



Government of Western Australia
Department of Treasury

Review of the Western Australian Rail Access Regime

Draft Decision Paper



Contents

| | |
|--|-----------|
| Executive Summary | 1 |
| 1. Purpose and scope of this paper | 5 |
| 1.1. Purpose | 5 |
| 1.2. Application of the Regime | 5 |
| 1.3. Review process so far..... | 6 |
| 1.4. Next steps | 6 |
| 2. Asset valuation..... | 7 |
| 2.1. Problem | 7 |
| 2.2. Options considered..... | 8 |
| 2.3. Assessment and draft recommendation | 8 |
| 2.3.1. Status quo - GRV..... | 8 |
| 2.3.2. Building block with DORC..... | 10 |
| 2.3.3. Transitional arrangements for change in asset valuation..... | 18 |
| 2.3.4. Building block with a 'line in the sand' valuation..... | 22 |
| 3. Pricing guidance | 24 |
| 3.1. Problem | 24 |
| 3.2. Options considered..... | 24 |
| 3.3. Assessment and draft recommendation | 24 |
| 3.3.1. Status quo..... | 24 |
| 3.3.2. Indicative tariffs..... | 25 |
| 3.3.3. Standing offer | 27 |
| 3.3.4. Competitive imputation pricing | 28 |
| 3.3.5. Guidance on allowable price changes..... | 30 |
| 4. Quantification of costs and benefits | 32 |
| 4.1. Assumptions..... | 32 |
| 4.2. Results | 34 |
| 5. Ability to opt out..... | 35 |
| 5.1. Problem | 35 |
| 5.2. Options considered..... | 35 |
| 5.3. Assessment and draft recommendations | 35 |
| 5.3.1. Requiring unfair discrimination provisions to include consideration of agreements made outside of the Code..... | 35 |
| 5.3.2. Applying Part 5 instruments to agreements outside the Code | 37 |
| 5.3.3. Fast track negotiation | 37 |

| | |
|--|-----------|
| 6. Capacity extensions and expansions | 39 |
| 6.1. Problem | 39 |
| 6.2. Options considered | 39 |
| 6.3. Assessment and draft recommendations | 40 |
| 6.3.1. Amending the current process | 40 |
| 6.3.2. High level guidance | 42 |
| 6.3.3. A more detailed process | 43 |
| 7. Efficiency of the regulatory process | 45 |
| 7.1. Problem | 45 |
| 7.2. Options considered | 45 |
| 7.3. Assessment and draft recommendations | 45 |
| 7.3.1. Preventing frivolous access requests | 45 |
| 7.3.2. Improving timeframes in the Code | 46 |
| 7.3.3. Publishing standard information package and regulator approved access agreement | 48 |
| 7.3.4. Standardise access seeker obligations | 50 |
| 7.3.5. Consistent consultation on Part 5 instruments | 52 |
| 7.3.6. Model set of Part 5 instruments | 53 |
| 7.3.7. Allow arbitrator to make interim order on access arrangements | 54 |
| 7.3.8. Confidentiality of information submitted to the regulator | 55 |
| 8. Railway owner accountability | 57 |
| 8.1. Problem | 57 |
| 8.2. Options considered | 57 |
| 8.3. Assessment and draft recommendations | 57 |
| 8.3.1. Regular and consistent reporting on compliance with Part 5 instruments | 57 |
| 8.3.2. Reporting on outcomes of access negotiations | 58 |
| 8.3.3. Reporting on service quality indicators | 59 |
| 9. Regulator Accountability | 61 |
| 9.1. Problem | 61 |
| 9.2. Options considered | 61 |
| 9.3. Assessment and draft recommendations | 61 |
| 9.3.1. Merits review for all regulatory decisions | 61 |
| 9.3.2. Merits review for certain decisions | 63 |
| 9.3.3. Up front direction and expert advice | 64 |
| 10. Marginal freight routes | 66 |
| 10.1. Problem | 66 |
| 10.2. Options considered | 66 |
| 10.3. Assessment and draft recommendation | 66 |
| 10.3.1. Removing lines from coverage (or providing a mechanism to do so) | 66 |
| 10.3.2. Providing guidance | 67 |

| | |
|--|-----------|
| 11. Greenfield developments | 69 |
| 11.1. Problem | 69 |
| 11.2. Options considered | 69 |
| 11.3. Assessment and draft recommendation | 69 |
| 11.3.1. Relief from Code obligations | 69 |
| 11.3.2. Differential treatment of foundation customers..... | 70 |
| 12. Vertically integrated networks in the Pilbara | 72 |
| 12.1. Problem | 72 |
| 12.2. Options considered | 72 |
| 12.3. Assessment and draft recommendation | 72 |
| 12.3.1. Developing a haulage regime..... | 72 |
| 13. Consistency with National Access Regime..... | 74 |
| 13.1. Problem | 74 |
| 13.2. Options considered | 74 |
| 13.3. Assessment and draft recommendation | 74 |
| 13.3.1. Implementing regulations consistent with the ARTC interstate undertaking | 74 |
| 13.3.2. Improving the Regime to more closely align to a typical undertaking under the ACCC..... | 75 |
| 13.3.3. Aligning the declaration criteria in the Act with the declaration criteria in the National Access Regime..... | 76 |
| Appendix 1 – Access proposal map..... | 78 |
| Appendix 2 – ERA recommendations that will be implemented | 79 |
| Appendix 3 – Assumptions for asset valuation graphs | 81 |
| Appendix 4 – Quantification of costs and benefits..... | 83 |

Executive Summary

Importance of an effective access Regime

Whether its minerals or grains, getting product from remote areas of Western Australia to market in a timely and cost effective manner is important to ensure that Australian industry remains competitive in the global economy. With Western Australia facing ever increasing competition in our key export industries, it is important that the cost structures through the supply chain, including rail access charges, terms and conditions, are as efficient and fair as possible.

An effective access regime is important for users and potential users of railways, whose business depends on rail freight, and for railway owners, who have made significant investments in infrastructure and reasonably expect to make a fair return on those assets.

Objectives of the Regime and the review

The WA Rail Access Regime (the Regime) is made up of the *Railways (Access) Act 1998* (the Act) and the Railways Access Code 2000 (the Code). The object 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 Department of Treasury considers this to mean that the Regime should result in efficient access prices that reflect what would be achieved in a competitive market for rail facilities, allowing for an appropriate return on investment for railway owners.

The Department of Treasury also considers it important that the Regime enables access seekers and railway owners to arrive at a commercially negotiated agreement that reflects the terms, conditions and risks specific to their access arrangements. At the same time, the Regime should maximise the efficiency of the regulatory process, so that railway owners, access seekers and the Regulator spend as little time and money as necessary in applying the Regime.

The Department of Treasury has considered the circumstances that parties are in when they choose to use the Regime, which is usually when a commercial agreement cannot be reached outside of the regulatory framework. With this in mind, it is important to provide a reasonable level of guidance and structure to negotiations to allow them to proceed on a fair and timely basis.

The Department of Treasury has carried out this review in close consultation with industry stakeholders. As well as seeking submissions on an Issues Paper in 2017, the Department of Treasury has held several workshops with railway owners and access seekers in Western Australia and interstate, and liaised closely with the Department of Transport, Department of Jobs, Tourism, Science and Innovation and the Economic Regulation Authority. These consultations have informed the strengths and weaknesses summarised below and the draft recommendations put forward in this paper.

Current strengths of the Rail Access Regime

There are a number of strengths of the Regime that have been identified. These include:

- **Emphasis on commercial negotiation:** the Regime focuses on allowing commercial negotiation between parties based on the unique terms, conditions and risks of each access agreement.
- **Flexibility:** the Regime suits the diverse range of railways and freight tasks in Western Australia.
- **Low regulatory burden:** the Regime imposes little regulatory burden as requirements such as an asset valuation are only required as and when an access proposal is made.

What are the issues that have been identified?

Despite several strengths, there are a number of weaknesses with the Regime which mean it is not providing an effective regulatory backstop for commercial negotiations. These include:

- **Not being seen by access seekers as a viable alternative when commercial negotiations fail:** access seekers do not see the Code as providing enough structure and guidance to be a realistic backstop to negotiations.
- **Inefficient and lengthy processes:** negotiating access under the Code takes an unnecessarily long amount of time.
- **Uncertainty about requirements:** ambiguity means that the Code presents opportunities to game the negotiation process or go to court to dispute whether certain provisions have been met.
- **Uncertainty about negotiation outcomes:** both access seekers and railway owners have submitted that negotiating under the Code is unattractive due to the uncertainty about what an arbitrated outcome would look like.
- **Unsuitability of light touch regulation:** light touch regulation does not work well when parties are already in a position where they cannot reach a commercially negotiated agreement.
- **Insufficient protections for railway owners:** railway owners are not protected from having to spend time and money on frivolous access requests.
- **Inefficient pricing guidance for negotiations:** the asset valuation methodology and the resulting floor and ceiling do not necessarily ensure that railways owners cover their incremental costs, or prevent them from earning monopoly profits. These unrealistic price limits hinder the efficacy of negotiations.

How to make a submission

The Department of Treasury is seeking feedback on how the recommendations put forward can be improved, or advice on any unintended consequences that have not been covered.

The Department of Treasury intends to publish submissions received. Submissions that are made in confidence must be clearly marked **IN CONFIDENCE** (within the document).

Stakeholders should provide comments in Microsoft Word file or PDF files. The closing date for feedback is 25 February 2019.

Feedback can be provided

by email: regulatoryreform@treasury.wa.gov.au

by post: Clara Cuevas
Manager, Regulatory Reform
Department of Treasury
Locked Bag 11, Cloisters Square
Perth Western Australia 6850

Draft recommendations

Having considered stakeholder feedback on how the problems of the Regime can best be addressed, The Department of Treasury has developed the draft recommendations summarised in the table below.

The Department of Treasury considers that these recommendations will strengthen the Regime, while at the same time improving its flexibility in effectively working for Western Australia's diverse railways. It will also make negotiating access agreements more timely, efficient and transparent. The Department of Treasury has commissioned a preliminary cost benefit analysis on the proposed changes to the pricing mechanism and pricing guidance (draft recommendations 1 - 3) which indicates that the changes would provide a net benefit of at least \$24.4 million over 20 years. This is primarily due to allowing projects that rely on rail access to begin operations earlier, and to reducing negotiation costs (see Appendix 4 for the full cost benefit analysis).

| Issue | Draft Recommendation | |
|---|----------------------|--|
| Pricing mechanisms | 1A | Change the asset valuation methodology to a building block based on an initial DORC valuation and align the floor and ceiling cost calculations with the DORC method. |
| | 1B | Allow for flexibility in the assessment of historical depreciation to manage transitional impacts on existing railway owners. |
| | 2 | Require railway owners to publish a standing offer for defined rail tasks when required by the ERA. |
| | 3 | Introduce a competitive imputation pricing principle as a part of the pricing principles set out in Clause 13, Schedule 4 of the Code. |
| Ability to opt out | 4 | Extend the requirement in s.16(1)(b) of the Code to not unfairly discriminate between proponents to access agreements made outside the Code. |
| | 5 | Allow access seekers who have begun negotiations outside the Code to fast-track the process to arbitration under the Code. |
| Capacity extensions and expansions | 6A | Make both parties responsible for assessing whether an expansion is required to facilitate an access request when a proposal for access is made. |
| | 6B | Place responsibility on the railway owner for demonstrating if an extension or expansion is technically feasible. |
| | 6C | Remove requirement to demonstrate technical feasibility as a pre-requisite to beginning negotiations and clarify that a request for an extension or expansion can be made at any time during negotiations if necessary to facilitate the access request. |
| Improve efficiency of the regulatory process | 7 | Insert a provision to allow a railway owner to refer an access request to the arbitrator if they can establish a prima facie case that it is frivolous. |
| | 8 | Insert timeframes for obligations under the Code where these do not already exist. |
| | 9A | Require the ERA to approve a standard access agreement for each railway owner and for this agreement, along with other relevant information to be published on a railway owner's website, instead of in hard copy format. |
| | 9B | Implement Recommendation 8 from the 2015 ERA review, to reduce the prescribed time limit for updating this information from two years to one year. |
| | 10 | Standardise section 8 and 14 requirements. |
| | 11 | Standardise consultation across Part 5 instruments. |
| | 12 | Require the ERA to develop and maintain a model set of Part 5 instruments |
| | 13 | Provide for an arbitrator to make an interim order on access prices, terms and conditions if parties have an agreement under the Code that is expiring and are renegotiating under the Code. |
| Railway owner accountability | 14 | Include requirements to publish service quality indicators. |
| Regulator accountability | 15 | Improve up front guidance for the regulator and require additional expert advice to inform decision making where appropriate. |
| Greenfield developments | 16 | Amend the Code to explicitly allow for differential treatment of foundation customers as a form of 'fair' discrimination. |

1. Purpose and scope of this paper

1.1. Purpose

The Department of Treasury (the Department) has been reviewing the Western Australian Rail Access Regime to consider how it should be improved so as to better achieve its objective of encouraging the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations. This paper presents draft recommendations for improving the Regime and discusses the options that the Department considered in arriving at these draft recommendations.

In considering how the Regime can better achieve its objective, the Department has developed underlying goals that target that broader objective. These are as follows.

- A successful negotiation within the Regime should result in efficient access prices that reflect what would be achieved in a competitive market for rail facilities, allowing for an appropriate return on investment for railway owners.
- The Regime should enable access seekers and railway owners to arrive at a commercially negotiated agreement that reflects the terms, conditions and risks specific to their access arrangements.
- The Regime should maximise the efficiency of the regulatory process, aiming to reduce the net cost of the Regime by reducing the time and money that railway owners, access seekers and the Regulator spend in applying the Regime.

In addition to these goals, the Department has also considered whether any of the proposed changes to the Regime could affect the likelihood that the Regime will be re-certified as an 'effective' access Regime by the Commonwealth Treasurer in accordance with the 1995 Competition Principles Agreement. Although the Regime was certified from 2011 to 2016, this certification expired. The Government will consider applying for re-certification once this review of the Regime is complete.

1.2. Application of the Regime

The Western Australian Rail Access Regime is established by the *Railways (Access) Act 1998* (the Act) and the Railways (Access) Code 2000 (the Code). The object 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." It does this by:

- providing for the establishment of a Code governing the use of certain facilities for rail operations by persons other than their owners;
- conferring on the Economic Regulation Authority monitoring, enforcement and administrative functions for implementing the Code; and
- specifying the kind of arrangements that railway owners are to have in place for the purposes of that implementation.

The Code must give effect to the Competition Principles Agreement (CPA) in respect of the railways to which the Code applies, and must prescribe which parts of the railway network and associated railway infrastructure are to be made available for use by parties other than the railway owner. Agreements for access under the Code can be reached through negotiation between a railway owner and an access seeker or through a determination by an arbitrator in the event of an access dispute. The Code must also set out the required content

of such agreements or determinations and the rights, powers and duties that apply through the negotiation and implementation processes.

A diagram of the current regulatory process under the Code is provided at Appendix 1.

The Regime covers the rail networks that are specified in Schedule 1 to the Code, which currently includes:

- Arc Infrastructure's freight network;
- The urban network; and
- The Pilbara Infrastructure's (TPI) network.

Roy Hill's Pilbara railway is also covered by the Regime pursuant to the *Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010*.

The Regime does not cover the heavy haul Pilbara railways owned by BHP Billiton Iron Ore and Rio Tinto Iron Ore.

1.3. Review process so far

The Economic Regulation Authority (ERA) is required to review the Code every five years, 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. The ERA completed reviews in 2005, 2011 and 2015. While changes were made to the Code in response to the 2005 review, no changes have been made in response to the 2011 and 2015 reviews.

The Department's review of the Regime has considered the recommendations of these previous ERA reviews, while also covering a broader range of issues.

In July 2017, the Department released an Issues Paper to canvass stakeholder views on the problems that had been identified with the Regime and some options for addressing them. In November 2017 the Department received 14 public submissions in response to this review, which are available on the Department's website. Since then the Department has been meeting with stakeholders to understand their views in more detail and has held several workshops to discuss options for improving the Regime. The Department has also consulted with the Department of Transport, the Department of Jobs, Tourism, Science and Innovation and the ERA. The information provided by stakeholders during this review has been vital to developing the draft recommendations that are presented in this paper.

1.4. Next steps

The Department welcomes further feedback on the draft recommendations presented in this paper by 25 February 2019 (please see page 2 for details on how to make a submission). The Department would also welcome meeting with interested parties to discuss their views.

Following consultation, the Department will amend the draft recommendations as needed and present final recommendations to the Government for approval. The Department plans to deliver its final recommendations in early 2019. Once the Government has decided what changes should be made to the Regime, the Department will then begin the process of progressing legislative change.

If agreed by the Government, it is also proposed that an application for re-certifying the Regime as an 'effective' access regime under the Competition Principles Agreement will be made once changes to the Regime are in place.

2. Asset valuation

2.1. Problem

The Regime provides for the railway owner and the access seeker to negotiate on an access price within floor and ceiling limits. The purpose of the floor and ceiling limit is to ensure prices are within the bounds of what can be considered economically efficient – that is, the ceiling seeks to prevent monopoly profits and the floor seeks to ensure the railway owner recovers its marginal costs. The use of a floor and ceiling to determine minimum and maximum access prices is similar to arrangements under other Australian access regimes. However, most other rail access regimes are more prescriptive about how prices should be set between these limits, and the Western Australian Regime is unique in its use of a gross replacement value methodology (GRV) as the basis for asset valuation that informs the floor and ceiling.

While some stakeholders have commented that the current asset valuation approach is suitable for achieving the objectives of the Regime, others have raised concerns that the current asset valuation methodology often does not reflect the costs that are incurred by railway owners and provides railway owners with an opportunity to earn monopoly profits.

The Department considers that while the GRV methodology is likely to prevent duplication of infrastructure, it does not prevent prices from exceeding the efficient cost of providing access to the infrastructure (including a competitive return on investment). This means the GRV methodology does not target the objective of the Regime to ensure access prices reflect what would be achieved in a competitive market for rail facilities.

Stakeholders have also commented that the floor and ceiling obtained under the GRV approach do not provide realistic guidance for negotiations and lead to uncertainty about the likely access price. This is because the GRV methodology assumes assets are in ‘as new’ condition and as such the capital costs assigned under GRV do not reflect the asset’s current condition or the economic value a user may expect to extract from the asset. The assumption of ‘as new’ condition also means that the operating costs used in the floor and ceiling limits may bear little resemblance to the actual costs the access provider incurs given the age and condition of the assets.

The current GRV pricing approach is particularly not well suited to facilitating access for older freight routes as in these cases the actual costs incurred depart more markedly from the floor and ceiling limits calculated under a GRV approach. The ceiling costs do not reflect actual costs primarily because they do not account for changes in the return on asset or depreciation as the asset ages. The floor costs do not reflect actual costs because they do not account for increasing operating and maintenance costs as the asset ages, meaning they may be lower than appropriate. This means that negotiation within the Regime for access to marginal freight routes is likely to be more difficult than for routes that are in better condition.

The current methodology is also not well suited for negotiations that involve an extension or expansion and may not provide adequate incentives for efficient investment. Under the current approach, the total cost is calculated prior to the expansion or extension, and then the cost of the expansion/extension is negotiated separately. Any future valuation of the asset will reflect the expanded asset, however, this will not necessarily reflect the actual cost of the extension or expansion. This is because the asset will be valued as a whole and assuming it is entirely a new asset, while in reality, the extension or expansion may have

been applied to an older asset and therefore may have been more costly than reflected in the regulatory value.

Additionally, the National Competition Council (NCC) raised some concerns with the GRV methodology when they assessed the Regime for certification as an ‘effective’ regime in 2010.¹ While GRV was not deemed to preclude certification, the NCC did have some concerns about the inconsistency between the asset valuation methodology in Western Australia compared to other jurisdictions.

2.2. Options considered

The Department considered three options for the asset valuation methodology:

- Status quo – GRV;
- Building block methodology with an initial depreciated optimised replacement cost (DORC) valuation; and
- Building block methodology with an initial ‘line in the sand’ valuation.

2.3. Assessment and draft recommendation

2.3.1. Status quo – GRV

The GRV approach sets the whole of life average annual capital cost as if the infrastructure service was provided by assets that would be used if the network was constructed today, with operating and maintenance costs also set on this assumption.

In applying this methodology, the assets are valued as the gross replacement value of the Modern Equivalent Asset (MEA) (or other replacement value basis as the regulator considers appropriate) at the time an access proposal under the Code is made. It is not revalued until a new access proposal is made, unless the regulator considers there has been, or may be, a material change from the circumstances that existed at the time the original determination was made.

The ceiling price for a route based on the GRV methodology is calculated as the sum of:

- capital costs, which are calculated as an annuity where:
 - the ‘principal’ is the gross replacement value of the assets;
 - the ‘interest rate’ is the weighted average cost of capital, expressed in real terms; and
 - the ‘term’ is the expected useful life of the assets (economic life), as set out in the railway owner’s costing principles
- operating costs, including maintenance costs and other operating costs, which are estimated on an average whole-of-life basis.

¹ National Competition Council, *Western Australian Rail Access Regime – Application for Certification as an Effective Regime – Final Recommendation*, paragraphs 9.21 – 9.31, 13 December 2010. Available at: <http://ncc.gov.au/images/uploads/CERaWAFR-001.pdf> [accessed 8 October 2018]

The floor price is assessed as the unavoidable component of the operating and maintenance costs on a route, where operating and maintenance costs are also assessed on a whole-of-life basis.

Assessment

As discussed above and summarised in Table 1, the GRV methodology does not adequately achieve the objectives of the Regime and does not provide effective guidance for negotiations, particularly where older lines are concerned.

The Department considered whether the GRV methodology could be modified to address the issues that have been identified, but found that a DORC methodology offers a more feasible way to address these issues (discussed further in section 2.3.2). The Department found that it was difficult to amend the GRV approach to adequately account for the condition of the railway in the asset valuation, and subsequently more closely reflect the railway owner's actual costs in the floor and ceiling, without arriving at an asset valuation and floor and ceiling methodology similar to a DORC.

Table 1: Summary of costs and benefits: Gross Replacement Value methodology

| Benefits | Costs |
|--|---|
| Low level of regulatory and compliance burden for the access seeker and the regulator, as a valuation is only done when an access proposal is made, and information about the GRV of a railway is relatively simple to obtain. | The ceiling does not necessarily reflect the asset's current condition or the economic value a user may expect to extract from an asset, and therefore allows for monopoly profits in some instances. This can compromise efficacy of negotiations where the ceiling does not reflect what could be achieved in a competitive market for rail facilities. |
| The ceiling represents the bypass cost and it therefore prevents inefficient duplication of infrastructure. | The floor price may not cover real operating and maintenance costs for lines that are nearing the end of their useful life, and is therefore not an economically efficient cost and does not assist negotiations, particularly for older lines that have not been well maintained. |
| Wide range between floor and ceiling price provides a high degree of flexibility for commercial negotiation. | Uncertainty about the ceiling over time (because it is re-assessed based on the current value of modern equivalent infrastructure when a proposal is made) can introduce uncertainty for when an agreement has to be re-negotiated or when a potential access seeker is considering a future access application. |
| | Where an asset is expanded, the actual expansion costs may be significantly higher than the resulting increase in GRV. This may constrain an infrastructure provider from recovering the full expansion costs in access charges, which may discourage investment. |

| Benefits | Costs |
|----------|--|
| | Where access negotiations fail to achieve an outcome, the floor and ceiling prices do not necessarily provide useful guidance to the arbitrator. |
| | The GRV approach is not consistent with other access regimes and may create additional regulatory burden for parties operating across jurisdictions. |

Draft recommendation

The Department considers that the costs of the GRV methodology substantially outweigh its benefits and as such, does not recommend retaining the GRV methodology.

