



Submission to:

Review of the Western Australian Access Regime

Issues Paper

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## Executive Summary

The Western Australian rail network is an essential aspect of modern agriculture. While farmers are not access seekers, they are a third party customer through the ownership of Co-operative Bulk Handling Group (CBH). Since the limitations of access have been imposed on the sector, farmers' ability to efficiently deliver grain to bins or port has been impacted. WAFarmers identifies the review of the Western Australian Access Regime as an opportunity to remove regulations that act as a bottleneck on industry, while there is scope to include clauses that may improve compliance, accountability and transparency which may improve supply chain profitability.

The Railways (Access) Code 2000 [the Code] has a number of protections which, if applied to negotiations, would improve transparency, efficiency and fairness to all parties within the agreement. However, due to the lack of utilisation of the Code, it is rendered ineffective. Should the Code have clauses that acknowledge issues with the imbalance of power in negotiations, there is likely greater scope for transparency to be instilled in all access negotiations. Furthermore, this will create a regulatory environment whereby parties will have confidence in the Code, and greater acceptance and willingness to utilise it in future negotiations.

The pricing mechanisms within the Code are not adequate for the condition of the network in WA, as well as the ability to negotiate access prices. The current pricing regime does not accurately factor in the state of repair of the rail within the network, thus does not reflect a fair or accurate access price.

WAFarmers has expressed concerns surrounding the lack of willingness to implement recommendations outlined in previous reviews. There must be timeframes for reviews to be considered and recommendations to be implemented, as this would ensure that reviews are of substance and that all clauses within the Code are fit for purpose.

Timeframes for reviews and additions to the Code must be considered when looking at the re-certification process. The reviews should be completed prior to the Code being certified as effective regulation. If this is not done, the review process and outcomes could be considered inadequate. The reviews and re-certification must be undertaken promptly and efficiently to upkeep public and customer perceptions and confidence in the Code and the processes within the regime.

Farmers are seeking transparency in regards to costs incurred, assurances in access and consistencies in the legislative and regulatory framework in which the Code sits. Having a functional Code will ensure that Western Australian farmers can deliver grain in a cost effective manner which will further assist our growers in being competitive in the global market.

## **Introduction**

The review of the Railways (Access) Code 2000 is timely given the significant interest in the status of the Code, as well as ongoing arbitration between the lease holder Arc Infrastructure and CBH Group. Since the privatisation of the railway infrastructure, the change of government and ownership of above and below rail in WA, there have been a number of issues raised that must be addressed for the effective operation of rail infrastructure.

Western Australian growers are impacted by the rail access regime through government ownership of the rail infrastructure, as well as their ownership of CBH Group as a grower cooperative. WAFarmers represents approximately one-third of CBH members, allowing the organisation to be well placed to represent growers' perspectives on railway access regime issues.

WAFarmers' involvement in representing the grower perspective has been long-standing, with contributions to the Economic Regulation Authority (ERA) 2014 review, as well as numerous State and Federal Government inquiries on monopoly transport infrastructure regulation.

The lack of implementation of the 2011 and 2015 ERA recommendations is a significant concern, as they could alleviate some issues with how the Code currently operates, as well as address a number of the concerns raised in this review and issues paper.

The recommendations had clarifications that are required for the efficient operation of the Code, such as definitions (R7 2015 review, p.40; R9 2015 review, p.45; R3 2011 review, p.9), clarification of sections (R4 2015 review, p.27; R6 2011 review, p.15) and inclusion of timeframes (R6 2015 review, p.33; R8 2015 review, p.45). There were also recommendations that would have allowed for more efficient regulation of the Code (R1 2015 review, p.13; R2 2015 review, p.19).

The ineffectiveness of the Code is further highlighted by the lack of utilisation. To date there has only been one negotiation under the Code, with initial undertakings beginning in December 2013 and arbitration still ongoing. All other access negotiations have been undertaken outside of the Code.

## **2.3 Main Provisions of the Act**

Any new rail line or amendment to the network may be declared by the Minister for Transport. WAFarmers sees this as a positive measure as the Minister can ensure the changes uphold competition and network access for all parties.

Under the current framework, the railway owner (WA State Government) approaches the lease holder (Arc Infrastructure) and access seeker (e.g. CBH Group) to collect information regarding the proposal. The access seeker provides specific information about the proposal, and the lease holder then assesses the validity. This is a significant commercial concern, as the access seeker is divulging potential commercial advantages or negotiation points to allow for access to be provided.

