PRAIC Regime in this way at that time, as it had not yet responded to the report. However, the WA Government agreed that RHI should have an opportunity of having a haulage service regime accepted by the ACCC as an access undertaking under Part IIIA as an alternative to the WA Rail Access Regime applying. Under the express terms of the State Agreement, RHI has until the commissioning of the Roy Hill railway to have such an access undertaking accepted by the ACCC, in which case the WA Rail Access Regime will not apply to it.

9.6 RHI submits that the WA Rail Access Regime is an inappropriate regime to apply to new railway lines. The Regime was designed to apply to existing government railways, some of which have been in operation for a long time, even in a railway context. Key elements prescribed by the Regime relating to the pricing of tariffs for the service will not result in economically efficient investment in railway lines, or any investment. Additionally, and equally importantly, the application of the Regime to railways in the Pilbara constructed and operated to transport iron ore results in the offering only of a service which prevents or hinders the efficient operation of the railway lines.