2.3.2. Building block with DORC

In its 2015 review of the Regime, the ERA recommended amending the asset valuation methodology to explicitly include depreciation in the opening value of the asset, in the form of an 'established asset base'.

Most other Australian rail access regimes or undertakings use a depreciated optimised replacement cost (DORC) method for calculating depreciated asset values. In these regimes, the DORC value is used as the basis for a building block calculation of allowable revenue, which includes recovery of operating costs, as well as return on and of capital.

Under this approach, a regulatory asset base established using the DORC method would be used as an input into developing the floor and ceiling costs for each segment of the network as follows.

Total cost

The total cost (i.e. the upper revenue limit) would be calculated for each year of an access proposal (and each route relevant to the access proposal) and would include:

- Annual capital costs, which would be based on the forecast regulatory asset base (RAB) for each year and which would be calculated as:
 - asset depreciation; plus
 - return on assets, assessed using the weighted average cost of capital; less
 - asset appreciation
- Annual operating costs, including:
 - maintenance costs, estimated as the efficient cost of maintaining the asset given its actual age and condition;
 - other operating costs; and
 - tax costs.

Incremental costs

The incremental cost would be calculated for each year of an access proposal and would be set with reference to the forecast incremental cost of continuing to provide the asset over the required term of access, including the annual avoidable elements of:

- the capital costs, being those that are attributable to avoidable asset renewal and asset expansion; and
- the operating and maintenance costs

that are used to determine the total cost.

Assessment

Compared with the status quo, the DORC methodology is more likely to result in access charges that reflect what would be achieved in a competitive market. This is because the ceiling costs will reflect the actual service potential of the railway, while also including a competitive return on investment, and the floor price will include all forward looking costs of providing access to the route, including maintenance costs, major periodic refurbishment and asset renewal.

While the range between the floor and ceiling may reduce, particularly for older lines that have not been maintained in as new condition, this approach will still allow for commercial negotiations between a range of economically efficient prices that reflect the condition and cost of running the asset.

Although the DORC approach will create some additional costs compared to the current approach, the Department considers that these costs are likely to be substantially outweighed by the additional benefits that the DORC approach will provide. As discussed further in section 4, a preliminary cost benefit analysis of the proposed changes to the pricing mechanisms (including implementing DORC, standing offers (section 3.3.3) and competitive imputation pricing (section 3.3.4)) indicates that the changes are estimated to generate a net present value (NPV) benefit of at least \$24 million over 20 years.

The DORC methodology was also assessed in the Independent Pricing and Regulatory Tribunal's (IPART) report 'Aspects of the NSW Access Regime' which examined, amongst other things, the asset valuation methodologies available to value railways. IPART recommended DORC as the most reasonable valuation methodology for setting a maximum allowable revenue of a utility.² In the Productivity Commission's submission to the NCC's review of the Regime, they note this view from IPART, and suggest the NCC encourage an approach in WA that will facilitate greater consistency across jurisdictions.³

Some infrastructure owners expressed concerns about the profile of a declining DORC ceiling not matching the profile of expected access revenue. However, a DORC ceiling will generally only decline (or in the case of existing railways, start lower than the GRV ceiling) where investments are not made in asset renewals as components of the railway reach the

² Independent Pricing and Regulatory Tribunal of New South Wales, *Aspects of the NSW Rail Access Regime*, April 1999. Available at: https://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/ipart_final_report_-_aspects_of_the_nsw_rail_access_regime_-_29_april_1999_pdf_version.pdf

³ Productivity Commission, *Productivity Commission Submission to the NCC's Review of the WA Rail Access Regime*, n.d. Available at: <https://www.pc.gov.au/research/supporting/wa-rail-access/warailaccess.pdf>

end of their useful life. Where there is efficient investment to maintain or extend the life of a railway, this expenditure will be rolled into the RAB or included in the ceiling as part of the operating and maintenance charge (depending on the nature of the expenditure and the construction of the RAB) and this will raise the level of the ceiling to reflect the investment and subsequent improved standard of the railway. If the ceiling has declined due to an asset nearing the end its life and asset renewal not occurring, the Department expects that commercial negotiations would have resulted in a price that reflects the state of that asset in any case.

Concerns have also been raised with the Department about the risk of asset stranding if a depreciation profile for a particular investment is agreed with an access seeker and approved by the ERA, but then the access seeker is unable to carry out the full term of their access agreement. The Department considers that this is a commercial risk that would arise under any valuation methodology, and that negotiations between railway owners and access seekers should address this risk. Under DORC, alternative depreciation profiles (e.g. accelerated depreciation) will be available to address stranding risk, and so offers more opportunities to address this than under GRV.

Some access seekers suggested using depreciated actual historical cost as the basis for establishing the initial depreciated asset base (rather than the depreciated optimised replacement cost). However, the Department considers that while this would ensure that the railway owner is compensated for past investments, it would not fulfill the intent of the Code to derive an economic value for rail assets, and there would be practical difficulties in implementing it. For example, it is possible that past investments may not have been efficiently incurred. However, it is difficult to determine if they would have been deemed efficient at the time and therefore a decision on whether to exclude them in hindsight is challenging.

The Department has also considered the extent to which the DORC approach set out in this section aligns with the ERA's established asset base approach as recommended in their 2015 Code review. In the final report, the implementation of an EAB was not explained in detail, however, the ERA stated:

“a rolled forward asset value, incorporating depreciation, would reflect the written down value of the route rather than the replacement value. The use of a rolled forward capital value for assets within a negotiate-arbitrate regulatory framework would represent a move part-way along the continuum between light and heavy handed approaches. Such an approach allows negotiations to occur, but better reflects the value of the asset in negotiations, by prescribing an upper limit to price negotiations which takes explicit consideration of the depreciation of the asset.”⁴

The Department acknowledges that the ERA, in their recommendation, did not consider the determination of total costs based on an EAB (and incorporating projections of capital expenditure, depreciation and operating amounts) over a fixed period was warranted, as it would involve an unnecessary increase in prescriptiveness. However, the Department considers that in order for the depreciated asset base and actual costs incurred by the railway owner to appropriately inform the negotiating range for a given access proposal, these should be calculated for each route relevant to an access proposal for the period of that access proposal. As detailed later in this section, that does not preclude the use of an annuity

⁴ ERA, Review of the Railways (Access) Code 2000, February 2015, paragraph 128.

approach to smooth depreciation cash flows, as suggested by the ERA when recommending the use of an ‘established asset base’.

Table 2: Summary of costs and benefits: Depreciated Optimised Replacement Cost methodology

| Benefits | Costs |
|--|---|
| The ceiling will more closely reflect the service potential and actual costs incurred by railway owner given the condition of the asset, which should assist negotiations by providing more realistic guidance on the maximum price. | Creates a requirement for a new regulatory process to develop and maintain RAB values across the rail networks. Determining the initial DORC value will be particularly costly. |
| The floor price will include all forward looking costs of providing the route, including maintenance costs (given actual condition), major periodic refurbishment and necessary asset renewal. This is consistent with setting a floor price that constrains clearly inefficient pricing and will assist with negotiations, particularly for older lines that have not been well maintained. | The Costing Principles will have to be amended to align with the DORC method. |
| Avoids uncertainty about future valuations of the ceiling, since the initial RAB under DORC is ‘locked in’ when first calculated and then updated each year to reflect depreciation and efficient investment in the asset. | Provides less flexibility in negotiations than the GRV method by providing a narrower range of possible prices between the floor and ceiling. |
| Presents better investment incentives by including actual expansion costs in cost determinations (including efficient project management costs). | Changing the asset valuation methodology may affect the expected revenue earning opportunity of some existing infrastructure owners, who invested on the basis of the existing regulatory framework. However, this will be mitigated through transitional arrangements. |
| Where access negotiations fail to achieve an outcome, the floor and ceiling prices provide more useful guidance to the arbitrator, as they reflect the condition of the asset. | |
| Offers consistency with other rail access regimes and extensive regulatory precedent to guide the application of the methodology. | |
| A regulatory valuation of the asset will not have to be completed when an access proposal is made, which will expedite the process for an access application to be dealt with. | |

Draft recommendation

In summary, due to the more accurate estimates that this methodology provides regarding the permissible range of economically efficient prices, and the improved investment incentives it presents, the Department considers that the DORC method is the option most likely to achieve the objectives of the Regime and offer net benefits.

Draft recommendation 1A – Change the asset valuation methodology to a DORC method and align the floor and ceiling cost calculations to a building block methodology with an initial DORC valuation.

How this would be implemented

Firstly, a regulatory asset base (RAB) would be calculated for each railway owner (and each route listed in Schedule 1 of the Code) using the DORC methodology. This would be fairly straight forward for new railway assets, and more complicated for existing railway assets, as outlined below. Secondly, a depreciation profile would need to be established (and approved) to allow the RAB to be initially determined and then be rolled forward on an annual basis.

This depreciated asset base would then be used to determine the total and incremental costs that railway owners and access seekers can negotiate between for any given access proposal.

Calculating the RAB – new railway assets

Calculating the initial RAB would be reasonably straight forward for new railway assets (i.e. those that may be built in the future and covered under the Code). Provided they have been built efficiently, the construction cost of the assets would be taken to be the optimised replacement cost. Given the assets are new, there would be no need to assess how depreciated the assets are. Therefore, the construction cost of the railway would be taken as the initial RAB value.

Calculating the RAB - existing railway assets

In order to establish a RAB, the optimised replacement cost and historical accumulated depreciation of segments of the railway would need to be calculated. How a railway is segmented or broken down for the purposes of establishing the RAB would be unique to each railway owner, who would propose a method for approval by the ERA based on the characteristics of their network.

This then requires calculating the efficient cost of replacing existing assets with an optimal mix of modern equivalents. Doing this would be comparable to the current process that is used to determine the gross replacement value (GRV) – it would require the railway owner to assess existing assets, optimise the network to meet current and future expected demand, determine the modern equivalent asset specification that would meet this demand (assuming the existing route and gauge specification are already efficient) and determine the replacement cost for this.

Once that is calculated, the remaining life of the asset would be established and a depreciation profile would be applied. This could be assessed by either:

- measuring the extent of physical asset deterioration from new condition; or
- assessing consumption of economic benefits to date (e.g. using straight line, economic (annuity), units of production or other recognised depreciation methodology).

The most common method used in other access regimes is to assess depreciation using straight line depreciation over the physical life of an asset, which spreads the depreciation cost evenly over the life of the asset. However, the application of straight line depreciation

may not be optimal for existing railway owners as they transition from calculating ceiling prices using the existing GRV methodology to the DORC methodology. The Department has developed a proposal for managing the transitional impacts of this on railway owners through using an alternative depreciation profile, as detailed in the transitional arrangements section below.

Calculating ongoing depreciation (new and existing railway assets)

New railway owners, and existing ones once the initial RAB is set, would be required to put forward a depreciation profile for the remaining life of the asset as part of the roll forward process. For existing railways, this depreciation profile may be but (provided there is no double counting) does not need to be the same as that which was used to assess historical depreciation. For new railways this will need to be established for the first time.

If a railway owner wishes to change from the depreciation profile previously used, they would be required to explain their reasons for deviating from the previous depreciation profile and how they will avoid double counting. The regulator would assess each proposal on its merits, assessing the reasonableness of the claims and proposed depreciation profile, and considering the legitimate business interests of the railway owner, as well as current and potential users of the railway.

Changes in asset life or depreciation profile

Any changes to the forward looking depreciation profile or remaining asset life should not have any impact on the net present value of the asset, however, it would change the timing of future depreciation charges for the asset. As such, the impact on the incremental and total costs, and therefore on current and potential users of the railway, must be considered.

Changes in asset life and subsequent changes to the depreciation profile could be proposed to the ERA at the time of a RAB review, which could be every 5 years or when an access proposal is made (this is discussed further under 'process' below). These would be assessed by the ERA in the same way as a request to use a non-standard depreciation profile would be (as outlined above).

RAB roll-forward

The railway owner would maintain an up to date estimate of the asset value by rolling forward the RAB every year. This would use the approved RAB value as a starting point, and would require the following items to be calculated for each year:

- asset appreciation (added);
- capital expenditure, including both asset renewal costs and expansion costs (added);
- depreciation based on the asset lives and depreciation methodology accepted by the ERA (deducted);
- asset disposals (deducted).

If an access proposal was made, at that time it would also be necessary to develop a forecast RAB for each year of the access proposal, so that it could be used as an input into assessing the incremental and total costs.

Process

As discussed above, the main difference between calculating a RAB using a DORC methodology and the current GRV approach is in calculating the remaining life and applying depreciation. The Department considers the process in the costing principles to determine ORC would not vary from the process to determine GRV in any material way.

Once the initial RAB has been determined, the railway owner would be required to roll forward the asset value each year as discussed above. However, the ERA would only review the roll forward every 5 years (to coincide with its current 5-yearly review of the WACC), or when an access proposal is made under the Code. This would involve an ex-post assessment of efficient capital expenditure.

The process for calculating the floor and ceiling during an application would remain largely unchanged from what exists under the Code at the moment, with incremental and total costs only being calculated when there is an access proposal, or where the regulator thinks one is likely.

Establishing the capital costs is likely to be somewhat simpler than the current process, as there would be an established RAB value and depreciation profile for these assets, although it would also be necessary for the railway owner to forecast, and the regulator to assess, asset renewal and expansion costs.

However, assessing forecast operating and maintenance costs is likely to be more information intensive than currently, as it would need to have regard to the current condition of assets and the actual operating and maintenance costs, rather than assessing it from a theoretical whole-of-life perspective. Nevertheless, it would be expected that the railway owner would maintain forecasts of these costs as part of its asset management plans, and therefore the information should be available at the point when an access request is made.

The new regulatory processes associated with the DORC method are detailed in Table 3 below.

The DORC methodology would be introduced in stages, as it will be impractical to expect the regulator to assess the DORC value of all railway assets at one time.

Table 3: Process for determining DORC and roll forward

| Task | Steps | What would be published* |
|--|--|---|
| Update costing principles | <ul style="list-style-type: none"> Railway owner updates costing principles to reflect change to DORC ERA assesses and approves or amends | <ul style="list-style-type: none"> Railway owner proposal Regulator draft decision Submissions Regulator final decision Approved costing principles |
| Calculate initial DORC/RAB (once-off step) | <ul style="list-style-type: none"> Railway owner submits proposal on ORC and accumulated depreciation ERA obtains an independent engineering report to inform its decision ERA obtains a second report if necessary (see recommendation 15) ERA releases draft decision paper Stakeholders make submissions on draft decision paper ERA releases final decision paper | <ul style="list-style-type: none"> Railway owner proposal Draft decision paper Consultant reports Submissions Final decision paper |
| Calculate RAB roll forward (including ongoing depreciation profile) (initially and then every 5 years) | <p>Initially</p> <ul style="list-style-type: none"> Railway owner submits proposal about how they will roll forward the RAB (as part of change to costing principles) ERA releases draft decision paper on proposal Stakeholders make submissions on draft decision paper ERA releases final decision paper Railway owner is then required to calculate the RAB roll forward every year in accordance with approved or amended costing principles, but it is only assessed by the ERA every 5 years (or when an access proposal is made). <p>5-yearly reviews</p> <ul style="list-style-type: none"> Railway owner submits RAB roll forward ERA assesses whether it complies with the approved proposal | <p>Initially</p> <ul style="list-style-type: none"> Railway owner proposal Draft decision paper Final decision paper <p>5-yearly reviews</p> <ul style="list-style-type: none"> Railway owner roll forward ERA statement on compliance |
| Determine WACC | <ul style="list-style-type: none"> No change to existing process | <ul style="list-style-type: none"> No change to existing process |
| Calculate floor and ceiling | <ul style="list-style-type: none"> Railway owner to submit forecast RAB and forecast efficient operating, maintenance and capital expenditure costs for the term of the proposal ERA to review and procure advice if necessary ERA consults on draft decision paper ERA issues final determination | <ul style="list-style-type: none"> Railway owner proposal Draft decision paper Final decision paper |

* commercial in confidence information redacted throughout

2.3.3. Transitional arrangements for change in asset valuation

The proposed move from GRV to a DORC methodology may affect the expected revenue earning opportunity of existing infrastructure owners, who invested on the basis of the existing regulatory framework. This is because for some routes, the starting asset value under a DORC approach may be lower than under a GRV approach, which would result in a lower ceiling. However, this will be partially offset through recognition of actual operating and maintenance costs, which will push up both the floor and ceiling, again particularly so for assets that are not in a new condition or well maintained.

Given this, the Department has considered the need for transitional arrangements, taking into account the following criteria:

- Efficiency: transition arrangements should target any impediments to efficient transition and help avoid potential market disruptions.
- Equity: the same assistance is provided to those who are in the same circumstances.
- Fairness: achieves a 'fair' outcome, considering whether the regulatory change causes an exceptional loss in the value of investments that cannot be, or has not been, otherwise recovered, or anticipated.

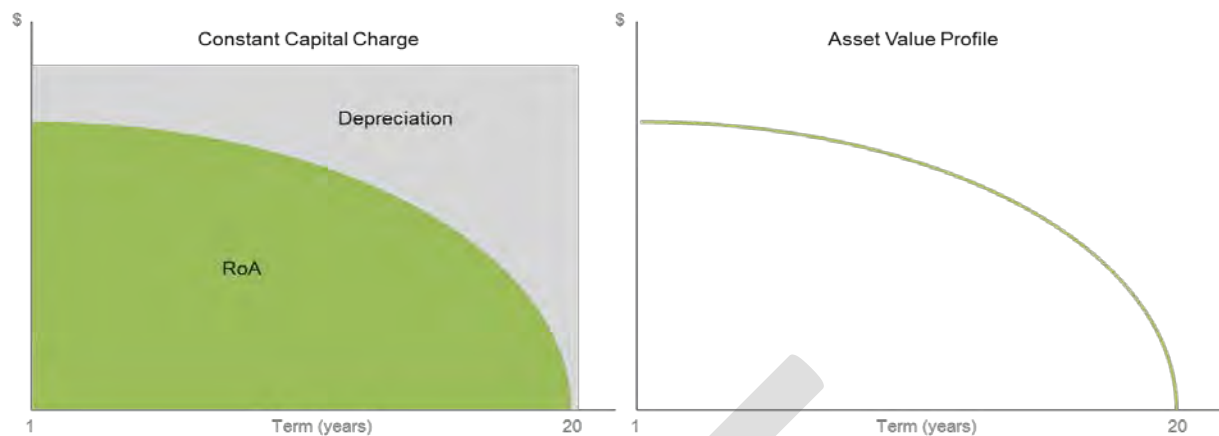
In doing so, the Department has considered whether exceptional loss could occur, not only in regard to the floor and ceiling, but also with regard to the prices that are realistically likely to be negotiated. For example, for older railway assets, access seekers would not accept a charge close to the GRV ceiling in any case, and railway owners are unlikely to accept an access price that is below the costs that would be considered in a DORC floor. As such, exceptional losses in actual revenue are not expected.

That said, the Department does consider that losses as a result of a change in the initial asset valuation should be addressed, as railway owners invested on the assumption of a GRV methodology and as a result, may not have obtained the benefits of having a DORC methodology applied from the beginning of their asset's life (which could have provided a higher ceiling than GRV in the early years).

The Department proposes to address these concerns by adjusting the timing of cash flows for depreciation and return on assets in certain circumstances. In particular, this could be achieved by using a 'backended' depreciation profile, which would be calculated by using an annuity formula to calculate capital costs. This annuity approach to calculating depreciation assumes that depreciation in the earlier years of an asset's life is lower than it would otherwise be under a conventional straight line approach, meaning the railway owner can depreciate at a higher rate over the remaining part of an asset's life. This could be seen as allowing a railway owner to account for depreciation that was not able to be recovered in the earlier years of an asset's life under the GRV approach.

A simple representation of this annuity approach is shown (in real terms) in Figure 1.

Figure 1 Annuity depreciation curve

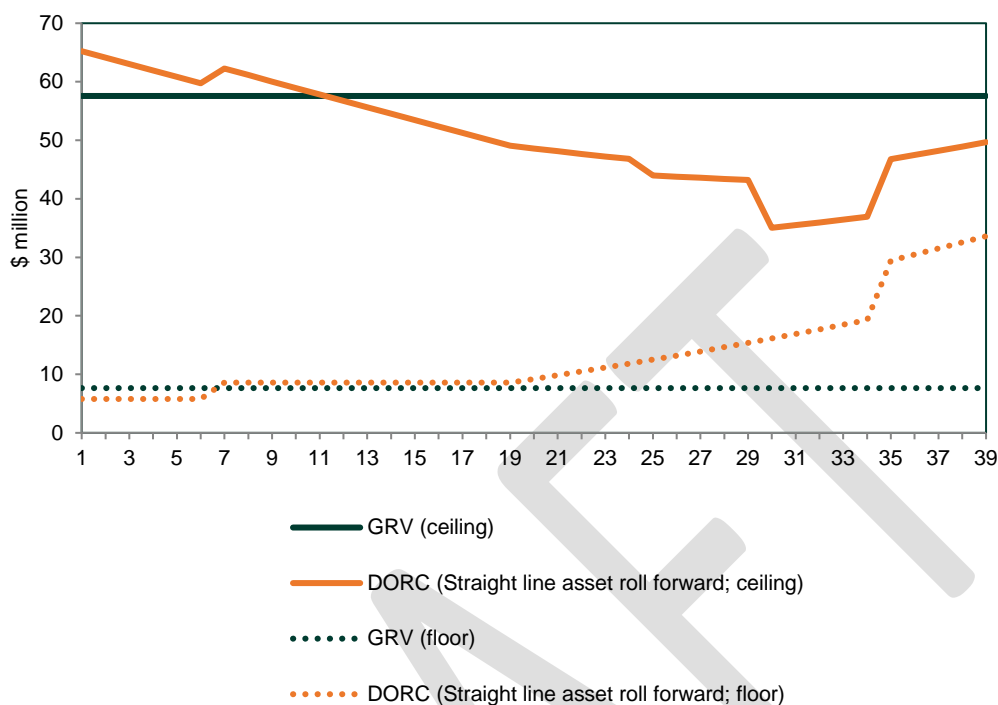


Source: Synergies Consulting

Using an annuity approach to depreciation will make the ceiling more consistent across the life of an asset. However, it does not result in a ceiling that is constant (in real terms). This is because the ceiling includes actual operating and maintenance costs, which vary across the life of an asset, and a railway does not consist of one 'asset' but rather multiple sub-assets that make up the whole. Figures 2 and 3 below show how the different depreciation profiles may affect the floor and ceiling across the life of an asset (the assumptions used to derive these graphs can be found in Appendix 3).

As shown in Figure 2, under a DORC methodology with a straight line depreciation profile, the ceiling would likely be higher than the GRV ceiling in the early years of the railway's life, and would then fall below the GRV ceiling as the assets age. However, the ceiling would rise if expenditure was incurred to replace assets. The floor and ceiling would also increase slightly after the first few years of the assets life, when a cyclical maintenance program began (this would not be required in the first few years). Under this approach the floor also increases as the asset ages to reflect increased operating and maintenance costs.