The information disparity between the State Government as the infrastructure owner, the lease holder, and the access seeker is significant, as both the rail owner and the access seeker require the lease holder to assess and declare information that can be disclosed. This is highlighted by the significant amount of information regarding the railway network that is declared commercial in confidence, despite the infrastructure being publically owned.

WAFarmers supports the review of the Act every five years. However the timeframe for recommendations and amendments to be implemented is a hindrance to the effective regulation of railway access. An example of the issues with the review period is the 2010 Code review. It was initiated in October 2009, with

a draft report in November 2010, and a final report in December 2011. The certification of the Code as 'effective' occurred in February 2011, despite the review of the Code not being finalised for approximately 11 months.

While WAFarmers supports the independent regulation of railway access by the ERA, the Act and Code have significantly limited the ability for oversight and regulation of the rail network and the lease holder. The issues with access negotiations between Arc Infrastructure and CBH Group, with ERA as the regulator, have also highlighted the ineffectiveness of the Act and Code

WAFarmers supports the requirement for the lease holder to segregate access-related functions from other functions. It provides a level of confidence that potential or perceived conflicts of interest should be limited and not impact on access negotiations.

## **2.4 Provisions in the Code**

While the Code should be a valuable tool for regulation of railway access, it has not been utilised for the majority of access negotiations in WA. The non-utilisation of the Code means that competition principles built into the Code cannot be utilised, nor can the infrastructure management have maximum transparency. Access arrangements outside the Code are either more effective for both the access seeker and the lease holder, or the Code does not meet the required function and requires amendments to meet the requirements under the Act, as well as those of the sector.

Pricing mechanisms outlined in the Code are not the most effective options, as they do not account for the actual value of the asset, nor do they reflect the upgrades or deterioration of the asset. Additionally, the cost of any extension or expansion of the rail network is borne by the users. This is not usual practice in other sectors, with expansion traditionally undertaken by the owner or lease holder, not the tenant. The current setting generally discourages investment, which locks out potential users and customers, as well as being uneconomical.

The pricing principles (Schedule 4) state that "apportionment of costs should be fair and reasonable." WAFarmers has concerns about what constitutes fair and reasonable. This statement appears to be ambiguous as there are no parameters in the Code to act as guidelines.

The conflicts in interests for the lease holder and access seeker are significant, as the lease holder is negotiating to maximise access fees, whereas the access seeker is negotiating for maximum access for the lowest possible (or minimum) access fees. While the guidelines for negotiating prices are part of the Code, they are only guidelines for negotiations, and there is limited accountability and transparency in how negotiations occur.

A final issue with the negotiation process is the timeliness of outcomes. CBH Group provided an initial access proposal in December 2013, with ERA providing floor and ceiling cost determinations in June 2014, an arbitrator appointed in March 2016, and an arbitration hearing in September 2017. An arbitrated access fee is set to be provided sometime in 2018. However, during this period, there have also been four interim access agreements negotiated. The process must be streamlined to allow for more efficient and timely negotiations.

The delay in an outcome is only increasing the costs of negotiation, and increasing the costs for users of the rail network, or the wider community that relies upon the network. With the delay in reaching an agreement, farmers as owners of CBH are paying the negotiation costs, as well as the time lag costs.

### **3.1 Balance of Power in Negotiations**

It is important to note that no party has gained access under the current regime. This may indicate that the regime is being used as a guide for negotiations rather than being implemented for its regulatory power. However, while the Code is operating generally untested, it is difficult to comment on its effectiveness or potential improvements. It is important to note that the current Code does not align with other jurisdictions, nor does it have similar competition clauses. As other jurisdictions have rail access regimes that are more prescriptive, there is an opportunity to learn from their experiences and adopt appropriate clauses.

The balance of power in negotiations is likely to favour the lease holder, due to greater knowledge of the capacity and restrictions of the network than the access seeker. The access seeker submits proposals to the lease holder to assess the viability of the proposal and any issues. The lease holder also has the advantage of information used in other negotiations from other access seekers, which is likely to not be available to other access seekers due to commercial in confidence concerns.