Figure 2: Comparison of floor and ceiling profile using GRV and DORC with straight line depreciation (real terms)



Source: Synergies Consulting

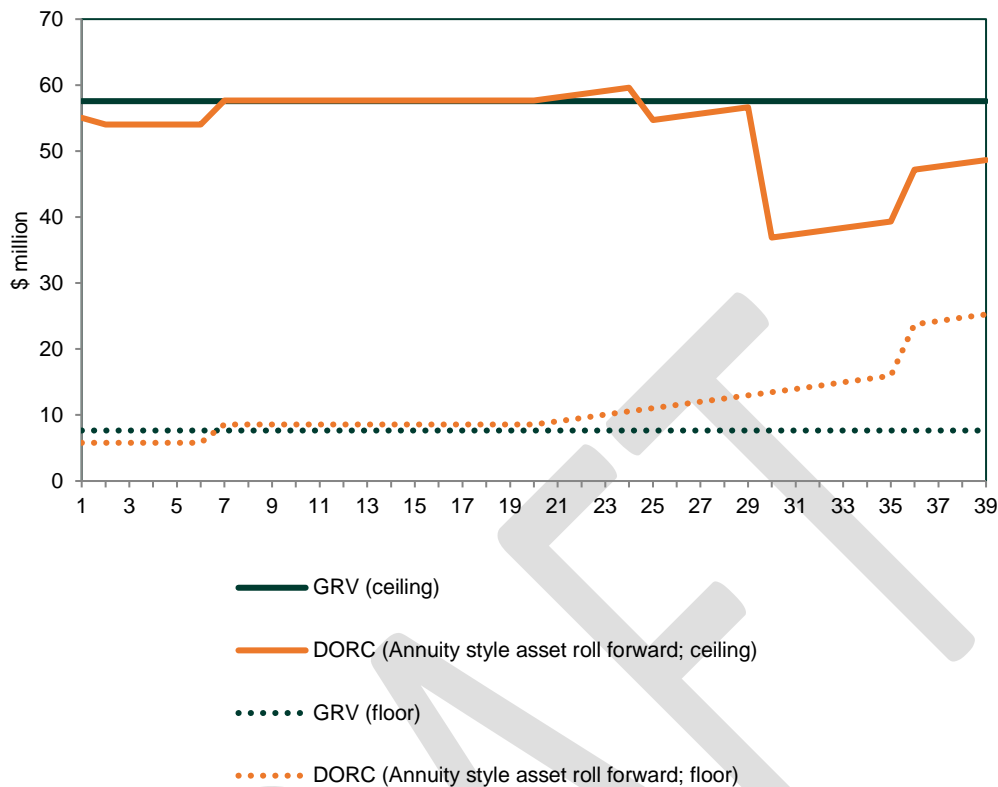
This is contrasted with figure 3, which shows how the floor and ceiling would change if an annuity depreciation profile was used, instead of a straight line depreciation profile. In this scenario, the DORC ceiling would closely track the GRV ceiling until the assets reached the end of their useful or economic life, at which point, unless the asset is replaced, the ceiling will fall significantly.

Under either methodology, where an asset's life is expired, no further depreciation or return on asset could be charged for that asset, only operating and maintenance costs (until new investment was made).

The Department is also proposing to limit the use of an annuity depreciation profile to five years, such that the ceiling could not be maintained at the GRV level for longer than five years. This would address any potential short term impacts on the access prices that could reasonably be negotiated, while still allowing for the ceiling to reflect the condition of assets as they age, as intended by this package of reforms. In assessing this timeframe, the Department has also been guided by the National Competition Council's guide for Certification under Part IIIA of the *Competition and Consumer Act 2010* (Cth) which states that while transitional arrangements may be necessary to help parties adjust to a competitive market, they delay the commencement of competitive arrangements, and as such should be phased out as soon as possible.⁵

⁵ National Competition Council, A guide to Certification under Part IIIA of the Competition and Consumer Act 2010 (Cth), December 2017, paragraph 3.16.

Figure 3: Comparison of floor and ceiling profile using GRV and DORC with annuity depreciation (real terms)



Source: Synergies Consulting

Assessment

The Department has considered how using an annuity depreciation profile for five years aligns with the criteria for transition assistance, as follows.

- Efficiency:
 - These transition arrangements directly address any potential short term loss in expected revenue for some existing railways from the transition to DORC by maintaining a ceiling similar to that obtained under the current GRV approach for five years while allowing future prices to better reflect asset condition after five years.
- Equity:
 - This option applies equitably, as railway owners with railways in similar condition will be treated in the same way.
- Fairness:
 - For railways that are in good condition, where there are access seekers willing to pay prices near the ceiling, the transition arrangements will ensure that the ceiling does not constrain the prices that can currently be negotiated (at least for five years).
 - The ceiling will reduce more substantially for older assets, if asset renewal does not occur. However, in this case this would not generally reflect a reduction in expected revenue as it is unlikely that negotiated access prices would be near the GRV ceiling in any case.

Draft recommendation

Given the suitability of the annuity depreciation approach to addressing the Department's transition criteria, the Department proposes to allow railway owners to use this where it is necessary to address transitional impacts, for a limited time.

Draft Recommendation 1B: Allow the use of an annuity approach to depreciation where it is necessary to manage transitional impacts on existing railway owners, for a limited time.

How this would be implemented

The Department proposes that the railway owner would be able to make a proposal to the ERA about using an annuity depreciation profile for their railway and the need for using that profile. The railway owner would have to demonstrate that an annuity depreciation profile was required to address any transitional impacts. This could be done by demonstrating that the conventional straight line depreciation approach to DORC would constrain the access prices that could otherwise be reasonably negotiated. This would involve providing evidence that the conventional DORC ceiling price would be below the prices that access seekers are willing to pay for the relevant railway.

If railway owners could demonstrate the need for these transitional arrangements, the ERA would then be required to approve the use of an annuity depreciation profile for a maximum of five years. At the conclusion of five years, railway owners would have to change their depreciation profile to the conventional straight line approach, or other depreciation profile that reflects the economic value or condition of the asset as approved by the ERA.

2.3.4. Building block with a 'line in the sand' valuation

The 'line in the sand' (LIS) approach is not used in any rail access regime in Australia. However, there is some precedent in applying a LIS approach to water infrastructure. These different applications of LIS have been used as a basis for considering it as a potential alternate option for the asset valuation in the WA Rail Access Regime.

Under the LIS approach, the initial RAB value reflects the NPV of current net revenues. This is similar to a commercial valuation, although such an approach would normally incorporate upside potential in the asset valuation to reflect future opportunities, which the LIS does not.

The RAB value is then rolled forward, and the floor and ceiling is calculated, in the same way as for the DORC approach discussed above, except with a different opening asset value used to assess the ceiling price.

Assessment

Although this option has some advantages, such as reducing uncertainty about future valuations of the ceiling and allowing the floor to reflect the actual costs incurred by the railway owner, it does not address most of the deficiencies of the current asset valuation approach, and also introduces some additional costs (see Table 4). Most notably, this option prevents the railway owner from capturing the benefits of increased utilisation of the route, and in doing to, is contrary to the objectives of the Regime of encouraging efficient use of and investment in rail facilities.

Table 4: Summary of costs and benefits: line in the sand methodology

| Benefits | Costs |
|---|---|
| Avoids uncertainty about future valuations of the ceiling, since the initial RAB is 'locked in' when first calculated. | Does not ensure access prices reflect what would be achieved in a competitive market for rail facilities. |
| The floor price will include all forward looking costs of providing the route, including maintenance costs (given actual condition), major periodic refurbishment and necessary asset renewal. This is consistent with setting a floor price that constrains clearly inefficient pricing. | By setting a ceiling price to reflect the NPV of the current net revenues on a route, this option prevents the railway owner from gaining benefit of increased utilisation of the route. This is likely to disincentivise the efficient use of and investment in the asset. |
| Presents better investment incentives by including actual expansion costs in cost determinations. | The ceiling under LIS may not assist negotiations because it may not reflect the asset's current condition or the economic value a user may expect to extract from the asset. |
| A regulatory valuation of the asset will not have to be completed when an access proposal is made, which will expedite the process for an access application to be dealt with. | Creates a requirement for a new regulatory process to develop and maintain RAB values across the rail networks. |
| | The LIS value will be dependent on confidential information relating to access agreements negotiated outside the Code. |
| | Is not consistent with other access regimes and may create additional regulatory burden for parties operating across jurisdictions, as well as providing little regulatory precedent to guide the valuation methodology. |
| | The Costing Principles will have to be amended to align with the LIS method. |
| | Provides less flexibility in negotiations than the GRV method by providing a narrower range of possible prices between the floor and ceiling. |
| | Where access negotiations fail to achieve an outcome, the floor and ceiling prices do not necessarily provide useful guidance to the arbitrator. |

Draft recommendation

The Department does not recommend using this asset valuation methodology to value railways in Western Australia, as it is not aligned with the objectives of the Regime and does not address existing deficiencies in the asset valuation methodology.

3. Pricing guidance

3.1. Problem

The Rail Access Regime is focused on enabling commercial negotiation around a wide range of possible prices within floor and ceiling limits. This allows parties to tailor access agreements to the particularities of each access proposal. However, there is currently only limited guidance provided in the Code about how a price between the floor and the ceiling should be selected and some stakeholders have commented that this is not effective in making negotiations efficient.

While changing the asset valuation methodology to DORC and updating the floor and ceiling methodology (as proposed above) is likely to reduce the range between the floor and ceiling, information asymmetry may make it difficult for parties to agree on an efficient price within that range. Effective pricing guidance can help address some of these information imbalances, and in doing so speed up the negotiation process.

3.2. Options considered

The Department considered five options to include further pricing guidance in the Regime to guide parties on how to negotiate an efficient price between the floor and ceiling:

- Status quo
- Indicative tariffs
- Published standing offers
- Competitive imputation pricing
- Guidance on allowable price changes

3.3. Assessment and draft recommendation

3.3.1. Status quo

The WA Access Code currently has provisions that provide some guidance about the price to be paid for access in clause 13 of Schedule 4 of the Code, set out as follows:

- There should be consistency in the application of the pricing principles to all rail operators, including the railway owner if it proposes to undertake rail operations. That is, any difference in prices for operators in the same market must only reflect differences in the cost or risks associated with providing them access.
- Prices should reflect the standard of the relevant infrastructure and the operations to be carried out, relevant market conditions and any identified preference of the access seeker.
- Apportionment of costs should be fair and reasonable.
- Prices should be structured to encourage optimum use of facilities.
- Prices should allow the railway owner to recover, over the economic life of the infrastructure, the costs of any extension or expansion required to accommodate the operator.

These provisions do not require an associated approvals or regulatory process; they are provided primarily for the consideration of parties in negotiating a price between the floor and ceiling and to inform an arbitrator's determination in the event of a dispute.

Assessment

As noted in section 3.1, this existing pricing guidance appears insufficient to make the negotiation process efficient. This is because there is little guidance on how to set prices between the floor and ceiling and in some cases, the existing guidance provides the opportunity for parties to develop conflicting interpretations. Depending on the particular access proposal being negotiated, either party may be able to use this insufficient guidance to their advantage, with the result that negotiations are imbalanced. For example, railway owners and infrastructure owners may have differing views on what constitutes a fair and reasonable price for access, particularly where the infrastructure is not near replacement condition. Or a price that an access seeker considers fair and reasonable may not be what the railway owner considers will encourage optimum use of the infrastructure.

Table 5: Summary of costs and benefits: current pricing guidance

| Benefits | Costs |
|---|---|
| Provides a high degree of flexibility in negotiating prices. | Relatively high opportunity for parties to have conflicting interpretations of some of the current pricing principles. |
| Has no requirements for regulatory approvals and therefore low regulatory burden. | Limited guidance on how to set prices between the floor and ceiling, which can slow negotiations. |
| | Lack of relevant pricing guidance may unfairly increase the negotiating leverage of railway owners, as uncertainty around an arbitrated outcome may discourage access seekers from seeking arbitration. |
| | In some cases, the lack of guidance may unfairly increase the negotiating leverage of access seekers, particularly where there is a competitive alternative to using rail. |

Draft recommendation

The Department considers additional guidance should be provided, as discussed and more specifically recommended in the following sections.

3.3.2. Indicative tariffs

An indicative tariff is a standard price for access that is approved by the regulator for a particular freight task. Where an indicative tariff exists, it is reflected in the price initially offered by the railway owner. The tariff, coupled with the standard terms and conditions, would guide any negotiation of that price with the access seekers, and would be considered in any subsequent arbitration.

Indicative tariffs aim to achieve more efficient use of below rail facilities, by providing more certainty that access prices will be set on the basis of efficient costing principles.

Indicative tariffs are a feature of access undertakings, including the ARTC's Interstate and Hunter Valley undertakings made under the National Access Regime, and Aurizon's undertaking under the Queensland Competition Authority Act 1997.

Assessment

In circumstances where there is low incentive for commercial negotiation, indicative tariffs can make the negotiation process significantly more efficient, as they limit the ability for a railway owner to impede negotiations.

However, there are costs associated with imposing indicative tariffs (as outlined below). Therefore, the Department considered applying indicative tariffs only where the following criteria are met:

- there are one or more access seekers with homogenous freight tasks (as there is less need for negotiation to meet the circumstances of a particular access seeker);
- the railway owner's revenue is close to total cost for that route (as potential for regulatory error in setting an indicative tariff would be lessened); and
- there is less incentive for the infrastructure owner to negotiate for access to its rail network (e.g. due to vertical integration).

Despite restricting indicative tariffs to these limited circumstances, during consultation, stakeholders expressed concern regarding the regulatory burden of tariffs, and many considered that the majority of the benefits in regard to transparency and consistency could be achieved by requiring railway owners to publish a standing offer instead (see section 3.3.3 below).

Table 6: Summary of costs and benefits: indicative tariffs

| Benefits | Costs |
|---|---|
| Improved certainty for access seekers that access prices are based on efficient costing principles. | Introduces the risk of regulatory error. |
| Reduces information asymmetries. | Tends to limit negotiated tailoring of arrangements to individual access seeker's preferences. However, provided that they are required where only limited 'tailoring' of arrangements is required, i.e. where the service sought is quite homogenous, then the costs associated constraining this opportunity for commercial negotiation will be lessened. |
| In circumstances where there is low incentive for commercial negotiation, indicative tariffs can significantly improve commercial negotiations, as they significantly limit the ability for a railway owner to frustrate the negotiation process. | Development of indicative tariffs will create a new regulatory process for both the initial tariff development and subsequent review. An efficient process for the regulatory review and approval of indicative tariffs may be resource intensive. However, adopting the suggested criteria for when indicative tariffs are to be developed should mean that these costs will only be incurred where the benefits of implementing indicative tariffs outweigh the costs incurred in this new regulatory process. |

| Benefits | Costs |
|--|--|
| Limits price increases to relevant and transparent changes in cost or risk involved with the provision of the service. | Does not account for a willingness to pay or changes in market conditions. |
| | Requires the regulator to define an indicative service which can be difficult – if too broad it is unlikely to be useful, if too narrow not many access seekers will meet the requirements to access it. |

Draft recommendation

As it is likely that most of the benefits of indicative tariffs can be achieved via a different mechanism that does not carry as high a regulatory burden, the Department does not recommend introducing indicative tariffs. An alternative is proposed in the following section.

3.3.3. Standing offer

A standing offer is similar in form to an indicative tariff, but without the regulatory approval process associated with a tariff.

Standing offers are used in electricity markets in other jurisdictions in Australia, where competition has been deemed to be effective enough to remove regulated tariffs, but there is a need to provide a signal to customers about what a reasonable price to pay might be. While there are many differences between the markets for retail electricity and rail access, the Department still considers there is merit in having a standing offer for certain rail tasks in WA to provide more transparency about what an efficient price between the floor and ceiling might be without the associated regulatory burden.

As with indicative tariffs, a standing offer would be for a standard freight task and would be accompanied by a standard terms and conditions. If the desired access differed from the standing offer then commercial negotiation would be expected around that offer.

Assessment

Given standing offers have a significantly lower regulatory burden than indicative tariffs, the Department considers it reasonable they could be applied in broader circumstances than those considered for indicative tariffs. In particular, the Department considers they could usefully apply in any situation where there are one or more actual or potential operators on a route with similar freight tasks.

With regard to the other criteria that are set out for indicative tariffs in the section above:

- The criteria regarding revenue being close to the ceiling is not relevant for the standing offer, as that criteria was designed to avoid regulatory error, which is not a risk in this option.
- The criteria regarding having less incentive to negotiate may exclude routes such as the interstate route where there is sufficiently homogenous traffic that would benefit from a standing offer. For example, the Department has received feedback from some stakeholders that intermodal traffic on the interstate route is sufficiently similar to justify an indicative tariff or standing offer, and notes that in its 2015 review of the Code, the ERA acknowledged that there may be a net benefit to indicative tariffs for interstate services west of Kalgoorlie (paragraph 92).

Overall, the Department considers that the benefits of standing offers is similar to that of indicative tariff, but with a reduced regulatory burden.

Table 7: Summary of costs and benefits: standing offers

| Benefits | Costs |
|---|---|
| Improved certainty and pricing signals for access seekers, thereby reducing transactions costs associated with commercial negotiations. | Tends to limit the tailoring of arrangements to individual access seeker's preferences, however less so than indicative tariffs. As per indicative tariffs, provided that they are required where only limited 'tailoring' of arrangements is required, i.e. where the service sought is quite homogenous, then the costs associated constraining this opportunity for commercial negotiation will be lessened. |
| Reduces information asymmetries to encourage market usage (where efficient). | Does not account for a willingness to pay. |

Draft recommendation

Due to the improved transparency and minimal regulatory costs, the Department considers that introducing standing offers will improve the effectiveness of the Regime.

Draft recommendation 2 – require railway owners to publish a standing offer for defined rail tasks when required by the ERA.

How this would be implemented

The Department proposes to implement a requirement to publish standing offers in the following way:

- The ERA would be required to determine when a standing offer is required, using the criteria that they apply in any situation where there are one or more actual or potential operators on a route with similar freight tasks, with similarity in freight tasks assessed in relation to train length, axle load and freight type.
- The railway owner would be required to develop standard terms and conditions to underpin the standing offer, including service standards associated with that price. This would also not need to be approved by the regulator.
- Once a standing offer was required, the railway owner would be required to keep it up to date until such a time that the ERA decided it was not required anymore.
- The railway owner would be required to publish the standing offer on its website.

3.3.4. Competitive imputation pricing

This option seeks to encourage efficient use and investment in rail services where access prices are constrained by competition from other transport modes. The competitive imputation pricing principle also seeks to ensure that access prices maximise access seekers' contribution to fixed and common costs while also encouraging use of the railway.

It achieves this by requiring that parties consider the following principle when negotiating access prices:

Where there is a competitive alternative, an access price should be negotiated with regard to the price of another mode of transport (or combination of) for

transporting similar freight, adjusted for service quality differences between rail and the competitive alternative and reduced by the efficient above rail cost of providing the relevant freight service.

Assessment

While competitive alternatives are already likely to be considered by parties in a negotiation, including the principle in the Code means that it would be more likely to be used by the arbitrator if there is a dispute. This would help limit the opportunity for either the access seeker or railway owner to attempt to value the alternative transport mode in a way that advantages them. As a result, it would likely make negotiations more efficient.

Table 8: Summary of costs and benefits: competitive imputation pricing

| Benefits | Costs |
|---|---|
| Would limit the opportunity for negotiations to be side-tracked by alternate pricing methodologies or disputes about how sunk investments should be accounted for. | Requires parties to obtain information about the cost of the access seeker's alternative transport option. |
| It would ensure the competitive imputation pricing principle is applied in arbitrations which arise, and in doing so may improve the efficiency of arbitrations where there is a competitive alternative. | May be difficult to assess service quality differences to justify negotiating away from competitive imputation price. |
| The competitive imputation principle would assist determining any contributions above the floor for routes which are nearing the end of their life (but only for routes where alternate transport modes are a viable option). | |

Draft recommendation

The Department considers that introducing this pricing principle could assist in determining an appropriate price between the floor and ceiling where road provides a competitive alternative to rail.

Draft recommendation 3 – introduce a competitive imputation pricing principle as a part of the pricing principles set out in Clause 13, Schedule 4 of the Code.

How this would be implemented

In order to ensure that the competitive imputation pricing principle is not imposed in an overly rigid manner, it would be drafted in the form of a guiding principle. The guideline would say that the access price should reflect:

- the maximum competitive price that could be charged for rail haulage for the freight service, having regard to:
 - the long term efficient line haul cost of using an alternate mode of transport for a similar freight service; and
 - any service quality or other differences between rail haulage and the alternate mode of transport;
- less the long term efficient cost of providing the above rail service.

The line haul cost would exclude the cost of non-line haul investment that would be need to be made by customers to switch to the alternate transport mode, e.g. construction of road based loading or unloading facilities.

There would be no additional formal process associated with the competitive imputation pricing principle, but parties in a negotiation and a potential arbitrator, would be required to interpret the principle in the context of any particular access proposal, as they currently are required to do with the pricing principles in Clause 13 of Schedule 4. This would likely involve collecting information on the costs of any alternative, assessing any differences in service quality then making a judgement about what the price should be.

3.3.5. Guidance on allowable price changes

This option provides guidance by specifying the circumstances in which access prices can vary over time. It assumes that there is an existing access charge in place for a service and that it is *prima facie* considered to be 'reasonable'.

There are two ways to approach this:

- Allowing access prices to be varied over time to reflect two main factors:
 - a railway owner's changes in costs of providing the service; and/or
 - changes in market circumstances, including the operator's capacity to pay.
- Requiring a railway owner to maintain its existing price methodology and not permit price variations for any changes other than the costs or risks associated with providing the service. This would mean that a railway owner could not consider changes in market circumstances or an operator's capacity to pay.

Assessment

Guidance on allowable price changes can be effective in ensuring that a railway owner does not increase charges in order to capture sunk value from its users. Stakeholders generally did not support this change, and in particular access seekers considered that access prices are not currently efficient and therefore this would offer no advantages, and railway owners considered that this approach would constrain efficient charges if it applied for an extended period of time.

As such, the Department does not believe it aligns with the objective of the Regime to ensure that access charges are economically efficient.

Table 9: Summary of costs and benefits: allowable price changes

| Benefits | Costs |
|--|---|
| Limits the circumstances in which prices can vary which could expedite commercial negotiations by reducing points of potential disagreement. | Assumes that a starting price exists and is efficient and there is no certainty that this is the case. |
| Will reduce uncertainty about likely access prices. | Limits the circumstances in which access charges can vary, which could lead to less efficient pricing outcomes. |
| | Could reduce flexibility in the negotiation process to arrive at a mutually acceptable price based on other determinants. |

Draft recommendation

The Department does not consider that introducing this pricing principle provides efficient guidance on economically efficient pricing between the floor and the ceiling, and as such does not recommend its inclusion in the Regime.

DRAFT

4. Quantification of costs and benefits

The Department commissioned a preliminary cost benefit analysis on the proposed changes to the pricing mechanisms, which incorporates implementing DORC with the recommended transitional arrangements, as well as standing offers (section 3.3.3) and competitive imputation pricing (section 3.3.4). This preliminary analysis provides a robust framework for assessing the costs and benefits of the proposed changes to the pricing mechanism, but at this stage provides indicative estimates of the values of the costs and benefits for further testing. Feedback is sought from stakeholders on the reasonableness of these value estimates.

The results of this preliminary cost benefit analysis are summarised below, and the full analysis can be found in Appendix 4.

4.1. Assumptions

The cost benefit analysis includes all the costs that would result from implementing the proposed pricing mechanisms, compared with the current situation. These costs include the development of a regulatory asset base using DORC, the calculation of regulated ceiling and floor under a DORC approach and the costs associated with standing offers and standard access agreements, as detailed in the table below. Where similar activities are undertaken under the status quo, only the additional time or money that will be involved is included in the analysis of costs.

Table 10: Categories of costs for pricing reforms

| Regulatory asset base development and maintenance costs | Pricing guidance costs (see sections 3.3.3 and 3.3.4) | Specific access proposal costs | Implementation costs |
|--|---|--|--|
| <ul style="list-style-type: none"> • Cost of amending the costing principles (railway owners and ERA) • Cost of developing a regulatory asset base (railway owners and ERA)⁶ • Cost of the annual asset roll forward (railway owners) • Cost of the five year roll forward (assessment of prudence and compliance) (railway owners and ERA) | <ul style="list-style-type: none"> • Assessing if a standing offer is required (ERA) • Developing and maintaining standing offer tariffs (railway owners) • Developing and maintaining standard access agreements (railway owners) • Approving standard access agreements (ERA) | <ul style="list-style-type: none"> • Developing the maintenance, operating and future capital expenditure costs for a specific proposal over a forecast term (railway owner). • Approving the above (ERA). | <ul style="list-style-type: none"> • Policy and regulatory amendment costs (Government) • Learning costs for industry (railway owners) |

⁶ The cost of the ERA procuring a second, independent expert report as per draft recommendation 15 has not been costed in this analysis. The addition of this cost is unlikely to significantly affect the NPV of the reforms.

Although the proposed pricing mechanisms would result in five main types of benefits, only two have been quantified to calculate the cost benefit analysis: the ‘bring forward’ of projects and the cost savings due to reduced negotiation timeframes. The remaining benefits have not been quantified due to insufficient information, but are assessed qualitatively below.

Table 11: Categories of benefits for pricing reforms

| Benefit item | Materiality rating | Rationale |
|--|--------------------|---|
| Lower negotiation costs due to: <ul style="list-style-type: none"> Utilisation of standing offer tariffs and regulator endorsed standard access agreements. Improved guidance where there are competitive alternatives. Clearer guidance on impact of age and condition of assets on asset value. | ★★ | Lower costs under Code due to standing offer tariffs and clearer price guidance regarding impact of age/condition of assets. |
| Net cost saving due to fewer disputes under the Code: <ul style="list-style-type: none"> Lower incidence of costly disputes due to factors listed above. | ★ | Moderate, but offset by potential for higher number of negotiations under code. |
| Bring-forward of projects due to reduced negotiation timeframes, resulting in economic gains through the bring forward in commercial revenues and reduced capital holding costs. | ★★★ | Faster development of new projects due to shorter negotiation/dispute resolution time. |
| Lower risk of good projects not coming to fruition. | ★★ | Under base case, a proportion of delayed projects will not proceed due to loss in investment window. Fewer delays under the new regime will mean fewer projects are abandoned. |
| Increased durability of negotiated agreements <ul style="list-style-type: none"> Establishing firm price guidance and a systematic process for reaching a negotiated agreement will be re-negotiations are less likely to involve ‘re-opening’ issues that have already been dealt with. | ★★ | Access agreements made under the Code are likely to be more ‘durable’ and more ‘robust’ in being able to address a range of future circumstances, thus resulting in cost savings from not having to re-negotiate terms and conditions of the agreement. |

4.2. Results

The proposed new pricing mechanisms are estimated to generate a net present value (NPV) benefit of at least \$24.4 million over 20 years. As noted above, this estimate includes all costs associated with the proposed pricing mechanisms, but not all the benefits, as some benefits could not be quantified. This means it is a conservative estimate of the likely net benefit of the new pricing mechanisms.

A sensitivity analysis completed as part of the cost-benefit assessment also shows that the proposed reforms are estimated to provide a net benefit even if key assumptions are varied, such as substantially reducing the assumed average value of projects brought forward (see Appendix 4 for more details).

5. Ability to opt out

5.1. Problem

The ability to opt out and negotiate an agreement without any Code provisions applying is unique to the Western Australian Rail Access Regime. This reflects the intention for the Regime to serve as a back-stop where commercial negotiations are not effective.

The option to negotiate for access outside the Regime provides parties the opportunity to negotiate on their own terms and avoid the more rigid regulatory process and costs associated with seeking access under the Code. However, some aspects of the Regime do not work effectively if they are only applied to agreements made within the Code.

Another difficulty with the ability to opt out of the Regime, is that it is currently cumbersome to move to arbitration under the Code if negotiations outside the Code stall. If either party chooses to recourse to the Code after beginning negotiations outside the Code, they are required to undergo the entire regulated process, as though they had not yet begun negotiations. This can be time consuming, and in some cases not all steps may be necessary to progress to arbitration. For example, where a dispute relates to a non-price term or condition, the determination of a floor and ceiling may not be a useful input into an arbitrator's deliberations. However, the regulator is required to carry this out before the parties can even proceed to the negotiation stage under the Code.

5.2. Options considered

The Department considered three proposals for reform:

- a. Making the unfair discrimination requirements mandatory regardless of whether an agreement is executed inside or outside the Code
- b. Requiring that the Part 5 instruments apply regardless of whether an access agreement is executed inside or outside the Code.
- c. Allowing a negotiation outside the Code that is in dispute to be brought within the Code, with the parties able to progress straight to arbitration under certain circumstances.

5.3. Assessment and draft recommendations

5.3.1. Requiring unfair discrimination provisions to include consideration of agreements made outside of the Code

The Code has provisions to prevent unfair discrimination, but parties who seek, or have gained, access under the Code cannot be guaranteed that they are being treated consistently and without unfair discrimination if agreements made outside of the Code are not considered in this assessment. Without looking at out of Code agreements, there is no basis for comparison because there have been no agreements made within the Code so far.

A proposal that the Department made in the Issues Paper was to extend the unfair discrimination requirements to make the non-discrimination requirements mandatory regardless of whether or not an access agreement was negotiated and executed inside or outside the Code. Following stakeholder consultation, the Department has amended this proposal, and now has considered an amendment which would mean that out of Code

agreements would be assessed in making a decision on unfair discrimination against a party seeking access under the Code. However, this would not mean that parties who negotiated outside the Code would be covered by these protections. It would only mean information on out-of-Code agreements is referred to in determining whether those that have sought access within the Code are being unfairly discriminated against.

Assessment

While not all stakeholders were in favour of this reform, those who did support it considered that it would be essential to ensure that proponents who choose to seek access under the Code can be effectively protected from unfair discrimination.

Some stakeholders considered that those who sought access outside the Code should also be protected from unfair discrimination and that the Department's proposal was not going far enough. However, the Department considers that it is reasonable that if proponents choose not to use the Code, they should not be provided with the protections of the Code. Therefore, the Department has focused on ensuring that access seekers who do choose to use the Code receive the protections they are intended to obtain.

Table 12: Summary of costs and benefits: Apply the unfair discrimination provisions to all negotiations, including those outside the Code

| Benefits | Costs |
|---|--|
| Would ensure the intent of the Code, that parties who seek access under the Code are protected from unfair discrimination in comparison to other agreements, both within and outside the Code, is achieved. | It may be difficult for the arbitrator to determine what constitutes unfair discrimination. However, this would be mitigated by providing additional guidance as outlined below. |
| Avoiding unfair discrimination encourages rail user confidence, competition and market growth. | |
| Will ensure vertically integrated operators cannot unfairly discriminate against third party access seekers and in favor of their own operations. | |

Draft recommendation

The Department considers that including out of Code agreements in an assessment of unfair discrimination is the most effective way of ensuring that access seekers who negotiate under the Code receive the protections that the Code is intended to provide.

Draft recommendation 4 - Extend the requirement in s.16(1)(b) of the Code to not unfairly discriminate between proponents to access agreements made outside the Code.

How this would be implemented

Under this proposal, a proponent seeking access under the Code would be permitted to request that the arbitrator assess a claim of unfair discrimination at any time after negotiations had begun. To be covered by the unfair discrimination provision an access seeker would have to be negotiating under the Code. Parties with agreements outside of the Code would not have access to Code protections against unfair discrimination.

The arbitrator would be required to consider whether the price, terms or conditions in the proposed access agreement could constitute unfair discrimination, both in relation to any other proponents that had sought access within the Code and in relation to proponents that had sought access out of the Code. The Code would be amended to specify that agreements made outside the Code should be considered in assessing unfair discrimination. The arbitrator would then be able to use its powers under the Commercial Arbitration Act 2012 to collect information to assess this.

5.3.2. Applying Part 5 instruments to agreements outside the Code

The Department considered applying the Part 5 instruments to agreements made outside the Code. The rationale behind this was similar to that outlined in the section above, to ensure overarching protections applied to all access seekers, and to bring about more consistent treatment of access seekers inside and outside the Code.

Assessment

Following consultation, the Department considers that while it is appropriate to ensure that access seekers who negotiate inside the Code receive the protections intended by the Code, it remains desirable to retain flexibility for out of Code negotiations.

Basic protections for access seekers who negotiate under the Code against unfair discrimination in regards to the subject of some Part 5 instruments, such as train path allocation and real time train management, will be provided through draft recommendation 4 above.

Table 13: Summary of costs and benefits: applying the Part 5 instruments to all negotiations, including those outside the Code

| Benefits | Costs |
|--|--|
| Imposing obligations on out of Code negotiations to align with the part 5 instruments may provide more guidance for out of Code negotiations and improve transparency. | Could increase the regulatory burden on the railway owner, as they would have to ensure agreements made outside the Code complied with the part 5 instruments. |
| | Would result in reduced flexibility and scope for commercial negotiations. |

Draft recommendation

The Department does not recommend applying the part 5 instruments outside the Code.

5.3.3. Fast track negotiation

The ERA raised in their 2004 review of the Code that many parties considered it important to be able to opt into the Code to access arbitration if negotiations happening outside the Code reached an impasse. They concluded that whilst opting into the Code would require negotiations to begin again at section 8, the parties would not need to serve out the maximum timeframes and the railway owner could opt not to request the information typically required under section 14, thus shortening the process to reflect the negotiations already carried out. However, they noted that the regulator would still have to carry out a cost determination which could extend timeframes.

In the Issues Paper, the Department put forward a proposal that where parties had been negotiating outside the Code, they would be able to move into the Code and skip some steps in the regulated process to arrive at arbitration, if these had already been completed outside the Code or were not considered relevant to a dispute.

Assessment

The Department considers that the likelihood that timeframes will be voluntarily expedited when commercial negotiations have already broken down are relatively low, and that as such there may be merit in amending the Code such that parties can more easily fast track to arbitration.

Table 14: Summary of costs and benefits: allowing parties to fast track to negotiation in certain circumstances

| Benefits | Costs |
|--|--|
| Could improve efficiency of the Regime in some instances | No substantial costs have been identified. |

Draft recommendation

Given that there was broad support for this in consultations, and that no substantial costs have been identified, the Department proposes to implement this proposal.

Draft recommendation 5 - Allow access seekers who have begun negotiations outside the Code to fast-track the process to arbitration under the Code.

How this would be implemented

A party would need to make a proposal for arbitration to the ERA, and demonstrate that they had made a proposal for access, had sought to negotiate and had been unable to agree, and that they were able to comply with section 14 requirements. If the ERA agreed that these conditions had been met, they would then appoint an arbitrator.

To assist them with making their decision, the arbitrator would also be able to request a floor and ceiling determination from the ERA if they consider this necessary, noting that this may not be required for some disputes. In cases where the arbitrator did require a cost determination, the arbitrator would be able to progress other parts of the dispute while a cost determination was being made, if they considered that appropriate. As such, timelines could be shortened.

6. Capacity extensions and expansions

6.1. Problem

The code provides limited guidance on how an expansion, if required, should proceed. Developing an expansion concept can be very complex, and other rail access regimes include considerably more detail around the process for developing and progressing an expansion from concept to construction.

Also, while specific guidance is limited, there are two problems with the process as it is currently set out for negotiating expansions or extensions under the Code.

Firstly, the obligations to demonstrate that an extension or expansion is required and feasible currently falls on the access seeker, who does not typically have all the information required to be able to demonstrate this. While the Code has provisions to enable the access seeker to obtain the required information from the railway owner, the process could be made more efficient if the party with the relevant information was also the one responsible for demonstrating the need for, or feasibility of, extensions and expansions.

Secondly, the Code currently requires that the technical and economic feasibility of an extension or expansion is proven prior to negotiations beginning. However, it may not be possible to definitively say whether an expansion is required prior to the parties negotiating and agreeing exactly how the requested service can be facilitated. As an access negotiation proceeds, it is likely parties may discuss different ways that access can be facilitated given the access seeker's needs and railway owner's capacity. As a result, the nature of an expansion project, or the need for one at all, may differ depending on the nature of the access solutions being negotiated. Additionally, the Code does not prevent a party from proposing an extension or expansion at any time during negotiations, which raises questions about the appropriateness of having requirement to demonstrate feasibility as a prerequisite to negotiations.

6.2. Options considered

The Department has considered three proposals for reform:

- a. Amending the current process to:
 - change the onus to demonstrate whether an extension or expansion is required;
 - change the onus to demonstrate whether a proposed extension or expansion is economically and technically feasible; and
 - remove the requirement to demonstrate technical feasibility as a pre-requisite to beginning negotiations.
- b. Introducing a high level set of principles to further guide negotiations on extensions and expansions.
- c. Introducing more detailed process to guide extensions and expansions.

6.3. Assessment and draft recommendations

6.3.1. Amending the current process

Early feedback from stakeholders in submissions to the Issues Paper regarding responsibilities in regard to expansions and extensions indicated that it's impractical to have the requirements to demonstrate need and feasibility in their entirety on one party. This is because both the access seeker and the railway owner have unique sets of information about the proposed task and the railway capacity, respectively.

As such, the Department has amended its original reform proposal from reversing the onus of these obligations to sharing the obligations by requiring both parties to notify the other if they believe an expansion is required (based on the information they have been provided) and for the railway owner to assess the technical feasibility, with the access seeker retaining responsibility for assessing the economic feasibility (based on an efficient price provided by the railway owner).

Additionally, the ERA's 2015 Code review recommended that the Code be amended to clarify that an extension or expansion request can be made in the course of negotiations under Part 3 of the Code if necessary, rather than it being a prerequisite to negotiations. There was broad support for this in submissions during the ERA's review and the Departments consultations. Given this, the Department considers that it is reasonable to remove the requirement to demonstrate the technical and economic feasibility of an expansion or extension as a pre-requisite to beginning negotiations and instead require it to be demonstrated during the course of negotiations where necessary.

Assessment

There was broad support for these reforms from stakeholders, who largely considered that that the revised process reflects what often happens in practice in any case and would make negotiations more efficient. No significant costs were identified in consultations.

Table 15: Summary of costs and benefits: proposed changes to negotiation responsibilities for extensions and expansions

| Benefits | Costs |
|--|---|
| Given that both parties have unique sets of knowledge about the access proposal and the railway capacity, it is appropriate for both parties to have an obligation to notify the other if they believe an expansion to the railway is required based on the information they have been provided. | The railway owner will incur costs in assessing whether an expansion/extension is required. However, it is likely they would already do this, even if they are not currently required to under the Code, to assist in their negotiating position and they will be permitted to recover the efficient costs of complying with this new obligation. |
| Avoids duplication of costs where the railway owner already has a capacity model and all the necessary information and inputs into that for their railway that the access seeker would have to duplicate to make a capacity assessment. | |

| Benefits | Costs |
|--|-------|
| Parties would have more flexibility to agree on the most efficient access solution if different options for building an expansion can be brought to the table as they arise. | |

Draft recommendation

The Department proposes to amend the process as per the following draft recommendations.

Draft recommendation 6a – Make both parties responsible for assessing whether an expansion is required to facilitate an access request when a proposal for access is made.

Draft recommendation 6b – Place responsibility on the railway owner for demonstrating if an extension or expansion is technically feasible.

Draft recommendation 6c – Remove requirement to demonstrate technical feasibility as a pre-requisite to beginning negotiations and clarify that a request for an extension or expansion can be made at any time during negotiations if necessary to facilitate the access request.

How this would be implemented

Draft Recommendation 6a

The railway owner would be required to notify the access seeker if they believe an expansion will be required, as an addition to their obligations under section 9 of the Code. The access seekers obligations under section 8 to notify the railway owner if they believe one is required based on the information they have been provided would remain. If the railway owner believed an extension or expansion was required they would be required to provide the access seeker with a reasonable preliminary estimate of the costs of the extension or expansion and the share that would be borne by the access seeker, as currently required by s.9(2)(b)(i) and (ii). This would assist both parties to realistically assess the access proposal as they proceed towards negotiations.

In cases where an extension (such as a spur or branch line) is required and it will not be operated by the infrastructure owner, it would remain the sole responsibility of the access seeker to notify the railway owner of the requirement for this.

Draft Recommendation 6b

The requirements in Section 15 of the Code would be amended (and moved into a different section of the Code) and will require that, if either party has identified that an extension or expansion is required, that during negotiations the railway owner will be responsible for assessing if an expansion or extension can be carried out in a technically feasible way, and that it will be consistent with the carrying on of safe and reliable operations on the route. They would then be required to notify the access seeker of the efficient price for building the expansion, or connecting the extension, and material to reasonably demonstrate how this price was calculated. The railway owner would be able to recover the efficient costs incurred in complying with this requirement.

The access seeker would retain responsibility for determining if any extension or expansion is economically feasible based on the efficient price provided by the railway owner. If there was a dispute about the efficient price for an extension or expansion, the parties would need to progress to arbitration to have a decision made on this.

No additional timeframes would be inserted into the Code to govern this, as the Department considers that the existing 90 day time limit on negotiations will provide the necessary incentives to carry this out in a timely manner. While this timeframe can be extended by agreement between the parties, if either party is dissatisfied with the progress of the negotiations on this aspect they will have the option to proceed to arbitration, as they do now.

This approach is similar to the approach in the ARTC interstate access undertaking, where the ARTC has 30 days to conduct a capacity analysis, determine if additional capacity is required and, if so, provide an outline of the works and indicative estimate of the cost of such works, or an outline of the requirements of an investigation into the provision of additional capacity. In this undertaking the ARTC can request more time from the applicant to do this, and the applicant has the right to proceed to arbitration if they do not believe reasonable progress has been made.

With regard to extensions that will not be operated by the railway owner, the railway owner would only be required to assess the feasibility and cost of the infrastructure insofar as it is required to connect to the existing rail line.

Draft Recommendation 6c

The Code would be amended to specify that a request for an extension or expansion can be made at any time during negotiations that are being carried out under Part 3, Division 2 of the Code.

At the time a request was made, the railway owner would be entitled to request that the access seeker demonstrate that it has the necessary financial resources, or can access the necessary financial resources, to pay its share of costs for the expansion (in accordance with the requirements set out in draft recommendation 10). The same provisions that currently exist in section 18 would apply to allow the railway owner to notify their dissatisfaction of any information provided in regards to this. Revisiting these requirements following a request for an extension or expansion would not invoke any stop the clock provisions in regards to the 90 day negotiation period.

6.3.2. High level guidance

High level principles could help clarify the roles and responsibilities of the various parties in negotiating an extension or expansion, such as who is responsible for developing plans, who is responsible for funding the investigations and, ultimately, construction, obligations to consult and arrangements for sharing the cost of an expansion (i.e. pro rata). This could assist with promoting effective and timely negotiations.

Assessment

Most parties that the Department has consulted with considered that high level principles could provide assistance in negotiating extensions or expansions, but did not consider them necessary.

The Department agrees that high level principles could be beneficial in the absence of any other reforms. However, draft recommendation 1 (to move to a DORC based asset valuation

approach) will provide some high level guidance as it would specify how the costs related to an extension or expansion should be treated as a matter of course. Under the DORC approach, when calculating the total cost that applies to a route for an access application, the railway owner (and regulator) would account for all the capital expenditure required to provide access, including that required for extensions and expansions. The change in responsibilities outlined in draft recommendations 6A-6C should also make the process more efficient as the obligations have been shifted to the parties that are best placed to meet them.

Table 16: Summary of costs and benefits: high-level guidance on the process for extensions or expansions

| Benefits | Costs |
|--|---|
| Improved guidance on the process, responsibilities, timing, cost sharing and recovery of an expansion project could assist in negotiations. However, this will not be necessary as draft recommendations 6A-6C will improve guidance on negotiating an expansion, and more detailed guidance will be provided if the DORC approach is implemented. | There could be some small costs involved for all parties in considering how to interpret the high-level guidance. |

Draft recommendation

As the objectives of high-level principles can be met by implementing other reforms recommended in this paper, the Department does not recommend introducing additional high level principles.

6.3.3. A more detailed process

A more detailed process could set out the steps to be taken in developing an expansion or extension project from concept, pre-feasibility and feasibility studies, and could include more detailed provisions around the roles and responsibilities of various parties.

Assessment

Most parties that the Department has consulted considered that introducing prescriptive process requirements would increase compliance costs and be difficult to design due the unique characteristics of different expansion and extension projects.

Table 17: Summary of costs and benefits: a detailed process to guide extension or expansions

| Benefits | Costs |
|--|---|
| Improved guidance on the process, responsibilities, timing cost sharing and recovery of an expansion project could assist in negotiations. However, additional guidance will already be provided if other draft recommendations in this paper are implemented. | Extension and expansion negotiations are highly complex and dependent on a number of unique commercial factors and as such are not suited to a highly prescriptive process. |

| Benefits | Costs |
|----------|--|
| | Increasing the prescriptiveness would increase compliance costs for both ERA and railway owners. |

Draft recommendation

The Department agrees with stakeholder submissions regarding the inappropriateness of a detailed process to guide extensions and expansions, and does not make any recommendations regarding this.

7. Efficiency of the regulatory process

7.1. Problem

It has been highlighted to the Department by many stakeholders that processes under the Code are inefficient. For example:

- the amount of work that is required to be carried out by the regulator and a railway owner in response to an access request could be inefficient in the case of a frivolous access request, however there is no mechanism for the railway owner to contest the validity of an access request before this work occurs;
- timeframes are not specified in certain parts of the Code, which can hinder the negotiation process;
- uncertainty about what is required to be provided to meet certain requirements of the Code can lead to unnecessary disputes; and
- limited guidance about the standard terms and conditions for access can reduce the efficiency of negotiations.

The Issues Paper also raised that, while the ERA has followed a standardised approach to consultation on Part 5 instruments, the provisions in the Code do not reflect current ERA practice.

7.2. Options considered

The Department has considered seven proposals for reform:

- a. a provision that allows the railway owner to refer an access request to the arbitrator where they can demonstrate that an access request is frivolous;
- b. improving timeframes in the Code;
- c. introducing a requirement for each railway operator to have a regulator approved standard access agreement;
- d. standardising access seeker obligations;
- e. standardising consultation across Part 5 instruments;
- f. requiring the ERA to maintain a standard set of model Part 5 instruments to apply to all new railways;
- g. Allowing the arbitrator to make interim orders on access arrangements; and
- h. Providing the regulator with the power to determine if information submitted as confidential should be released or not.