#### **Issue 1 – Ability to Opt Out**

The application of the Code in Western Australia is unique as it provides an avenue for negotiation to occur outside the Code, whereas other jurisdictions do not have this option. However, when negotiating outside the Code, no protections from the Code apply.

Negotiations outside the Code may not be balanced and could favour a particular party. If there is a breakdown in relations between parties it can become time-consuming and costly to bring negotiations within the realms of the Code. With this in mind, it may be prudent for the parties to use the overarching protections outlined in the Code in order to provide ample protections for both parties, and these protections may apply both inside and outside of the Code.

WAFarmers supports the proposals A-C outlined in the discussion paper. Enforcement of some aspects of the Code - specifically the non-discriminatory provisions, the role of the ERA in negotiations inside and outside the Code (part 5), and a dispute resolution process - all have the potential to improve negotiations whether within or external to the Code. Imposed obligations to negotiate in alignment with parts of the Code are likely to streamline negotiations, as well as add a level of transparency that is not currently available.

#### **Questions**

The Code has had limited use in Western Australia, making it difficult to comment on its effectiveness. It is concerning that negotiating parties are choosing to negotiate outside of the Code.

- 1.1 The Code is, to date, untested and has no dispute reaching an outcome through the Code process. As a result of this, negotiations within the Code were a disincentive, as it was previously an untested regime with significant capacity for interpretation of clauses and limited precedents set. Negotiations outside the Code have been the norm for most access seekers, as there were somewhat unknown costs involved in the Code negotiations, as well as concerns with how the Code would work.
- 1.2 Costs of negotiating outside the Code are worn through the lack of guidelines or negotiating principles that must be followed. There are also costs associated with initiating access agreements outside the Code, and then bringing the negotiations within the Code. Access negotiations outside

the Code that then must go to dispute resolution or arbitration under the Code, must comply with a series of processes that may have been undertaken previously.

- 1.3 The balance of power in negotiations is likely to favour the lease holder, as they already have the rail network and the specific information required by the access seeker to build their access proposal. The lease holder also has the information from previous access seekers and proposals. Access seekers are restricted in the amount of information they can disclose about the negotiations due to significant commercial in confidence requirements.
- 1.4 The reform options above could allow for more effective negotiations outside the Code, and facilitate negotiations to come within the Code should disputes arise.

## **Issue 2 – Barriers to Negotiation**

Barriers to negotiation are a real concern for WAFarmers Members, as the lack of transparency around feasibility, costing, access, safety and other restrictions for the access seeker are all hindrances to productivity and efficiencies for growers and other key stakeholders. WAFarmers understands that the disclosure of information can dilute the negotiating power for parties involved in rail access negotiations.

### **Questions**

- 1.6 The ability for the access seeker to assess the capacity of the network to accommodate the proposal is severely limited, as the lease holder is in the best position to assess this information. However, the access seeker must present a proposal to the lease holder for assessment of feasibility. Presenting this information to the lease holder may disclose information that could affect negotiations in the future.  
The requirement for the access seeker to demonstrate capacity and feasibility of any expansion is a barrier to negotiations. The network owner has access to specific network information that would be ample for a feasibility study or desktop review. This process does appear to be a duplication of resources which creates an inefficient system.  
Economic feasibility of a proposal is determined by the access seeker, pending the network owner's cost modelling and other restrictions that may limit the success of the regime. There is scope for the available information not to serve in the best interest of a single party; i.e. lease holder or access seeker.
- 1.7 The requirement for the network owner to supply information to the access seeker may not mitigate any choke points in negotiations. This scenario still provides scope for commercial-in-confidence information to lead to costly and timely litigation and human resources. Unless enforced, there is the opportunity for the rail owner to withhold information from the access seeker which may alter the outcome. This provision requires further study to gauge which provisions are impossible under the Code, or if these provisions can even be implemented for those negotiations occurring outside the Code.
- 1.8 The reform options proposed have scope. However, there must be transparency in the decision making process and specific information on deficiencies or issues with the proposal must be presented to the access seeker with specific information that will allow them to adjust it to meet the reality of the network. WAFarmers would accept this; however, the costs must be transparent with how they are calculated or a framework set up on how the costs are calculated.
- 1.9 Another potential barrier to negotiations is the pricing mechanisms within the Code. They do not reflect the fair value of the asset, particularly given the age and condition of some parts of the network. The pricing mechanism must reflect the true cost of the infrastructure.