7.3. Assessment and draft recommendations

7.3.1. Preventing frivolous access requests

While section 14 (or the equivalent requirements if draft recommendation 10 is implemented) provides important protections for railway owners to ensure they do not have to negotiate until the access seeker can demonstrate that they have the necessary financial and managerial capacity, the ERA and railway owners have to fulfil time consuming obligations (e.g. preparing incremental and total costs) prior to this requirement coming into effect.

Other rail access regimes have provisions that allow the infrastructure owner to refer access requests to an arbitrator if they believe the request is frivolous or vexatious.

Assessment

Including a provision on frivolous access requests allows the authenticity of an access proposal to be questioned up-front, which would more effectively protect railway owners and the regulator from spending time and money on frivolous access requests. Although there is a risk that this provision may be used to attempt to delay an access request, this will be minimised by placing the burden of proof on the railway owner. Nevertheless, if a claim were made to the arbitrator that a proposal was 'frivolous', it would likely be less costly for all parties to resolve it through the Code than if the railway owner questioned the authenticity of a proposal through judicial review, as they can currently do.

Table 18: Summary of costs and benefits: ability for railway owner to refer frivolous requests to the arbitrator.

| Benefits | Costs |
|--|--|
| Protects the railway owner from having to invest time in responding to frivolous access requests. | There may be attempts to use it as a mechanism to delay or defer an access proposal. |
| Protects the regulator from having to carry out a floor and ceiling determination for frivolous access requests. | |
| Provides a mechanism other than judicial appeals for railway owners to test the intentions of an access seeker. | |

Draft recommendation

The Department considers the potential benefits of this reform outweigh the risks that it would be used to defer or delay access negotiations, and that risk can be minimised through placing the burden of proof on the railway owner.

Draft Recommendation 7 – insert a provision to allow a railway owner to refer an access request to the arbitrator if they can establish a prima facie case that it is frivolous.

How this would be implemented

A requirement would be added in to the Code to require allow the railway owner refer a request to the arbitrator for determination where they believe, and can make a case that, an access request is frivolous. The arbitrator would then be required to make a determination on this within 30 days.

It will be up to the railway owner to demonstrate why it should not negotiate, rather than up to the access seeker to prove that it should. The arbitrator would only be assessing the issues put forward by the railway owner, and the access seekers response, in making their assessment on whether the railway owner must negotiate.

7.3.2. Improving timeframes in the Code

While there are timeframes imposed on the railway owner for their responsibilities under the Code, this is not the case for arbitration proceedings and some access seeker obligations.

With regard to arbitration timeframes, the National Access Regime, which requires the Australian Competition and Consumer Commission to make a final determination within 180 days from the day an arbitration application is received. This regime does have stop the clock provisions that allow the ACCC to not count certain periods of time where more information is required, or where the parties agree to stop the clock.

Assessment

Stakeholders generally agreed with this proposal and did not identify any significant costs, however, this was on the basis that there would be an option to extend timeframes if the parties agreed, in order not to compromise good outcomes for the sake of expediency.

Table 19: Costs and benefits: imposing timeframes where they do not currently exist.

| Benefits | Costs |
|---|---|
| Will provide more certainty to railway owners about the timeframes for different stages of the negotiation and arbitration process. | Timeframes on an arbitration could compromise the ability of the parties to provide a considered response or decision. However, this will be mitigated through stop the clock provisions and an option to extend the timeframe if both parties agree. |
| Will improve transparency about progress of arbitrations. | |

Draft recommendation

The Department considers the addition of timeframes into the Code where they do not currently exist will improve the transparency and timeliness of the regulatory process for potential access seekers without any significant costs.

Draft recommendation 8 – insert timeframes for obligations under the Code where these do not already exist.

How this would be implemented

Timeframes would be added into the following Parts or sections of the Code:

- Part 3, Division 3: A requirement for the arbitrator to make a decision within 180 days would be inserted into the Code. It would include stop the clock provisions in a similar manner to the National Access Regime such that outcomes are not compromised where more time to consider the issues is required. It would also allow parties to extend the timeframe for the arbitrator, if both the access seeker and railway owner agree it should be extended.
- Section 18, which under the changes proposed in draft recommendation 10 will relate to the financial capability of the access seeker, will be amended to require that the access seeker provide further information within 10 business days, and to notify the railway owner if there a dispute within 10 days if the railway owner still believes the information provided is insufficient.

7.3.3. Publishing standard information package and regulator approved access agreement

Under section 7A of the Code, the railway owner is required to ‘make a publication’ containing their standard access agreement and the information required in Schedule 2. Schedule 2 of the Code requires information such as track diagrams, length of track, location and length of passing loops, maximum axle loads and maximum train speeds and the running times of existing trains, amongst other things.

This requirement was inserted into the Code following the ERA review of the Code in 2005. In this review, the ERA recommended that this information be published on the railway operators website, citing that ‘the increase in available information will help access seekers understand the potential operational feasibility of their proposal prior to making formal inquiries to the railway owner’. While the requirement was implemented, it was done so in a way that required the railway owner to make this available in hard copy on request rather than on their website. In the ERA’s 2011 review they recommended again that this information be provided on the railway owner’s website (draft recommendation 1). The Department proposed that this be implemented in its 2017 Issues Paper.

Assessment

Consultation with stakeholders throughout this review has highlighted that having more information readily available about the railway would help potential access seekers to assess the potential use of the railway prior to lodging an access request. Stakeholders also noted the importance of a ‘master train plan’ showing the train paths subject to contractual entitlements (including by the railway owner) and the paths available for contracting or ad-hoc utilization to help them assess the capacity of the network to accommodate their freight task.

Stakeholders have also commented that, although a standard access agreement can currently be obtained under section 7A of the Code, the standard agreements provided by railway owners do not always contain all the useful information that could reasonably be expected. Many also appeared to have little confidence that the standard agreements provided at the beginning of the process would reflect the terms and conditions that they could expect once an agreement was later struck (noting it is reasonable to expect that these would change somewhat as the details of the access proposal were negotiated).

In other rail access regimes across Australia, and in other regulated infrastructure with third party users such as airports, this type of information about the existing traffic (and therefore capacity) is readily available to potential access seekers. In addition, publishing this information on a website should represent no significant additional regulatory burden or bring about any concerns about the release of commercial in confidence information, since the railway owner is already required to keep this information up to date and provide it to any party who makes a request under the Code.

The Department considers that the standard access agreement should be approved by the ERA prior to publication, so ensure that it will be effective in informing access seekers of the likely terms and conditions that the railway owner will seek to apply. Flexibility would be preserved as parties would continue to be free to agree on terms and conditions that differ from those set out in a standard access agreement.

Table 20: Costs and benefits: publishing information required in s.7A on a railway owners website and requiring regulator approved standard access agreement

| Benefits | Costs |
|---|--|
| Expedite the information discovery process and remove any opportunity for an information request to be delayed or deferred. | Increased regulatory burden for ERA and railway owner to approve standard access agreements. |
| Improved use of standard access arrangement. | |

Draft recommendation

The Department considers that having information similar to that contained in Schedule 2 available online will improve transparency for access seekers at minimal additional cost, and that requiring regulator approval of a standard access agreement will improve the usefulness of this document.

Draft recommendation 9a – require the ERA to approve a standard access agreement for each railway owner and for this agreement, along with other relevant information to be published on a railway owner’s website instead of being made available in hard copy format.

Draft recommendation 9b - implement Recommendation 8 from the 2015 ERA review, to reduce the prescribed time limit for updating this information from two years to one year.

How this would be implemented

Part 2A of the Code would be amended by adding a further requirement that each railway owner must have at least one standard access agreement approved by the regulator. It would also require that the information required to be provided by a railway owner as described under sections 6(a) and 6(b) of the Code should be published on the railway owner's website. If a railway owner does not have a website, but information relating to the railway is maintained on the website of an associated company, then the required information as described under sections 6(a) and 6(b) should be published on that company's website.

The prescribed time limit set out in section 7C(2)(b) for the amendment or replacement of required information (information described in section 7A) would be reduced from two years to one year as per recommendation 8 of the ERA’s 2015 Code review.

The information required by Schedule 2 would be reviewed (in consultation with railway owners and access seekers) to assess its suitability given it would be required to be published. In particular, the Department intends to review whether:

- The requirement to publish ‘the running times of existing trains’ in Schedule 2 means a document similar to a master train plan is required;
- Gross tonnages and tonnages of freight should be amended to be replaced with gross tonne kilometers; and
- The definition of capacity in Schedule 2 should require information on the nameplate capacity (i.e. the capacity the asset would have in its replacement condition) and operational capacity to be given, with both calculations taking into account other traffic on the line.

7.3.4. Standardise access seeker obligations

Feedback from stakeholders has indicated that it can be difficult to determine what is required from them to satisfy certain provisions of the Code, and that this uncertainty can lead to differing opinions and unnecessary disputes that delay the process for making an access agreement.

Assessment

The Department agrees that some obligations under the Code could be made clearer to improve the process for progressing an application. The Department considers that obligations under section 8 (making a proposal for access) and section 14 (demonstrating financial and managerial capacity) are sections that should be standardised.

Section 8

While the Regime has some guidance on what must be provided in an access application, there is no standard form or requirements to guide an access seeker. In contrast, other access undertakings have more detailed on guidance on the information requirements for an access application. For example, Schedule B of Aurizon's undertaking with the QCA sets out in detail the information an access seeker must provide in their access application. Schedule B of the ARTC's Interstate Access Undertaking also provides the information that must accompany an access application, although in less detail.

The Department considers that there is value in standardising the requirements for an access proposal to provide more certainty to the access seeker about the information they need to provide, and also to the railway owner that they will receive the information they need.

Section 14

Section 14 of the Code currently allows the railway owner to request that a proponent show it has managerial and financial ability to carry on the proposed rail operations and pay its share of costs related to any extension or expansion. The scope of these requirements is quite broad, and there is not any guidance for an access seeker as to what a railway owner may consider necessary knowledge and experience or necessary financial resources.

In other undertakings that govern access to railways in Australia, standard prudential requirements are set out which set the minimum requirements an access seeker must meet before a railway owner is obliged to negotiate with them. The ACCC's guidelines on access undertakings states:⁷

“A service provider may wish to stipulate pre-conditions that access seekers must satisfy in order to be granted access to the service in question – for example, satisfying certain prudential requirements.

Pre-conditions can be appropriate where they reflect the reasonable commercial interests of the access provider, such as ensuring an access seeker is solvent before the provider is required to sign a contract for access.

Pre-conditions may be problematic, however, if they are used in an anti-competitive manner, such as to discriminate against certain types of users, or to set the 'bar' for obtaining access unreasonably high. Accordingly, it is important that any pre-conditions for access be clear, fair, reasonable and non-discriminatory. For transparency, it will likely be necessary to include the pre-conditions in the undertaking or standard terms.”

⁷ <https://www.accc.gov.au/system/files/ACCC%20-%20Part%20IIIA%20access%20undertaking%20guidelines%20-%20August%202016.pdf>

An example of how this has been implemented in accordance with these guidelines, is the ARTC interstate access undertaking, which states that an applicant must meet the following criteria:

- the Applicant must be Solvent; and
- the Applicant, or a Related Party of the Applicant, must not be currently, or have been in the previous two years, in Material Default of any agreement with ARTC, or any agreement in accordance with which access to rail infrastructure not managed by ARTC, has been provided to the Applicant or a Related Party of the Applicant; and
- the Applicant must be able to demonstrate to ARTC that it has a legal ownership structure with a sufficient capital base and assets of value to meet the actual or potential liabilities under an Access Agreement, including without limitation timely payment of access charges and payment of insurance premiums and deductibles under the required policies of insurance.

The Department considers there is merit in standardising and providing more clarity about the information that is required to demonstrate financial capacity. If this is standardised and known in advance, it is also reasonable to move the requirement forward to the access proposal stage. The Department notes that the ERA recommendation to require this information be provided within 7 days of the railway owner requesting this information meant the information was required within 2 weeks of an access proposal in any case.

Table 21: Costs and benefits: standardising section 8 and 14 requirements

| Benefits | Costs |
|--|---|
| Less opportunity for negotiations to be delayed or deferred. | It may be difficult to determine standard requirements due to the variety of railway lines in WA. |
| More clarity for access seekers about their obligations. | |

Draft recommendation

The Department considers that standardising access seeker obligations will improve the transparency and efficiency of the regulatory process with minimal costs.

Draft recommendation 10 – standardise section 8 and 14 requirements

How this would be implemented

Section 8

The Code would be amended to include a Schedule with the standard information required for an access agreement. Provisions would be included to allow the railway owner to ask for further information, as long as that information was reasonably required to assess the access proposal.

The Department would consult as these requirements were developed.

Section 14

The requirements in section 14 of the Code would be moved to Section 8 of the Code and amended to be more formulaic or prescriptive requirements.

The Department considers that the first two requirements in the ARTC undertaking as set out above are reasonable. A requirement similar to the third ARTC undertaking requirement listed above would be included, however, it would be amended to require an access seeker to demonstrate that it has, or will have, the ability to access, the financial resources to meet its obligations (to both the railway owner and any third parties) under an access agreement. The ability to access financial resources would be satisfied by providing a bank or parent company guarantee based on the initial information provided by the railway owner under section 7.

The Department would consult on the standard requirements as these were being developed. For clarity, this would not prevent a railway owner from imposing further financial requirements as a pre-requisite to signing an access agreement.

7.3.5. Consistent consultation on Part 5 instruments

The ERA recommended in its 2011 review of the Code that Part 5 should be amended as follows:

- Section 42 should be revised to only require public consultation for variations to segregation arrangements considered by the Authority to constitute a material change.
- Section 45 should include the costing principles and overpayment rules in order to ensure consistency in the public consultation processes across all Part 5 instruments.
- A new provision should be added to provide for the review of all Part 5 instruments every five years or as otherwise determined by the Authority.

Assessment

In practice, the ERA currently carries out consultation on all Part 5 instruments before approving or amending them. Periodic review of the Part 5 instruments allows for material changes in market conditions or circumstances not envisaged at the time of their original development, or from the last review, to be reflected so they continue to advance the statutory objectives. This proposal would make the Code clearer in this regard and regulatory burden will not increase as this reflects the approach currently taken by the Authority.

Concerns were raised in stakeholder submissions about the ability for the ERA to define what a material change to the segregation arrangements is without consulting first. The Department considers that the ERA has sufficient experience under other access regimes to be able to determine if a change is likely to affect outcomes for access seekers and therefore whether consultation is required.

Table 22: Summary of costs and benefits: consistent consultation on Part 5 instruments

| Benefits | Costs |
|---|--|
| This would ensure the Code reflects current practice and therefore creates realistic expectations for railway owners and access seekers | Less flexibility for the ERA to tailor consultation requirements in future |

Draft recommendation

Given this change is to reflect to the ERA's consultation in practice, the Department considers it reasonable to implement it.

Draft recommendation 11 - Standardise consultation across Part 5 instruments

How this would be implemented

The Code would be changed to require the ERA to:

- Consult on the costing principles and overpayment rules, and only require the ERA to consult on material changes to the segregation arrangements; and
- Review of all Part 5 instruments every 5 years at a minimum.

7.3.6. Model set of Part 5 instruments

During the ERA's 2011 Review, concerns were raised that the Code, rather than specifying a definitive timeframe for the submission or approval of Part 5 instruments, requires they be submitted 'as soon as is practicable after the commencement of the Code'. The ERA considered that the lack of definitive timeframes for submitting Part 5 instruments by greenfield railway owners hampers a Code objective of providing timely access to prescribed railways, undermining the effectiveness of the Code.

Assessment

A model set of Part 5 instruments that would apply to all new railways six months before operations begin (or before an access holiday expires) would enable the railway owner to propose amendments to the model instruments sufficiently early for the ERA to approve them prior to the date they are intended to apply. It would improve the transparency of how the Regime might apply for prospective railway owners or access seekers.

Table 23: Summary of costs and benefits: model set of Part 5 instruments

| Benefits | Costs |
|--|--|
| Will ensure more timely access to new railways, and would facilitate potential access seekers to advance project funding arrangements prior to launching their access application. | Increased regulatory burden for the ERA. |

Draft recommendation

There was broad support for this proposal in consultation and the Department considers it will improve the efficiency of the regulatory process for new railways with minimal costs.

Draft recommendation 12 - Require the ERA to develop and maintain a model set of Part 5 instruments

How this would be implemented

A requirement would be inserted into the Code for the ERA to maintain a model set of Part 5 instruments. The ERA would be required to consult on the model Part 5 instruments, and consideration would need to be given to where model instruments may have a need to vary to account for different organisational structures of the owner.

7.3.7. Allow arbitrator to make interim order on access arrangements

The Department has received feedback that the time period leading up to an access agreement expiring presents an opportunity for infrastructure owners to exercise monopoly powers by unreasonably amending prices, terms and conditions and withholding access if the access seeker does not agree. This is particularly the case where access seekers have significant sunk investment in above rail infrastructure, and require ongoing rail access to maintain business profitability.

Assessment

While different access prices, terms or conditions may be justified in an access agreement renegotiation, the Department considers it reasonable that where parties have an agreement that has been negotiated under the Code, and are in the process of negotiating a new agreement under the Code, that the arbitrator should be able to make interim orders for a temporary access price (even if the parties have not yet reached the arbitration phase). This will allow the railway owner to make a case as to why prices, terms or conditions should be varied, and to have the arbitrator assess the reasonableness of this prior to a final agreement being negotiated or decided by an arbitrator.

Table 24: Costs and benefits: Allowing the arbitrator to make an interim ruling on access

| Benefits | Costs |
|--|--|
| Improved assurance for access seekers that railway owners will not be able to exercise monopoly power in access arrangement re-negotiations. | Additional regulatory oversight, which could limit railway owner negotiation approaches. |

Draft recommendation

The Department does consider that the time between access arrangements being negotiated is one that involves a higher risk of the exercise of monopoly power by the railway owner, and as such considers it reasonable that there are some protections available for this time period.

Draft recommendation 13 – Provide for an arbitrator to make an interim order on access prices, terms and conditions if parties have an agreement under the Code that is expiring and are renegotiating under the Code.

How this would be implemented

A provision would be inserted into the Code that allows for an access seeker or railway owner to request the arbitrator to make an interim decision on prices, terms and conditions provided that:

- the parties had an agreement under the Code and were renegotiating access under the Code for the same route; and
- the current access agreement was due to expire in less than 6 months.

In making its decision, the arbitrator would be allowed to consider the existing access arrangements and any material submitted by the parties as to why they should be varied.

7.3.8. Confidentiality of information submitted to the regulator

Under the Code, the regulator cannot release, publicly or to an access seeker, any information that has been submitted to them if the railway owner has claimed it is confidential. This may impede negotiations if parties cannot access information relevant to the access proposal.

In contrast, other access regimes allow for the regulator to consider whether information should be kept confidential when publishing decisions or reasons for decisions. For example, under the National Access Regime in the Competition and Consumer Act 2010, the Australian Competition and Consumer Commission considers submissions from relevant parties before deciding what should remain confidential when they are publishing their decisions, but they ultimately have the power to determine what will or will not be published.⁸ The National Gas Law allows the Australian Energy Regulator or the Economic Regulation Authority to release information where the detriment of doing so does not outweigh the public benefit.⁹

Assessment

Whether or not parties should be able to claim confidentiality over any information was something that was considered by the ERA in their 2015 Code Review. Submissions from stakeholders at that time indicated that access seekers consider that primacy should be given to the transparency of regulatory processes, and that confidentiality should be restricted to instances where the publication of information would be commercially damaging to the railway owner. Railway owners submitted that they should be able to require the confidentiality of documents and information provided to the regulator. The ERA concluded that the confidentiality of information in negotiations is paramount, and that disclosure of costs was only necessary where a more prescriptive regime applies.

Given the changes that are being proposed in this paper, and the importance of transparency to allow the ERA to consult broadly to make an informed decision regarding the regulated asset base and subsequent floor and ceiling, it is now appropriate to review the confidentiality provisions as envisaged by the ERA. The Department has considered whether it is necessary to extend to the powers of the regulator to be able to release information where it is in the public interest. A number of costs and benefits have been outlined as below. While a number of benefits have been identified, the Department does not currently have enough evidence of the materiality of the benefits that would arise from the regulator being able to release information if they consider it in the public interest.

⁸ Competition and Consumer Act 2010, section 44ZZBE

⁹ National Gas (South Australia) Act 2008, Schedule – National Gas Law, section 329

| Benefits | Costs |
|--|---|
| The regulator will be able to more broadly consult and therefore will be able to make a more informed decision. | The railway owner may be more reluctant to provide information if they consider it may be released publicly. |
| Increased transparency will assist with negotiations. | The regulator may not be best placed to determine what information might be commercially damaging to the railway owner. |
| It will ensure procedural fairness for access seekers as they will be able to understand the reasoning and facts considered by the regulator when making a decision. | |

Draft recommendation

The Department does not make a recommendation on this issue but invites information on the materiality of the costs and benefits of allowing the regulator to release information that they consider is in the public interest.

8. Railway owner accountability

8.1. Problem

Accountability arrangements for access providers need to strike a balance between providing sufficient transparency and assurance to stakeholders while not imposing unnecessary regulatory burden. The Issues Paper identified that the Regime is currently light handed in terms of its compliance obligations, and that this may not be providing stakeholders with information on how effectively the Regime is being applied or the service quality they should expect from railways covered by the Regime.

8.2. Options considered

The Department three options for reform:

- a. providing for more regular and consistent reporting of the railway owner's compliance with the Part 5 instruments;
- b. requiring the railway owner to publicly report on a regular basis on the progress of access negotiations, including for example: the number of access applications outside the Code, the number of access applications within the Code, the number of negotiations under the Code that have commenced, information on disputes or judicial challenges to any obligations under the Code, and the number of negotiations under the Code that have concluded with an access agreement; and,
- c. requiring the railway owner to publicly report on a regular basis (e.g. annually) on service quality matters such as: track condition, percentage of track under speed restriction, percentage of train services delayed, percentage of train services cancelled and average below rail delays.

8.3. Assessment and draft recommendations

8.3.1. Regular and consistent reporting on compliance with Part 5 instruments

The aim of having more regular and consistent reporting on compliance with Part 5 instruments was to provide more transparency on how railway operators were complying with their requirements under the Regime. Comments from stakeholders in submissions in response to this proposal mainly focused on the need for more detailed information about pricing, performance standards and asset quality.

Assessment

The Department considers that this type of information will be provided through other changes to the Regime. For example, draft recommendation 1 (to introduce a DORC approach) will provide more information about asset quality, and draft recommendation 14 (to improve reporting of service quality indicators) will provide information on performance standards,. As such, the Department did not consider that there was a need for more regular or consistent reporting on compliance with Part 5 instruments.

Table 25: Summary of costs and benefits: regular and consistent reporting on compliance with Part 5 instruments

| Benefits | Costs |
|---|---|
| Additional compliance monitoring and reporting could give access seekers confidence that instances of non-compliance will be identified and remedied and provide more confidence in the Regime. However, the additional benefits provided by additional reporting are likely to be small if other draft recommendations made in this paper are adopted. | Increased regulatory burden for railway owners in terms of time and costs to prepare reports. |
| | Increased enforcement costs for the ERA. |

Draft recommendation

Given the information identified as useful will be provided as a result of other reforms, the Department does not make any recommendation for reporting on Part 5 instruments.

8.3.2. Reporting on outcomes of access negotiations

In the Issues Paper, the Department made a proposal for the railway owner to publicly report on a regular basis on the progress of access negotiations under the Code as a means of improving transparency about how the Regime was operating.

Assessment

The Department does not consider there to be enough justification for reporting on the outcome of access negotiations, and agrees with stakeholder submissions that stated that there may be reasons why both parties may want to keep negotiations confidential.

The Department notes that the ERA must already be made aware of access proposals under the Code, and should they have concerns about the progress of negotiations is able to compel a railway owner to provide information using their existing powers in the Act.

Table 26: Summary of costs and benefits: reporting on outcomes of access negotiations

| Benefits | Costs |
|---|---|
| Could provide useful information on how the Regime is performing. For example, may highlight an area where timeframes are routinely extended which could assist with making improvements to the Regime. | It may not be in either party's interests to have negotiations reported publicly. |
| | This may adversely affect the progress of any access negotiations, and breach confidentiality obligations assumed by the railway owner and access seeker. |
| | Increased regulatory burden for railway owners in terms of time and costs to prepare reports. |
| | Increased costs for the ERA. |

Draft recommendation

The Department does not recommend any changes to require the railway owner to report publicly on the outcome of access negotiations.

8.3.3. Reporting on service quality indicators

Several stakeholders have raised concerns about the lack of transparency about the service quality they might expect if they gain access to railways in Western Australia. Requiring railway owners to report on service quality indicators can increase the accountability of railway owners with regards to the service they offer to access seekers, and is a standard component of the other access undertakings in Australia.

For example, the IAU commits ARTC to periodically report on unit costs and the service quality performance indicators of reliability, network availability, transit time, temporary speed restrictions and track condition. The HVAU commits ARTC to periodically report on transit time, maintenance requirements and coal chain capacity losses.¹⁰

Assessment

With the introduction of a DORC based valuation methodology, there is likely to be more information available about the age and condition of a track, and the cost of operating it, which may mean that less additional information is needed on the service quality that a party using the railway should expect. However, the Department considers that some service quality information that has been identified as useful will not be available as a result of this, and that it is important for access seekers to be able to access this to enable them to make an early assessment of whether rail is likely to be a feasible freight solution for them.

Having service quality indicators available would also improve the accountability of the railway owner in regards to the level of service quality, by requiring them to evaluate and publish key drivers in the cost of providing the service and contributing factors in any service quality decline.

Table 27: Summary of costs and benefits: reporting on service quality indicators

| Benefits | Costs |
|--|---|
| Access seekers will be able to find out the standards at which the railway owner will operate at in exchange for its access fees, and to understand whether the railway operator is operating the rail network efficiently and supplying services at a satisfactory level. | Increased regulatory burden for railway owners in terms of time and costs to prepare reports. |
| Understanding and being able to demonstrate expected service quality will assist third party access seekers who are negotiating funding arrangements. | Information that is required may be commercially sensitive. |

¹⁰ Australian Competition and Consumer Commission, *Submission to Rail Access Review*, January 2018.

| Benefits | Costs |
|--|-------|
| The publication of service quality information can support lower transaction costs in the negotiation and monitoring of performance under an access agreement. | |
| Publicly reported service quality indicators can assist haulage operators to demonstrate expected levels of service to their customers. | |

Draft recommendation

The Department considers that having additional information available on service quality indicators will improve the transparency of the Regime and facilitate more effective negotiations.

Draft recommendation 14 – include requirements to publish service quality indicators

How this would be implemented

Obligations for railway owners to report on certain service quality indicators would be inserted into the Code. The Code would be clear that these are published for information only and do not constitute a binding constraint on the railway owner.

This is to include quarterly reporting on:

- actual minimum, maximum and average section run time performance;
- network entry and exit time against schedule; and,
- percentage of track under temporary speed restriction (i.e. where a speed restriction has differed to one set out in the standard information package).

Provisions would be allowed for individual railway owners to seek exemptions from the ERA if they could demonstrate that providing a particular service quality indicator could not reasonably be provided by them.

9. Regulator Accountability

9.1. Problem

Just as accountability mechanisms for railway owners are important to ensure they comply with the Regime, accountability mechanisms for the regulator are important to ensure the Regime is appropriately implemented. There are currently a number of ways in which the regulator's decisions are scrutinised, including extensive public consultation processes and the publication of draft decision and final decision documents for significant regulator decisions. The regulator's decisions are also currently open to judicial review.

Ensuring the Regime is implemented well is particularly important in relation to regulator decisions that have a substantial effect on regulated parties, which are complex and therefore have a higher potential for regulator error, and in which the regulator has substantial power in determining the end outcome. Currently the Regime is a relatively 'light-handed' regime based on setting the parameters for negotiation, and the ERA would not often have substantial power in determining the end outcome of access negotiations. This power would more likely rest with the arbitrator (if there is a dispute).

However, if changes are made to the pricing mechanisms in the Code, the regulator could be seen as having substantial power in influencing the regulatory value of covered railways following the transition. This means additional regulator accountability mechanisms are particularly warranted during the transition to new pricing mechanisms.

9.2. Options considered

The Department considered three options for reform:

- a) Allow for merits review for all regulatory decisions.
- b) Allow for merits review only for certain decisions.
- c) More up-front direction for regulator decision making through instruments such as a statement of expectation or intent, combined with requirements to obtain at least two expert independent reports to inform certain decisions (e.g. for the initial asset valuation) and existing consultation processes and requirements to issue draft decision and decision documents.

9.3. Assessment and draft recommendations

9.3.1. Merits review for all regulatory decisions

Merits review is one way of providing assurance to stakeholders that the Regulator will implement the Regime appropriately. It is a process by which a person or body other than the original decision maker reconsiders the facts, law and policy aspects of the original decision and determines what is the correct and preferable decision. A merits review body makes decisions within the same legislative framework as the primary decision maker, and may exercise all the powers and discretions conferred on the primary decision maker. It can provide assurance to access seekers and railway owners that their interests will have some protection from regulatory error.

It differs from judicial review, which allows a Court consider and overturn a decision if it believes that there was an error of law, that the decision maker took into account irrelevant considerations (or failed to take into account relevant ones) or that the decision maker acted unreasonably or with improper purpose. A judicial review body, if they did find evidence of any of these things, would overturn the decision and usually the original decision maker would have to make the decision again with regard to the court's findings.

Assessment

Allowing for merits review for all regulatory decisions might provide greater confidence to stakeholders that the regulator is appropriately implementing the Regime, however, this would likely introduce substantial additional delays in obtaining an access agreement and regulatory uncertainty. For example, elements of a recent regulatory decision by the ERA regarding the access arrangement for the Dampier to Bunbury natural gas pipeline were appealed through merits review and the merits review process took 2 years (from 2016 to 2018) to be completed.¹¹

Concerns about delays and costs have resulted in merits review being removed from other regulated infrastructure sectors such as gas, electricity and telecommunications.

As well as having substantial costs, it is also unclear whether merits review would provide substantial benefits. Judicial review is already available to challenge regulatory decisions and it is not clear whether merits review would provide substantial benefits over judicial review. In any case, regulatory decisions involving access determinations are complex and involve a considerable amount of regulatory judgement. Carrying out a review of this is costly for all parties, and although a different decision may be reached, it may not be more correct or more beneficial than the original decision.

Furthermore, the Department considers that there does not appear to be a need to introduce greater accountability for all regulator decisions. Some decisions may not carry substantial regulatory risk, or may not have a significant impact on either party. Introducing additional accountability mechanisms for low-risk, low-impact decisions would likely unduly lengthen processes, and impose additional costs, to reconsider matters that will not materially affect the relevant parties.

¹¹ Economic Regulation Authority, *Notice – Australian Competition Tribunal's judgement on the Dampier to Bunbury Natural Gas Pipeline merits review*, 30 July 2018. Available at: <https://www.erawa.com.au/cproot/19351/2/Notice%20-%20ACT%20Judgement%20on%20the%20DBNGP%20Merits%20Review.pdf>

Table 28: Costs and benefits: merits review for all regulatory decisions

| Benefits | Costs |
|--|---|
| Improves confidence in the ability of the Regime to deliver good regulatory outcomes through accountability for regulator decisions. | Could be used as a way to delay or defer regulatory decisions. This risk would be substantially greater if merits review were allowed for all decisions, rather than just for decisions that are particularly significant for stakeholders. |
| | Would involve a considerable amount of resources for all parties. |
| | Would add uncertainty by introducing an additional decision maker (the merits review body) and no clarity as to how the judgements of the second decision maker may differ from the judgements of the original regulator. |

Draft recommendation

The Department does not recommend allowing for merits review for all regulator decisions.

9.3.2. Merits review for certain decisions

The Department recognises that there are some circumstances where an incorrect regulatory decision carries a very high financial consequence, and, as such additional regulator accountability mechanisms may be warranted in those cases.

Stakeholders have indicated that the decision that carries the most regulatory risk, and has potentially the highest financial consequence, is setting the initial regulatory asset base. The Department considered the option of allowing merits review for that particular decision, and further restricting access to merits review to cases in which the review of the regulator's decision has the potential to significantly affect the end outcome.

Assessment

Other merits review regimes have allowed for merits review in limited circumstances and have applied a materiality threshold to ensure the potential benefits outweigh the costs of the review. For example, previously under the National Electricity Law limited merits review was allowed for to seek the correction of a material error of fact, an incorrect exercise of discretion or unreasonableness in regulators decision making. Prior to merits review being abolished under that regime, the Council of Australian Governments (COAG) Energy Council had agreed to make reforms to further tighten and clarify the grounds for review, to apply higher financial thresholds, to require reviews to be conducted on the papers, rather than through potentially expensive and adversarial oral hearings, and to set a higher bar for appellants to

demonstrate the overturning the original decision would not be to the detriment to the objective of the National Electricity Law.¹²

However, as noted above, merits review has now been abolished from these regimes, as it was found to impose more costs than benefits, even when applied to limited circumstances.

Table 29: Costs and benefits: merits review for initial decision on asset value

| Benefits | Costs |
|---|--|
| Improves confidence in the ability of the Regime to deliver good regulatory outcomes through accountability for regulator decisions that have a material impact on stakeholders. | Could be used as a way to delay or defer regulatory decisions. |
| | Would involve a considerable amount of resources for all parties. |
| | Would introduce greater uncertainty about the initial asset valuation. |

Draft recommendation

The Department considers that merits review is unlikely to provide material benefits over what is already provided by the availability of judicial review. The Department considers that additional confidence on the initial asset valuation could be provided to stakeholders at a lower cost than through merits review. This is discussed in the following section.

9.3.3. Up front direction and expert advice

More up front direction for the regulator could involve instruments such as a statement of expectation or intent, combined with a requirement to obtain at least two expert independent reports in certain circumstances, in addition to existing consultation processes and requirements to issue detailed draft decision and decision documents for certain decisions.

Under this approach, judicial review would be available, as is currently the case.

Assessment

The intent of this option is to reduce the risk of regulatory error occurring in the first place, while minimising the uncertainty about regulatory decisions that results from lengthy review processes.

The Department considers that requiring the regulator to obtain (and publish) more up front direction and expert advice for decisions that carry a large regulatory risk will provide an appropriate level of accountability and transparency for regulator decisions. It can ensure

¹² Department of Treasury, Reforms to the Limited Merits Review Regime under the National Electricity Law and National Gas Law: Consultation Paper, 6 June 2017, p. 1. Available at: http://www.treasury.wa.gov.au/uploadedFiles/Site-content/Public_Utillities_Office/Industry_reform/Consultation-Paper-Reforms-to-Limited-Merits-Review-under-NEL-and-NGL.pdf

that several expert opinions inform the decision of the regulator where necessary, without costs associated with a separate merits review body or process.

The continued availability of judicial review will ensure that if the decision maker has acted unreasonably, the parties will be able to remedy the error through the judicial system, as they are able to now.

Table 30: Up-front direction and expert advice

| Benefits | Costs |
|---|--|
| Will reduce the risk of regulatory error and misjudgement by providing clear up-front direction and additional information to the regulator. | The regulator would have to incur twice the costs in obtaining expert advice to inform the initial regulatory asset value (assuming the ERA currently obtains 1 expert report). However, this is expected to be smaller than the cost of decisions being reviewed after they are made and would only be incurred where the first expert report obtained by the ERA differs markedly to the railway owners' proposal. |
| Will promote transparency and accountability in regulator decision making by enabling all stakeholders to see the advice that is provided to the regulator. | |

Draft recommendation

The Department considers additional accountability is warranted around the initial decision on the regulatory asset value, if the recommended changes to the asset valuation method are implemented. The Department considers this accountability can be most efficiently achieved through additional expert advice and up-front direction for the ERA.

Draft recommendation 15 – provide more upfront direction to the ERA and require the ERA to obtain two expert reports for the initial decision on the regulatory asset value, in certain circumstances

How this would be implemented

The ERA would be required to obtain a second independent expert opinion on the initial asset valuation if the first expert opinion obtained by the ERA differed significantly to the proposal put forward by the railway owner. This would ensure the ERA does not unnecessarily incur costs in obtaining a second expert report where it will not provide materially new information.

The Department also proposes to provide up-front guidance to the ERA in the form of a statement of intent (or similar) to guide the ERA in applying the transitional arrangements set out in draft recommendation 1B of this report.

10. Marginal freight routes

10.1. Problem

There are several rail lines, referred to as ‘tier 3’ or ‘marginal’ lines, which have been closed by the infrastructure manager since July 2014 due to limited usage. However, these are still listed in Schedule 1 of the Code and therefore remain covered by the Regime.

There is limited guidance about how access to these marginal routes should be negotiated. Particular concerns have been raised about the limited role of the regulator in price setting, timeliness and a lack of transparency.¹³

10.2. Options considered

The Department considered two options for reform:

- a) Removing marginal freight lines from coverage under the Code, or providing a mechanism for reviewing coverage.
- b) Providing greater guidance on the provision of access for these routes.

10.3. Assessment and draft recommendation

10.3.1. Removing lines from coverage (or providing a mechanism to do so)

While the Minister can amend the Code to add or remove lines from coverage, there is no formal process in the Regime to trigger a reassessment of the coverage of routes. Such a mechanism could make the issue of viability more transparent and could also better prevent inefficient investment in rail infrastructure where it was found that certain lines no longer satisfy the access criteria.

Assessment

Most stakeholders did not agree with any proposals to remove marginal routes from the Code as they considered this would result in less chance of accessing marginal freight routes. Some stakeholders also expressed concern that, if these routes were not covered by the WA Regime, they could be open to being declared under the National Access Regime.

The Department agrees that marginal freight routes should remain regulated under the Regime. As was raised by several stakeholders, the Department notes that the Government does not have any levers under the Code to require lines or routes to be ‘handed back’ to the State to be operated by someone else. While a route can be removed from coverage under the Code, this will have no effect on the ‘ownership’ of the line.

¹³ In 2014, the Final Report of the Parliamentary Inquiry into the management of Western Australia’s freight network discussed some of the limitations of the regulatory regime for the freight rail network. In particular, it noted the limited role of the regulator in price setting, concerns about timeliness and a lack of transparency in the access application/price setting process. See: Parliament of Western Australia (2014). The Management of Western Australia’s Freight Rail Network, report no. 3, Economics and Industry Standing Committee

Table 31: Summary of costs and benefits: removing marginal routes from the Code

| Benefits | Costs |
|---|--|
| The railway owner will not have to provide access under the WARAR to lines considered uneconomic. | The lines could be subject to an access seeker requesting them to be declared under Part IIIA of the CCA. Having different access regimes applying to different parts of one network creates unnecessary regulatory burden for railway owners and unnecessary complexity for access seekers. |
| | It could become even more difficult for access seekers to gain access to the lines. |

Draft recommendation

The Department considers it inefficient to remove lines from coverage under the Code where they are still the sole responsibility of the lessee under the lease, as this would remove the opportunity for anyone to require the lessee to provide access to the lines. As such, no recommendation is made to remove them from coverage, or provide a more formal process to trigger a review of coverage.

10.3.2. Providing guidance

The Department proposed in the Issues Paper that further guidance on access to these routes. This could include: specifying particular matters to have regard to in setting access prices (such as costs to be included in incremental cost and guidance on contributions above incremental cost); and the treatment of any payments by the Government to support the ongoing provision of these routes for pricing purposes.

Assessment

Most stakeholders agreed that there should be greater guidance on provision of access to marginal freight routes.

The Department considers that the DORC approach, as set out in section 2.3.2 will provide more guidance for negotiations for access to marginal freight routes as a matter of course. This is because, as noted, it sets an incremental cost that reflects the true costs of providing access to a route given its condition. The current GRV pricing approach is not well suited to this because the incremental cost does not reflect the actual costs the railway owner incurs to provide access, but rather the average cost to maintain and operate an asset over its life, which could set unrealistic expectations for negotiations.

Draft recommendation 3, to introduce a competitive imputation pricing principle, will then assist in considering to what extent the access price should be set above the incremental cost in certain circumstances. Improved service quality indicators (draft recommendation 14) and more relevant standard terms and conditions (draft recommendation 9A) may also assist price negotiations by reducing information imbalances and reducing the range of issues for negotiation.

As such, the Department considers there would be little benefit to providing separate guidance in addition to that implicitly provided through other changes to the Regime.

Table 32: Summary of costs and benefits: guidance for marginal routes

| Benefits | Costs |
|--|--|
| Providing additional guidance will mean that access seekers will have more certainty about the conditions under which they can access lines. However, it is unlikely providing separate guidance for marginal routes would provide material benefits above the guidance provided through the use of DORC and the competitive imputation pricing principle, as it this guidance would cover similar information, such as which costs should be taken into account when calculating a floor cost and on what basis to negotiate a price above the floor. | Could restrict flexibility in negotiation. |

Draft recommendation

Given additional guidance will already be provided through other reforms, the Department does not recommend any further reforms in regard to marginal routes.

11. Greenfield developments

11.1. Problem

The Regime focuses on established railways and does not address issues specific to greenfields railways. This means there is little guidance about how the regulator might take the particular circumstances of greenfields developments into account in applying the Regime. Issues such as uncertainty about future costs and risks can mean that some obligations, such as the costing principles, may not be feasible to develop in the early stages of a new railway development.

Additionally, foundation customers, who typically underpin greenfield railway developments, often take on different costs and risks compared to subsequent customers of the established railway. However, it is not currently clear in the Code how foundation customers should be treated, and whether the regulator would accept that their access agreements may contain favourable terms and conditions to reflect the additional risks and costs they bear, for example, through rebates on access charges or priority access to expansion capacity.

11.2. Options considered

The Department considered two options for reform:

- a) Introducing some flexibility in applying the Code; or
- b) applying the Code but acknowledging that foundation customers and subsequent customers are separate classes of users, and that different treatment of foundation and subsequent customers may be required in order to reflect risks borne by foundation customers.

11.3. Assessment and draft recommendation

11.3.1. Relief from Code obligations

Possible amendments that were raised in the Issues Paper for allowing relief from Code obligations included

- Acknowledging that some flexibility in imposing Code obligations may be warranted having regard to the particular circumstances of the railway.
- Providing for a defined 'access holiday' for greenfield railway developments (for example, specifying that access obligations will commence after a certain defined period from commencement of operations) to provide greater certainty and minimise regulatory risk for such developments.
- Allowing railway owners or developers to apply to the regulator for a binding no coverage ruling for a specified period.

Assessment

Most parties agreed with this general concept, and spoke about the advantages and disadvantages of the options listed above for relieving railway owners of their access obligations quite generally. However, most preferred the idea of an access holiday over flexibility in applying the Code, so as to reduce regulatory complexity. This is congruent with

comments about consistency of the application of Regime being important across a number of areas.

Stakeholders commented that it would be impractical to expect greenfield railway owners to allow access requests from the railway's first day of becoming operational, as the asset owner would need time to manage any practical 'teething issues' with their own operations before committing to third parties. They also commented that providing third party access during ramp up period might hinder the foundation customer reaching optimal efficiency.

The Department agrees that it will be difficult to facilitate access requests in the early stages of a greenfields railway, particularly where a foundation customer with an associated mine has not yet reached nameplate capacity. However, given the variety of purposes for which a new railway may be built, it is difficult to specify a generic timeframe or project milestone after which a railway owner could be considered to be in a position to facilitate third party access. Therefore, the Department considers that any allowance for an access holiday should be assessed on a case by case basis as part of the Treasurer's consideration about whether to add a greenfields railway to Schedule 1 of the Code.

Table 33: Summary of costs and benefits: allowing greenfields railway owners relief from Code obligations

| Benefits | Costs |
|--|--|
| Allowing an access free period will reduce risk and encourage investment in railways, however, this access free period can already be provided, through the Treasurer's consideration on whether to add a new railway to the Code. | It could open opportunities for the railway owner to unreasonably defer, delay and frustrate access seekers |
| | By providing relief from Code obligations means a railway owner forgoes the benefits of reduced risk through customer diversification |
| | If an ability to seek exemptions for certain obligations was introduced, rather than allowing for an access holiday, it may lead to inconsistent regulatory arrangements across Western Australia. |

Draft recommendation

The Department does not recommend putting any provisions in the Code that provide new railway owners any specific relief in complying with Code provisions.

11.3.2. Differential treatment of foundation customers

As noted above, ensuring that rights that reflect the additional costs and risks borne by foundation customers is allowed for under the Code is important to underpin greenfields railways development. The Issues Paper proposed amending the Code to clarify that these rights are allowed for.

Assessment

This proposal received broad support from stakeholders, who highlighted that foundation customers take on more risk than subsequent customers and should be compensated for this accordingly.

While the Code does not currently prevent preferential treatment of foundation customers to reflect the additional risks they bear, it also does not clarify that this is permitted. Stakeholders expressed concern that because of this lack of clarity the Regulator may not approve favourable treatment for foundation customers, particularly when required to consider the unfair discrimination provisions. The Department proposes to clarify within the Code that favourable terms, conditions or prices for foundation customer that are proportionate to the risk they take on are permitted.

Table 34: Summary of costs and benefits: allowing for differential treatment of foundation customer

| Benefits | Costs |
|---|---|
| Greater clarity on foundation customer rights will improve incentives for investment in railway infrastructure in WA. | It could provide railway owners with more opportunity to attempt to provide unreasonable benefits to foundation customers, however, this will be mitigated through the requirement that the benefits provided be commensurate with the risks and costs they bear. |

Draft recommendation

The Department considers that implementing this change would improve incentives for investments in greenfields railways.

Draft recommendation 16 - Amend the Code to explicitly allow for differential treatment of foundation customers as a form of 'fair' discrimination

How this would be implemented

Amendments would be made to the Code to acknowledge that foundation customers and subsequent customers are separate classes of users, and that different treatment of foundation and subsequent customers may be required in order to reflect risks borne by foundation customers.

Foundation rights would not be required to be approved by the ERA. However, if an access seeker believed they were being unfairly discriminated against even once foundation customer rights had been taken into account, they would be able to request an assessment in accordance with the process set out in draft recommendation 4.

12. Vertically integrated networks in the Pilbara

12.1. Problem

In its Issues Paper, the Department raised two issues regarding access to vertically integrated railways in the Pilbara:

- the different arrangements for different Pilbara railways, which has led to uncertainty about whether there will be a regulatory path for access to some lines that are not covered by the Western Australian Regime, and if so, what that may be; and,
- the costs for integrated railway owners from granting third party access that may arise from losing efficiency and flexibility.

12.2. Options considered

The Department sought feedback on how a haulage regime may assist with gaining access to vertically integrated railways, noting that a haulage regime would not be developed as a part of the Review of the Rail Access Regime. Strengthening below rail access provisions is the immediate priority, but developing haulage regulations may be re-visited in the future, should the need arise. Nevertheless, rail owners are not precluded from negotiating haulage arrangements with access seekers on a commercial basis. Stakeholder feedback on a possible haulage regime is summarised below.