- 1.10 Adoption of the ERA 2015 review recommendation 2, p.19 may address part of the issue with the floor and ceiling price mechanisms, also referred to as Gross Replacement Value (GRV) currently used.

## **3.2 Accountability**

### **Issue 1 – Railway Owner Accountability to Comply with Regime**

There appears to be no accountability applied to the lease holder, Arc Infrastructure, as opposed to the State Government as the owner of the rail network, as regime accountability only applies if access is sought under the Code, which it has not been. Currently the regulatory role undertaken by the ERA has minimal impact on the sector as it was designed to not be overzealous. Regular reporting is essential to build transparency into the system. This may then see more parties want to use the Code.

WAFarmers reaffirms that the sector requires full information sharing as the current commercial-in-confidence nature of agreements does not encourage accountability.

WAFarmers recognises that all businesses deserve degrees of protection from communicating information that may impact business operations, but it is concerning that the argument of information being “commercial-in-confidence” is often used to end discussions or eliminate opportunities to share information. Given the current agreement pertaining to the Western Australian rail network is a lease-only agreement, the asset, being monopoly infrastructure still owned by the State Government, lends itself to conditions where unfair advantage can be gained and exploited.

WAFarmers reaffirms that any reporting must be overseen by an independent statutory body and that reports must be tabled to the Western Australian Parliament.

#### **Questions**

WAFarmers has been a long term advocate for transparency within the rail network. Transparency should address all aspects of the rail network, and as much information as possible should be tabled in WA Parliamentary reports.

The reporting could include information on access fees, safety restrictions, information or frameworks on how this information is calculated, and any other data that would improve transparency for access seekers, as well as the general public as owners of the rail network.

### **Issue 2 – Regulatory Accountability**

The regulator accountability within the Code is restricted, as the role for the ERA is generally applicable to dealings with the Code only. The ability for ERA to enforce the Code is ineffective when agreements are outside the Code. There is scope to provide the ERA with additional powers to involve itself when there is a breakdown in relations. As it stands, the ERA is rendered powerless. This change can minimise the risk of drawn out negotiations, misuse of power and should expedite any arbitration process.

WAFarmers encourages this to be included as part of this review.

#### **Questions**

The inclusion of a merits review for decisions made under the Code is a good option to consider, however given the lack of utilisation of the Code to date, there would be limited scope for review.

### **Issue 3 – Processes Relating to Part 5 Instruments**

WAFarmers welcomes clarification of processes relating to Part 5 instruments. However, the issues with Part 5 had a number of recommendations from the 2011 review, which could address some of the issues and concerns within this review.

The obligation and reporting outlined is likely to have a number of commercial-in-confidence restrictions from the lease holder.

#### **Questions**

The implementation of the 2011 recommendations is likely to improve transparency and allow the public to engage with the ERA on their issues with costing principles under the Code. The introduction of timeframes is also likely to improve accountability and efficiencies, and deliver outcomes under the Code.

### **3.3 Capacity Expansions and Extensions**

WAFarmers does not have a contribution to this section.

### **3.4 Pricing Mechanisms**

Western Australia allows parties to negotiate pricing within a floor or ceiling limit, also known as the GRV. WAFarmers supports the implementation of recommendation 2 of the 2015 review, changing GRV to Established Asset Base (EAB).

However, it is important to note that there are no benchmarks or reference tariffs approved by the regulator. The lack of information available for access seekers is very concerning, as it is a potential disincentive to seek access, as well as leading to information disparity for access seekers and the lease holder.

The pricing mechanism in WA is not used in other jurisdictions, and therefore becomes a deficient system for regulation and use as a comparison tool on access regime effectiveness throughout Australia.

The inclusion of reference tariffs is a potential area that will improve transparency. However, the development of the reference tariff will require the regulator to access a significant amount of commercially sensitive information from both the lease holder and the access seeker. Tariff development will also require; an understanding of the ERA, the circumstance under which the ERA is the regulator of the wider environment, including vertical integration interests, and a good understanding of the broader, commercially sensitive aspects of the supply chain.

### **3.5 Marginal Freight Rail Routes**

WAFarmers supports the issues raised within the review paper, and has significant concerns about the transparency in the price setting process plus the assessment of access arrangements.