12.3. Assessment and draft recommendation

12.3.1. Developing a haulage regime

As noted in the Issues Paper, the main elements of a haulage regime would be substantially the same as the current above rail Regime (i.e. a negotiate-arbitrate model). However, there would need to be some modifications to reflect the different nature of a haulage regime. For example, pricing would need to reflect a combined above and below rail service. Also, some of the Part 5 instruments, such as policies around train management, could be replaced or may no longer be required, and while costing principles and segregation arrangements may still be required they would likely need to be modified.

Assessment

In general, stakeholders did not appear to see substantial benefits in developing a haulage regime. The main costs and benefits identified by stakeholders and the Department are outlined below. The costs and benefits of a haulage regime that are also costs of providing third party access (e.g. less flexibility for a vertically integrated operator) have been omitted from the table below, as these are not considered to be 'additional' costs on top of the costs already imposed by third party above rail access.

The main benefit identified by stakeholders is that a haulage-based access regime could allow rail owners to retain control over the technical operation of the entire rail system, facilitating optimisation and management of risks. However, the nature and scale of these advantages remains to be clearly articulated or quantified.

Table 35: Summary of costs and benefits: haulage regime

| Benefits | Costs |
|---|---|
| Could allow access seekers to obtain a haulage service that they may not currently be able to access. | May impose additional costs on railway owners that would not have otherwise provided a haulage service by requiring them to accommodate the needs of other users, thereby reducing their own above rail and supply chain efficiency (although possibly less so than having to accommodate third party rolling stock). |
| Compared to gaining below rail access, obtaining a haulage service could provide quicker resolution of the sought infrastructure solution, more flexible arrangements, and lower upfront capital investment requirements. | Would also involve costs in complying with the regulations for railway owners, access seekers and the regulator. |
| May assist the development of small deposits that would not be able to support the cost of trucking or investment in independent rail. | |

Draft recommendation

As set out in the Issues Paper, no recommendation is made to develop a haulage regime as part of this review.

13. Consistency with National Access Regime

13.1. Problem

In the Issues Paper, the Department raised concerns about consistency between the Western Australian Regime and the other access regimes in Australia, particularly in relation to the interstate rail network. The different regimes applicable on different parts of the interstate network creates complexity for those that operate across different jurisdictions, since they have to understand the different processes, obligations and likely outcomes from each rail access regime.

Improving consistency between the Western Australian Regime and other Australian regimes could also improve the likelihood that the Regime will be re-certified as an 'effective' access regime by the Commonwealth Treasurer, in accordance with the Competition Principles Agreement. In the NCC's 2010 assessment of the Western Australian Regime, concerns were raised about the inconsistency between the Western Australian Regime and other jurisdictions (although the Commonwealth Treasurer did decide to certify it as an 'effective' Regime).

13.2. Options considered

The Department considered two options:

- implementing Recommendation 1 of the ERA's 2015 Review, which would bring interstate services offered by Brookfield Rail on the interstate route under regulations consistent with the Australian Rail Track Corporation (ARTC) access undertaking;
- making other changes to the Western Australian Regime to better align it with other access regimes around Australia; and,
- aligning the declaration criteria in the Act to align with the declaration criteria in the National Access Regime.

13.3. Assessment and draft recommendation

13.3.1. Implementing regulations consistent with the ARTC interstate undertaking

In its 2015 review of the Code, the ERA recommended implementing the requirement of the Competition and Infrastructure Reform Agreement 2006, which was that the relevant Governments would implement a simpler and more consistent national system of rail access regulation to apply to the interstate rail track from Perth to Brisbane, using the ARTC undertaking as a model. The ERA considered that the ideal outcome would be for (then) Brookfield Rail to submit an undertaking to the ACCC for administration of the interstate services under the National Access Regime.

Assessment

If the ERA's preferred approach were implemented, it would not guarantee that the undertaking submitted to the ACCC would be consistent with the one that ARTC is operating

under (now or into the future), as undertakings are submitted by individual railway owners and are subject to change from time to time.

In addition, while implementing consistent regulation on the interstate route would improve consistency with the National Access Regime, it would introduce inconsistency in rail access regulation within Western Australia. This would also cause complexity and unnecessary costs for the railway owner that would have to comply with two different regimes.

Table 36: Summary of costs and benefits: imposing regulations consistent with the ARTC undertaking on the interstate line

| Benefits | Costs |
|---|---|
| Potential to reduce costs and complexity for access seekers or holders who operate across jurisdictions, however, it is uncertain whether Western Australian regulation or a new undertaking, could be made to sufficiently align with the prevailing ARTC undertaking. | Having two regimes operating in Western Australia creates regulatory inconsistency within Western Australia, introducing extra complexity and regulatory burden for the railway owner that was required to comply with two regimes. |

Draft recommendation

For the reasons outlined above, the Department considers that the benefits of attempting to implement consistent regulation on the interstate route are unlikely to outweigh the costs, particularly as the changes recommended to the asset valuation method will already improve interjurisdictional consistency, if implemented. This is discussed further under the next option.

13.3.2. Improving the Regime to more closely align to a typical undertaking under the ACCC

The second option considered was to assess whether the Western Australian Regime would be improved by adopting regulatory approaches similar to the regulation imposed by the ACCC through the undertakings it has approved. This was considered through the assessment of options such as adopting a DORC based valuation method to determine floor and ceiling costs, the introduction of indicative tariffs, and the public release of more information by railway owners.

Assessment

As discussed under the relevant sections of this paper, the Department considers some of the approaches used under the National Access Regime, such as adopting a DORC methodology and standardising the minimum criteria that access seekers must meet, should be implemented in the Western Australian Regime. However, in other cases, the costs of some National Access Regime approaches were considered to outweigh the benefits and alternative options have been proposed.

The Department considers that implementing the changes proposed in this paper will sufficiently align the Western Australian Regime with the National Access Regime and reduce uncertainty and complexity for access seekers, while not imposing unnecessary regulatory burden on railway owners.

No cost benefit summary has been prepared as the costs and benefits of potential reforms have been canvassed throughout this paper.

Draft recommendation

Other reforms recommended this paper should be implemented to better align the Western Australian Rail Access Regime with standard components of undertakings administered by the ACCC.

13.3.3. Aligning the declaration criteria in the Act with the declaration criteria in the National Access Regime

The Competition and Consumer Amendment (Competition Policy Review) Bill 2017 introduced, amongst other things, changes to the declaration criteria that must be satisfied for a service to become declared under the National Access Regime. As a result, the criteria in the Western Australian Act now differ from that used in the National Access Regime, as demonstrated the table below.

Table 37: Comparison of declaration criteria in WA and the National Access Regime

| National regime | WA Regime | Commentary |
|--|---|--|
| That access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service | Whether access to the route will promote competition in at least one market, other than the market for railway services | The national criteria focus on whether the effect of the declaration would increase competition, rather than just whether access, or increased access, will increase competition (as this could occur in some cases without a declaration). |
| That the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market: <ul style="list-style-type: none"> over the period for which the service would be declared; and (at the least cost compared to any 2 or more facilities (which could include the first mentioned facility)) | Whether it would be uneconomical for anyone to establish another railway on the route | Prior to these changes, the High Court has ruled that the uneconomical test required the decision-maker to be satisfied that there is not anyone for whom it would be profitable to develop another facility. The amendments made now clarify that this criteria, as it exists in the National Access Regime, should be assessed as it previously had been in the past by the National Competition Council and the Minister. |
| No equivalent | Whether access to the route can be provided without undue risk to human health or safety; | Railway owners covered by the Code are also subject to safety requirements imposed by the office of the National Rail Safety Regulator. |
| No equivalent | Whether there is not already effective access to the route | Consideration of this criteria in the WA Regime would likely be considered under the first criteria in the national regime. |

| National regime | WA Regime | Commentary |
|--|---|---|
| <p>That the facility is of national significance, having regard to:</p> <ul style="list-style-type: none"> the size of the facility; or the importance of the facility to constitutional trade or commerce; or the importance of the facility to the national economy | <p>Whether the route is of significance having regard to:</p> <ul style="list-style-type: none"> its length; its importance to trade or commerce; or its importance to the economy | Substantively similar |
| <p>That access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.</p> | <p>Whether access or increased access to the route would not be contrary to the public interest.</p> | Places a positive requirement, arguably meaning that an increased amount of justification about public interest would be required to declare a service. |

Assessment

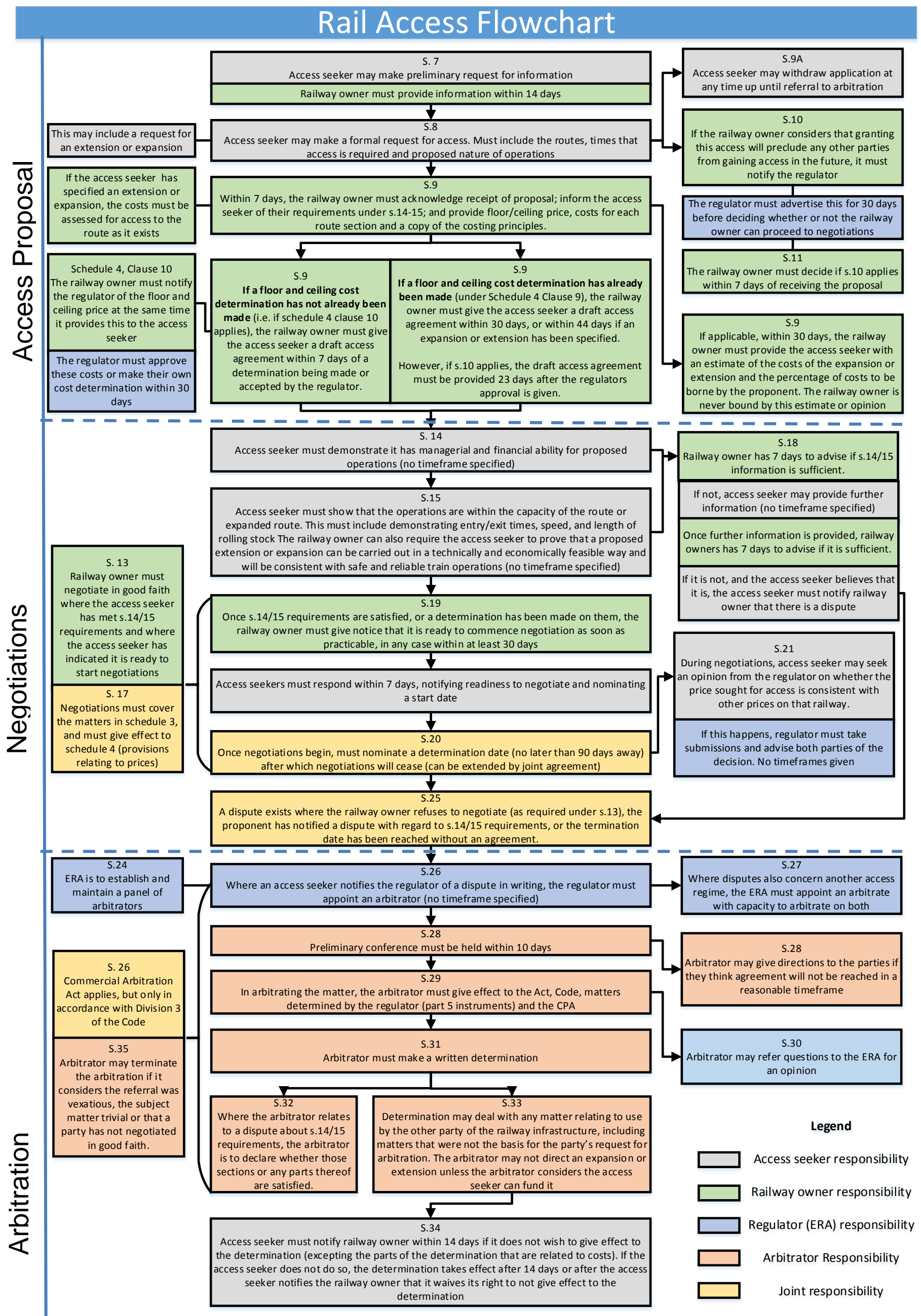
Amending the declaration criteria in the Regime to better align with those in the National Access Regime offers some consistency benefits. Firstly, it is likely that the similarity between the declaration criteria in the WA Regime and the National Access Regime will be considered by the National Competition Council in any application for certification of the Regime as an effective regime. Secondly, consistency across declaration criteria in different regimes could lead to more certainty for railway owners and access seekers who operate across different regimes (now or into the future) about what types of railways are likely to be subject to access regulation.

However, at this stage the Department has not considered the benefits and costs of applying each individual amended criteria on the rail industry in Western Australia.

Draft recommendation

No recommendation is made on this issue, however, information on the costs and benefits of amending the criteria to better align with the National Access Regime is invited in response to this paper.

Appendix 1 – Access proposal map



Appendix 2 – ERA recommendations that will be implemented

As indicated in the 2017 Issues Paper, the Department intends to implement other, less material, changes that were recommended by the ERA in its 2011 and 2015 review of the Code as outlined below.

ERA Code Review 2015

Recommendation 5

Section 10 of the Code be removed.

Recommendation 7

The term “days” in the Act and the Code be defined to mean “business days”.

All timeframes in the Code be adjusted accordingly.

In particular, the timeframes prescribed in Part 2 of the Code (“Proposals for access”) be amended to:

Section 7(2) – 10 days

Section 9(1) – 5 days

Section 9(2) – 20 days

Section 9(3a)(3)(a)(i)(I) – 20 days

Section 9(3a)(3)(a)(i)(II) – 30 days

Section 9(3a)(3)(a)(ii) – 15 days

Section 9(3a)(3)(b) – 5 days

Section 10(3) – 20 days

Recommendation 10

The Code be amended to include provisions, in place of section 26(2), enabling the following:

The parties in dispute to agree upon an arbitrator(s), and this agreement is to occur within ten business days of the Regulator being notified that the proponent is in dispute with the railway owner.

The proponent must notify the Regulator of the agreement of such an arbitrator(s).

If the Regulator is not notified within ten working days that an agreement has been reached, the Regulator is to appoint one or more persons whose names are on a panel established under section 24 to act as arbitrators to hear and determine the dispute.

The Regulator must consult with the parties in dispute prior to the appointment of an arbitrator from the panel.

ERA Code Review 2011

Final Recommendation 2

Section 7 of the Code should be amended by adding a new sub-section noting that any capacity information provided by the railway owner must be compiled on a reasonable basis consistent with the railway owner’s obligation under section 16(2) not to unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner.

Final Recommendation 5

Sections 52(1), 52(2), 52(3), 52(4) and 53 of the Code should be deleted as these transitional provisions are no longer relevant.

Final Recommendation 6

Schedule 1 should be amended as follows:

Item 52 should be amended by replacing the words "... the railway constructed pursuant to the TPI Railway and Port Agreement" with "... the railway constructed pursuant to the TPI Railway and Port Agreement and defined as 'Railway' in that Agreement".

Schedule 4 should be amended as follows:

Item 50A of Schedule 1 should be added to clause 3(1)(a)(i) of Schedule 4.

Clause 3(1)(a)(ii) should be amended by replacing the words "in the other items in that schedule" with "in items 1 to 48 in that Schedule".

Clause 3(2) should be amended to ensure that the public consultation arrangements set out in sections 3(3) to 3(5) of Schedule 4 apply to the initial WACC determination for any new railway which comes under the Code.

Appendix 3 – Assumptions for asset valuation graphs

Generic graphs showing a hypothetical railway from the day it was built until the end of its assumed life have been produced to show the ceiling and floor change over the life of the asset. This was done for the three scenario options GRV, DORC straight line and DORC annuity.

Underpinning each scenario are the following generic cost assumptions for a typical railway:

| Item | Value Assumed | Comment |
|--|---|-------------------------|
| Track length (km) | 100km | |
| Asset Values | | |
| Total replacement cost | \$6.0m per km = \$600m total | |
| Asset lives – 100 years | 30% of total | |
| Asset lives – 50 years | 20% of total | |
| Asset lives – 30 years | 40% of total | |
| Asset lives – 25 years | 10% of total | |
| Operating and Maintenance Costs | | |
| Average whole of life maintenance costs | 1% of replacement cost or \$6.0m p.a. | For GRV |
| Routine maintenance cost | 0.6% of replacement cost p.a. or \$3.6m p.a. | For DORC |
| Cyclical maintenance cost | 0.6% of replacement cost p.a. or \$3.6m p.a. commencing from year 7 | For DORC |
| Corporate / overhead costs | 0.5% of replacement cost p.a. or \$3.0m p.a. | For GRV and DORC |
| Capital Costs | | |
| Phase 1 replacement capex: | Starting from year 20, annual capex of 1% of replacement cost p.a. or \$6.0m p.a. | |
| Phase 2 replacement capex: | In year 35, capex of 15% of replacement cost or \$90m | Major replacement capex |
| Other | | |
| Real pre-tax WACC | 7.52% | |
| Allowable share of maintenance cost to be charged under floor price calculations | 77.5% | |

Source: Synergies assumptions

Commentary on charts:

- DORC (annuity) approach is lower than GRV in initial years as maintenance costs are assumed to be lower than the whole of life average in initial years, but then shows an increase from year 7 due to cyclical maintenance commencing from that year
- Depreciation gradually increasing under the annuity approach to year 25 when 10% of the assets have reached the end of their assumed lives. By year 30 more assets (another 40%) have reached the end of their lives, hence the big decline. The increase in year 35 reflects the \$90m major replacement capex, but it is only slight as the annuity approach results in only small depreciation charges being recognised in the initial years of an investment's life.
- Under the annuity approach, the ROA gradually declines as the asset depreciates and by year 25 when 10% of the assets have reached the end of their assumed lives steps down. By year 30 more assets (another 40%) have reached the end of their lives, hence the big decline. The increase in from year 35 reflects the \$90m major replacement capex.
- DORC floor value shows a marginal uplift from year 7 due to cyclical maintenance commencing from that year
- From year 20 the commencement of phase 1 replacement capex causes the floor to gradually increase. This floor further increases from year 35 when the phase 2 major replacement capex is undertaken.

Appendix 4 – Quantification of costs and benefits

DRAFT



Cost Benefit Analysis of a new pricing mechanism for rail access in WA

FINAL REPORT

November 2018

Synergies Economic Consulting Pty Ltd
www.synergies.com.au

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Contents

| | | |
|----------|--|-----------|
| 1 | Introduction | 5 |
| 1.1 | Features of the proposed pricing mechanism | 5 |
| 2 | Costs | 7 |
| 2.1 | RAB development and maintenance | 7 |
| 2.2 | Pricing guidance | 8 |
| 2.3 | Specific proposal costs | 9 |
| 2.4 | Implementation costs | 10 |
| 3 | Benefits | 11 |
| 3.1 | Lower negotiation costs | 11 |
| 3.2 | Lower cost of disputes | 13 |
| 3.3 | A bring forward of projects | 13 |
| 3.4 | Lower risk of good projects not coming to fruition | 14 |
| 3.5 | Increased durability of negotiated agreements | 14 |
| 4 | Quantification of costs and benefits | 16 |
| 4.1 | Future use of the new access arrangements | 16 |
| 4.2 | Cost profile | 17 |
| 4.3 | Benefit Cost Analysis results | 18 |
| 4.4 | Sensitivity analysis | 19 |
| 4.5 | Conclusion | 19 |

Figures and Tables

| | | |
|----------|--|----|
| Figure 1 | Cost profile over time | 18 |
| Table 1 | Key features of the new pricing mechanism | 5 |
| Table 2 | Qualitative assessment of the materiality of each benefit item | 11 |
| Table 3 | Estimated change in negotiation costs under the new arrangements | 12 |

| | | |
|---------|--|----|
| Table 4 | Cost of disputes inside the Code under new arrangements - worked example | 13 |
| Table 5 | WA Resource projects, by average value (\$mill) and number (in parenthesis) | 14 |
| Table 6 | Access negotiation scenarios | 16 |
| Table 7 | Benefit-Cost results | 18 |
| Table 8 | Sensitivity of NPV (\$) to assumed value of projects negotiated under the Code | 19 |

1 Introduction

This report presents a preliminary cost benefit analysis of proposed changes to pricing mechanisms under Western Australia's rail access regime. In undertaking this analysis we have identified the nature of costs and benefits of changing from the existing Code arrangements to the proposed pricing mechanism. The analysis provides a qualitative evaluation of how material each impact category is likely to be (rated as low, moderate or high) and also provides an indicative quantification for two benefit items that are regarded as material and that are more amenable to being quantified in dollar terms.

While the analysis provides a robust framework for assessing the net economic benefits of the proposed changes, at this stage the estimates should be regarded as indicative because Synergies Economic Consulting ('Synergies') has not tested the assumptions and analytical inputs with stakeholders.

1.1 Features of the proposed pricing mechanism

The proposed package of changes comprise:

- establishing a RAB value and roll-forward, using a Depreciated Optimised Replacement Cost (DORC) method for calculating asset values; and
- adopting pricing guidance in the form of a 'competitive imputation price' and 'standing offers'.

The key features of the package that differentiate it from the current regime (or the Base Case) are summarised in Table 1.

Table 1 Key features of the new pricing mechanism

| Current pricing mechanism | Proposed pricing mechanism |
|--|---|
| Implementation and maintenance of RAB | |
| Not applicable | <ul style="list-style-type: none"> • Update Costing Principles to reflect change to DORC methodology, principles for RAB establishment and principles for ongoing RAB rollforward • Calculate initial DORC/RAB, which will require <ul style="list-style-type: none"> • Railway owner to propose DORC value • ERA to procure consultant review of DORC value (including a provision for ERA to procure a second, independent expert report, if necessary) • Consultation process • Final determination • Annual RAB roll-forward, which will require <ul style="list-style-type: none"> • Development of internal 'regulatory asset book' • Annual update of internal 'regulatory asset book' • Five year ERA review of RAB rollforward, which will require |

| Current pricing mechanism | Proposed pricing mechanism |
|--|--|
| | <ul style="list-style-type: none"> Review of compliance with roll forward methodology Prudency and efficiency review of capex (may be for selected projects only) |
| Pricing guidance | |
| <ul style="list-style-type: none"> Some pricing guidance is provided in Clause 13 of Schedule 4. | <ul style="list-style-type: none"> The negotiated price will be guided by the 'competitive imputation price' (where this is below the ceiling price) <ul style="list-style-type: none"> this is an additional factor that will be considered in negotiations, and will not result in any additional processes Railway owners will be required to develop and maintain standing offer tariffs where there is one or more actual or potential operators on a line with similar freight tasks The ERA will be required to assess when the criteria for a standing offer tariff is met. The process will include: <ul style="list-style-type: none"> the ERA assessing services against criteria consultation process final determination on whether services meet criteria Where the criteria are met, the railway owner will be required to develop a standing offer tariff consistent with the pricing guidelines set out in the Code <ul style="list-style-type: none"> there will be no requirement for the standing offer tariff to be reviewed and endorsed by the ERA Railway owners will be required to develop and maintain a regulator endorsed standard access agreement, which will involve the following process <ul style="list-style-type: none"> the railway owners to prepare a draft standard access agreement ERA to review draft standard access agreement Consultation process Final determination |
| Specific access proposals | |
| <ul style="list-style-type: none"> For each access proposal, ERA must assess total and incremental costs based on GRV methodology, which requires: <ul style="list-style-type: none"> Assessment of GRV value of the route Assessment of efficient whole of life operating and maintenance costs for the route Process for assessing total and incremental costs for access proposals includes <ul style="list-style-type: none"> Railway owner to provide its assessed costs ERA to procure consultant review of costs Consultation process Final determination | <ul style="list-style-type: none"> For each access proposal, ERA must assess total and incremental costs based on BBM methodology, which requires: <ul style="list-style-type: none"> Adoption of RAB value for the route Assessment of forecast efficient operating, maintenance and capex costs for term of proposal Process for assessing total and incremental cost for access proposals <ul style="list-style-type: none"> Railway owner to provide its assessed RAB roll forward and forecast costs ERA to review RAB roll forward ERA to procure consultant review of forecast cost Consultation process Final determination |

2 Costs

Adoption of the new pricing regime will give rise to a number of additional costs, both at the initial start-up phase and ongoing. The four main categories of costs are as follows:

- Regulatory asset base (RAB) development
- Pricing guidance
- Specific proposals
- Implementation costs

These costs are evaluated as 'net additional costs', relative to current arrangements. We examine each cost in turn.

2.1 RAB development and maintenance

This cost item includes the additional costs to a railway owner of developing, and ERA approving, the initial RAB value. We assess this cost as being 'moderately material'. Specifically, it will include the following components.

2.1.1 Cost of amending costing principles

This cost item comprises:

- internal resource costs for ERA, railway owners and other stakeholders – estimated for each railway owner to be 0.5 FTE for 3 months, and for ERA a total of 1.0 FTE for 3 months assuming costing principles for all three railway owners are amended at a similar time; and
- consultancy costs, which are assumed to be double the internal resource costs for both railway owners and ERA

2.1.2 Cost of developing RAB

This cost item comprises:

- consultancy costs for railway owners to develop DORC valuation – estimated for each railway owner to be \$100,000 plus \$250/km of railway (we have assumed that each railway owner has, on average, 2100 kilometres of rail assets¹);
- consultancy cost for ERA to review DORC valuation – estimated for each railway owner to be \$100,000 plus \$250/km of railway²; and
- internal resource costs ERA, railway owner and other stakeholders, estimated for each railway owner to be 2.0 FTE for 6 months, and for ERA to be 0.5 FTE for 6 months per railway owner.

2.1.3 Cost of annual asset roll forward

The railway owners will need to develop systems to record the RAB, and then maintain this on an annual basis. Therefore, this cost item comprises:

- one off initial system development costs for each railway owner estimated to be \$100,000 plus \$100/km of railway; and
- internal resource cost for each railway owner to maintain RAB on annual basis estimated 1.0 FTE for 3 months.

2.1.4 Cost of five year roll forward review

It is expected that, in the five year roll forward review, the ERA will conduct some review of the prudence and efficiency of capital expenditure that has been included in the RAB. Therefore, this cost item comprises:

- internal resource costs for ERA, railway owner and other stakeholders – estimated for each railway owner to be 1.0 FTE for 3 months, and for ERA to be 0.5 FTE for 3 months; and
- consultancy costs, which are assumed to be double the internal resource cost for railway owners and ERA.

2.2 Pricing guidance

This cost item includes the additional costs relating to:

¹ This is an average across the three rail owners (i.e. Arc Infrastructure has a railway network of approximately 5500km, TPI has approximately 500km, and Roy Hill has approximately 350km).

² Only one review has been costed in this analysis. If a second independent expert report on the initial asset valuation is necessary, this would be an additional cost.

- The railway owner developing *standing offer tariffs* where the criteria for such tariffs is met (it is assumed that 4 standing offer tariffs will be developed in total for the 3 railway owners. These will be developed over a period of 6 years, with each tariff corresponding to an actual or potential operator on a line). Related costs include:
 - the cost of assessing when criteria for standing offer tariffs are met, which includes the internal resource cost for ERA, railway owner and other stakeholders - estimated to be 0.5 FTE each for 2 months for each assessment; and
 - the internal resource cost to railway owners of developing standing offer tariffs - estimated to be 1.0 FTE for 3 months.
- The railway owner developing, and ERA approving, *standard access agreements*. This will include:
 - internal resource cost for railway owner to develop draft standard access agreement – estimated for each railway owner to be 2.0 FTE for 3 months and 1.0 FTE for 3 months for ERA; and
 - consultancy costs, which are assumed to be double the internal resource cost for railway owners and ERA.

2.3 Specific proposal costs

Under the proposed regime, railway owners and the ERA will incur new costs in developing and approving, respectively, the maintenance, operating and future capex costs for a specific proposal over a forecast term. These costs (on a 'per proposal basis') would include:

- consultancy costs to the railway owner of demonstrating efficiency of forecast costs (estimated to be about \$100,000 per proposal plus \$100 per km of railway);
- consultancy costs to ERA of assessing the efficiency of forecast costs (estimated to be \$100,000 per proposal plus \$100 per km of railway); and
- internal resource costs for ERA and the railway owners (estimated for each party to be 1 FTE for 3 months).

There would be no additional cost for assessing asset value, as this will be based on RAB value (which is already accounted for in sub section 2.1). Nor would there be any additional cost to the railway owner for assessing forecast costs for the term of the proposal as this would be expected to occur in the normal course of business regardless of whether the proposal is inside or outside Code.

2.3.1 Costs under Base Case

The new costs listed above will be moderate but will be materially offset by the costs incurred under Base Case, given that under existing arrangements there is a requirement to assess costs on a 'whole of life average' (noting that under the new regime the main difference is that actual forecast costs need to be developed based on the age and condition of the asset).

The costs currently incurred in developing a proposal are estimated to include:

- consultancy costs to the railway owner for assessing GRV (approximately \$100,000 per proposal plus \$100 per km of railway) and for assessing efficient whole of life operating and maintenance costs (approximately \$50,000 per proposal plus \$50 per km of railway);
- consultancy cost to ERA for assessing GRV (approximately \$100,000 per proposal plus \$100 per km of railway) and for assessing the efficient whole of life operating and maintenance costs (approximately \$50,000 per proposal plus \$50 per km of railway); and
- internal resource costs for ERA and the railway owner – estimated for each to be 1 FTE for 3 months.

2.4 Implementation costs

There will be a number of costs associated with implementing the new regime. The two main types of additional costs are:

- policy and regulatory amendment costs for government. We have assumed 2 FTEs for 6 months at a salary level of \$165,000 per annum; and
- learning costs for industry to become familiar with the new regime, which may involve a number of days of legal advice per railway owner. We anticipate that this cost item would be relatively low, given consistency of proposed frameworks with approaches used nationally. In our modelling we have assumed that each railway owner would assign 0.5 FTE for 1 month to familiarise with the new regulatory process, plus engage legal advice at a cost of \$50,000.

For the purpose of the Cost Benefit Analysis, all costs are calculated as net costs, relative to Base Case. Section 4 contains dollar estimates of the four main categories of costs described in this section, together with a profile of when these are incurred over time.

3 Benefits

On the benefit side of the ledger we identify five main types of benefits:

- Lower negotiation costs under the Code
- Lower cost of disputes, due to fewer disputes under the Code
- A bring-forward of projects, through less protracted negotiations
- Lower risk of ‘good’ projects not coming to fruition
- Increased durability of negotiated prices

We have made a qualitative assessment of the materiality of these benefits, which is presented in Table 2 below. Each of the benefit items is discussed further beneath the table.

Table 2 Qualitative assessment of the materiality of each benefit item

| Benefit item | Materiality rating | Rationale |
|---|--------------------|--|
| Lower negotiation costs | ★ ★ | Lower costs under Code due to standing offer tariffs and clearer price guidance regarding impact of age/condition of assets |
| Net cost saving due to fewer disputes under the Code | ★ | Moderate, but offset by potential for higher number of negotiations under code |
| Bring-forward of projects due to reduced negotiation timeframes | ★ ★ ★ | Faster development of new projects due to shorter negotiation/dispute resolution time |
| Lower risk of good projects not coming to fruition | ★ ★ | Under base case, a proportion of delayed projects will not proceed due to loss in investment window. Fewer delays under the new regime will mean fewer projects are abandoned. |
| Increased durability of negotiated agreements | ★ ★ | Access agreements made under the Code are likely to be more ‘durable’ and more ‘robust’ in being able to address a range of future circumstances, thus resulting in cost savings from not having to re-negotiate terms and conditions of the agreement |

3.1 Lower negotiation costs

The new regime is expected to result in negotiations being completed more quickly under the Code, thus resulting in cost savings to project proponents. The main factors that will contribute to speeding up negotiation timeframes include:

- the utilisation of standing offer tariffs where criteria are met;

- the utilisation of regulatory endorsed standard access agreements;
- provision of pricing guidance in circumstances where alternate competitive transport solutions mean that access charges are set below the ceiling; and
- clearer guidance regarding the impact of age and/or condition of assets on asset value.

We anticipate that negotiation times could be reduced, on average, by 1.5 years for each access agreement that is negotiated under the Code. In turn, this will lead to resource cost savings in terms of professional time spent by the proponents and regulator engaging in the negotiations. The benefits are assessed as being ‘moderately material’.

While cost savings are likely on ‘per proposal’ basis, it is possible that the aggregate annual cost of negotiations under the Code (i.e. across all proposals) will increase under the new arrangements if the access pricing mechanism catalyses a significant increase in the number of proposals being negotiated under the Code (with a corresponding reduction being negotiated outside the Code).

The table below illustrates this potential outcome. Under the assumptions presented in the table, there is an aggregate increase in negotiation costs under the Code (relative to current), while there are substantial reductions in aggregate negotiation costs outside the Code due to:

- fewer proposals negotiated outside the Code; and
- a halving of average negotiation times outside the Code, due to many of the more complex proposal now being negotiated under the Code.

Table 3 Estimated change in negotiation costs under the new arrangements

| | Current | New arrangements | Change in cost |
|---|-------------|------------------|--------------------|
| INSIDE CODE | | | |
| Number of proposals per year | 0.3333 | 1.3333 | |
| Negotiation time per proposal (years) | 2.50 | 1.00 | |
| Unit cost of negotiation (\$/proposal/yr) | \$742,500 | \$742,500 | |
| Aggregate negotiation costs (\$/yr) | \$618,750 | \$990,000 | -\$371,250 |
| OUTSIDE CODE | | | |
| Number of proposals per year | 3 | 2 | |
| Negotiation time per proposal (years) | 1 | 0.5 | |
| Unit cost of negotiation (\$/proposal/yr) | \$742,500 | \$742,500 | |
| Aggregate negotiation costs (\$/yr) | \$2,227,500 | \$742,500 | \$1,485,000 |
| NET COST SAVING | | | \$1,113,750 |

Source: Synergies’ assumptions

The above assumptions have been adopted for the CBA (see section 4). We have used an average negotiation cost of \$742,500 for each proposal *per year of negotiation* under both the Code and outside the Code. This assumes that access seekers and railway owners will each apply 0.5 FTE of internal resource over a 18 month period (equivalent to \$123,750 per firm), plus incur consultancy fees of twice this amount (i.e. \$247,500).

3.2 Lower cost of disputes

Owing to the same factors referred to above, the new regime is also expected to result in lower incidence of costly disputes, for every proposal that is negotiated under the Code. While the probability of a dispute arising under the Code is lessened on a project-by-project basis, we expect that under the new regime there will be a greater proportion of proposals negotiated under the Code, which will partly offset the cost savings. We therefore assess the net cost savings to be only of 'low materiality'. The following worked example illustrates:

Table 4 Cost of disputes inside the Code under new arrangements - worked example

| | Current | New arrangements |
|---|-------------|------------------|
| Number of proposals per year | 0.3333 | 1.3333 |
| Ratio of proposals in dispute | 0.666666667 | 0.166666667 |
| Average cost of a dispute (\$/proposal) | \$1,000,000 | \$1,000,000 |
| Expected dispute cost (\$/year) | \$222,200 | \$222,217 |

Source: Synergies' assumptions – for illustrative purposes

This example shows that the expected cost savings from lower risk of disputes per proposal are likely to be small or neutral in aggregate terms because under the new arrangements there will be more proposals being negotiated under the Code.

3.3 A bring forward of projects

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

We assess the 'bring forward' effect as being the most material benefit of the proposed pricing mechanism, which can also be quantified relatively easily. For the purpose of our modelling (see Cost Benefit Analysis in next section) we have assumed that:

- projects will be brought forward by 1.5 years;

- one third of proposals received are new projects;
- 80% of proposals negotiated under the Code reach agreement;
- an average project value of \$300 million, of which 20% is contingent on a rail access agreement being secured (i.e. \$60 million of investment is potentially held up until an access agreement is reached); and
- a real cost of capital of 7%.

The average value of project estimate is based on data from the Commonwealth Department of Industry, Innovation and Science, which shows that as at October 2017 there were six new, 'committed' resource projects with an average value of \$290 million (Table 5). (In the Cost Benefit Analysis in section 4 we also examine an alternative scenario in which non-committed projects are included in the total, which results in an average project value of \$592 million across a total of 55 projects).

Table 5 WA Resource projects, by average value (\$mill) and number (in parenthesis)

| | Expansion | New project | Redevelopment | Total |
|---------------|-----------|-------------|---------------|------------|
| Committed | \$773 (3) | \$290 (6) | \$197 (1) | \$425 (10) |
| Not committed | \$114 (1) | \$629 (49) | \$272 (2) | \$605 (52) |
| Total | \$608 (4) | \$592 (55) | \$247 (3) | \$576 (62) |

Note: Excludes oil and gas projects, and all projects owned by BHP, Rio Tinto, Hancock Prospecting and Fortescue Metals Group

Source: Department of Industry, Innovation and Science – Resources and Energy Major Projects List

3.4 Lower risk of good projects not coming to fruition

Not all project proposals culminate in an access agreement being successfully negotiated between the parties. Under current arrangements, we suspect that there is a proportion of 'good' projects that are commercially viable, but do not proceed because the protracted negotiation timeframes and associated transaction costs mean that they miss the investment window. Under the new regime, the reduced risk of dispute and shorter negotiation timelines should result in a fewer good projects being abandoned.

This benefit item is difficult to quantify owing to the lack of data on the number of projects that would have been developed had the negotiation process been less onerous.

3.5 Increased durability of negotiated agreements

The proposed new regime will mean that access agreements made under the Code are likely to be more 'durable' and more 'robust' in being able to address a range of future circumstances. Having established a firm price guidance and a systematic process for reaching a negotiated agreement under the new arrangements, subsequent negotiations

are less likely to involve a 're-opening' of issues that have previously been dealt with. There will be established precedent in how the issues are to be best addressed and resolved. In turn, this will result in cost savings from not having to re-negotiate on those matters. It is difficult to quantify the scale of these cost-savings as each project will be different. We nevertheless regard this benefit to be moderately material.

4 Quantification of costs and benefits

In the analysis that follows, we quantify two of the main benefits of the proposed pricing reform:

- the bring forward of projects; and
- the cost savings due to reduced negotiation timeframes.

These benefits are calculated using the assumptions outlined in the preceding section, together with an assumed frequency of proposals that are negotiated under the new arrangements, which is set out in sub-section 4.1 below.

The benefits are compared to the additional costs of the new pricing mechanism. All benefits and costs are evaluated over a 20 year timeframe using a central discount rate of 7% (with sensitivity testing to 4% and 10%). We assume the new arrangements are introduced in 2019, with the first year of benefits commencing in 2020.

4.1 Future use of the new access arrangements

A key factor underpinning the assessment of costs and benefits of the proposed change to pricing mechanism is the number of negotiations that will occur under the Access Code. Table 6 summarises the expected number of projects negotiated within the Code – both “with” and “without” the new arrangements.

Table 6 Access negotiation scenarios

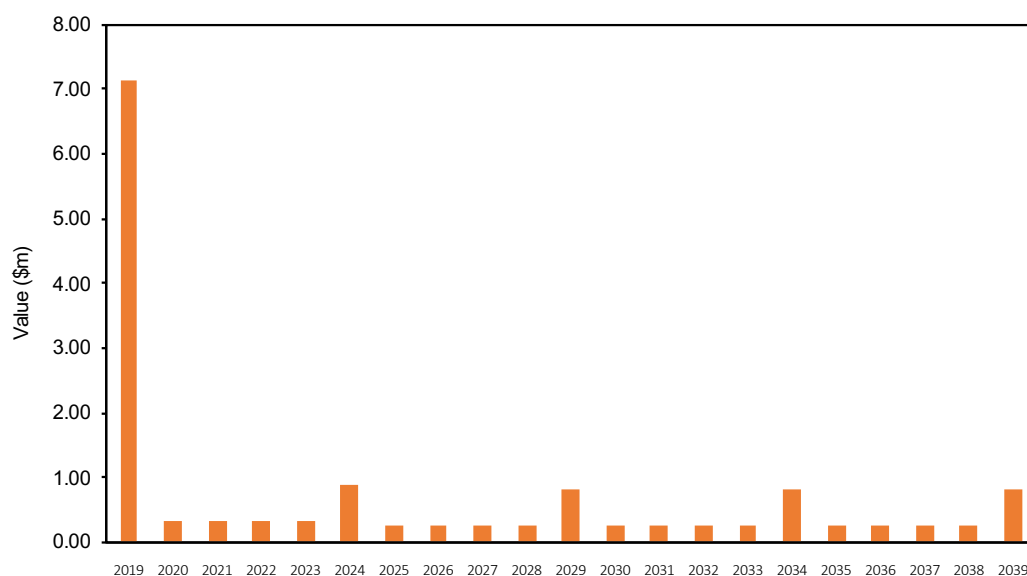
| | Base Case | New Arrangements |
|---|---|--|
| NUMBER OF PROPOSALS | | |
| Average number per year | 10 | 10 |
| Average length of railway per proposal | 500km | 500km |
| Negotiations within Code | 1 proposal every 3 years Based on historical incidence of 3 proposals under Code in last 10 years | 1 $\frac{1}{3}$ proposals per year Assumes that there will be a greater likelihood of negotiations occurring within Code, but still will not involve all negotiations |
| Negotiations outside Code | 3 proposals per year Based on historical incidence of 20 agreements negotiated in 10 years, and assuming some additional proposals that did not proceed to agreement | 2 proposals per year Assumes same rate of proposals per year as previous 10 years |
| FREQUENCY OF DISPUTES UNDER CODE | | |
| Frequency | 2 out of 3 proposals under Code referred to dispute Based on historical incidence of 2 proposals in last 10 years either | 1 out of 6 proposals under Code referred to dispute Reduced rate of disputation reflects low number of negotiations referred to dispute in other regimes nationally |

| | Base Case | New Arrangements |
|--|---|--|
| | referred to Court resolution or arbitration | |
| NEGOTIATION TIMEFRAME | | |
| Under the Code | 2.5 years per proposal, on average Where there is a major dispute, negotiations will be much longer, with CBH negotiation still continuing after 4.5 years | 1.0 years per proposal, on average Evidence under Aurizon public reporting of time taken for negotiations well under 6 months. While the absence of regulator approved indicative tariffs will mean that negotiations are unlikely to be this short, the inclusion of standing offer tariffs and regulator endorsed standard access agreement will be likely to significantly reduce negotiation period. |
| Outside the Code | 1 year per proposal, on average | Half a year per proposal, on average. Negotiation time reduces under the new arrangements because fewer complex proposals are negotiated outside the code. i.e. a greater number of complex proposals are now negotiated under the Code. |
| NUMBER OF ACCESS AGREEMENTS | | |
| % of proposals within the Code that reach agreement | 30% | 80% |
| STANDING OFFER TARIFFS | | |
| Number | Not applicable | 4 standing offer tariffs to be developed It is assumed that standing offers will only be required where there is, or is likely to be, at least one operator (in addition to the incumbent operator) who is interested in access for a similar service requirement (i.e. access for the same commodity on the same route). The only existing instance where there is more than one operator on a route with a similar service requirement is the interstate intermodal service. It is assumed that, over the next five years, there may be one more service identified for each railway owner where there is interest from another operator with a similar service requirement. |

4.2 Cost profile

Figure 1 illustrates the additional costs of the new pricing mechanism, relative to Base Case. Most of the 'new' costs of adopting the new pricing mechanism arise up-front, in the first year. Recurrent annual costs are approximately \$300,000 (across all three rail owners, ERA and other stakeholders). Every fifth year the costs reach approximately \$800,000 coinciding with those years in which a regulatory review is undertaken of the RAB roll forward.

Figure 1 Cost profile over time



Data source: Synergies modelling

4.3 Benefit Cost Analysis results

The results indicate that, based on the central assumptions outlined in this paper, the new pricing mechanism will generate a net present value (NPV) benefit of \$24.4 million over 20 years (Table 7). Of this total benefit, 67 per cent is due to the assumed bring forward of projects, with the other 33 per cent due to reduced negotiation costs.

Benefits are estimated to exceed costs by a ratio of 3.17 to 1. Benefits are conservative because the analysis does not quantify the benefits of lower incidence of disputes, the reduced risk of 'good' projects not coming to fruition, and the benefit of improved durability of negotiated prices.

Table 7 Benefit-Cost results

| | Discount Rate | | |
|--------------------------------|---------------|------------|------------|
| | 4% | 7% | 10% |
| Present value of Costs (\$) | 12,461,678 | 11,269,218 | 10,445,028 |
| Present value of Benefits (\$) | 45,795,550 | 35,698,827 | 28,688,298 |
| NET PRESENT VALUE (\$) | 33,333,872 | 24,429,609 | 18,243,270 |
| BENEFIT COST RATIO | 3.67 | 3.17 | 2.75 |

4.4 Sensitivity analysis

The NPV result is sensitive to the assumed average value of projects, as this parameter is a key factor in determining the economic value of bringing forward the commencement of new projects negotiated under the Code (Table 7). However, the NPV remains positive even under an assumed average project value of \$20 million and a higher discount of 10% (NPV of \$5.4 million and a BCR of 1.52).

At the other end of the scale, if we adopt a higher average project value of \$120 million 'at risk' of being delayed (corresponding to a 20% share of the average value of both committed and non-committed resource projects in WA as at October 2017), the NPV result increases to \$48.3 million at 7% discount rate (BCR of 5.29).

Table 8 Sensitivity of NPV (\$) to assumed value of projects negotiated under the Code

| Average value of projects (\$mill) | Discount Rate | | |
|------------------------------------|-------------------|-------------------|-------------------|
| | 4% | 7% | 10% |
| 20 | 12,894,322 | 8,496,447 | 5,439,059 |
| 40 | 23,114,097 | 16,463,028 | 11,841,164 |
| 60 (central) | 33,333,872 | 24,429,609 | 18,243,270 |
| 80 | 43,553,646 | 32,396,190 | 24,645,375 |
| 120 | 63,993,196 | 48,329,353 | 37,449,586 |

Note: The \$120m upper project value is based on 20% of the average value of both committed and non-committed WA resource projects, as per the Major Projects List published by the Department of Industry, Innovation and Science

4.5 Conclusion

This paper provides an indicative, 'order of magnitude' estimate of the net economic benefits of the proposed rail access pricing mechanism. The analysis is necessarily assumption-driven and built around our judgement of what constitutes reasonable scenarios 'with' and 'without' the proposed reform.

The analysis suggests that the expected benefits of just two reform outcomes – the bring forward of projects and reduced negotiation costs – is likely to be sufficient to outweigh the additional cost of implementing and operating the new arrangements.