The routes have been assessed as uneconomic, despite the economic values or framework used not being disclosed, or justification of the assessment being released. WAFarmers understands the discussion about marginal routes has been a long term issue, involving Parliamentary reviews, and a significant amount of media attention.



Disclosure of the actual state of the lines, as assessed by an independent expert or assessed with full transparency by the lease holder, with inclusion of detailed costing, maintenance and repair requirements, is something that the wider public is interested in knowing.

### **3.6 Greenfield Development**

WAFarmers does not have a contribution to this section.

### **3.7 Vertically Integrated Rail Networks in the Pilbara**

WAFarmers does not have a contribution to this section.

### **3.8 Consistency with National Access Regime**

Currently there is inconsistency with how interstate rail routes in WA interact with the national access regimes. Any inconsistency is likely to cause regulatory inefficiencies.

The WA access regime should be consistent with the national regime, as it will encourage competition and potentially create greater efficiencies in how rail is regulated and used in both WA and Australia.

However, WAFarmers does not want to duplicate regimes and create inefficiencies such as just removing the interstate route from the WA regime, while still requiring access to be sought for intrastate routes under the WA access regime. Amendments to the Code to allow the regime to be more consistent with the principles in other jurisdictions and the National regime would be an option for the effective regulation of access to rail infrastructure.

## **Additional comments**

### **Concerns with the Certification of the Code Under the National Competition Council (NCC)**

The certification of the railway regime as 'effective' in 2011 was a concern for WAFarmers, as the NCC did not recommend re-certification of the regime. The reasons for the recommendation are outlined on the NCC website<sup>1</sup>. In that determination, the NCC found that "the Regime does not provide for a consistent approach to regulation of third party access to railways in Western Australia."<sup>2</sup>

The certification of the Code, despite concerns raised with the effectiveness of how the Code regulates competition and access, is a significant concern which must be addressed before the Code is re-certified.

1 – National Competition Council. Application for certification of the Western Australian rail access regime. [http://ncc.gov.au/application/application\\_for\\_certification\\_of\\_the\\_western\\_australian\\_rail\\_access\\_regime](http://ncc.gov.au/application/application_for_certification_of_the_western_australian_rail_access_regime)

2 – National Competition Council. Western Australia Rail Access Regime. Final recommendation 13 December 2011. Pg 7. <http://ncc.gov.au/images/uploads/CERaWAFR-001.pdf>

## **Organisational Background**

The Western Australian Farmers Federation (Inc.) (WAFarmers) is the state's largest and most influential rural advocacy and service organisation. WAFarmers boasts a membership of over 3,500 primary production businesses and individual farmers including grain growers, meat and wool producers, horticulturalists, dairy farmers, commercial egg producers and beekeepers. Collectively our members are major contributors to the \$7.5 billion gross value of production that agriculture in its various forms contributes annually to Western Australia's economy. Additionally, through differing forms of land tenure, our members own, control and capably manage many millions of hectares of the state's land mass and as such are responsible for maintaining the productive capacity and environmental wellbeing of that land and the animals that graze it.

WAFarmers is also a proud member of the National Farmers' Federation (NFF), ensuring that the voice of WA farmers is heard at the national level. The NFF is the peak national body representing farmers and, more broadly, agriculture across Australia. It is one of Australia's foremost and respected advocacy organisations, proactively representing farm interests and asserting policy positions to governments and the broader community.

## **Statistics on Western Australian Agriculture**

Australian agriculture makes an important contribution to Australia's social, economic and environmental fabric.

### ***Social***

There are approximately 8,400 farm businesses in Western Australia, which is nearly 9.8 per cent of all the farm businesses in Australia.

### ***Economic***

The gross value of Western Australian farm production in 2015-16 was \$8.2 billion, which was 15 per cent of the total gross value of agricultural production in Australia (\$56 billion). Western Australian agricultural industries are highly export oriented, accounting for over \$7.6 billion in exports in 2015-16. Western Australia contributed to 16 per cent of Australians overall agrifood exports over 2015-16.

### ***Workplace***

The Western Australia agrifood sector is a significant source of employment, providing jobs for 183 600 people in 2015-16, and continues to be the lifeblood of rural and regional communities. Australia wide, the farm sector employs 304,200 people, and across the entire supply chain, agriculture powers 1.6 million jobs.

### ***Environmental***

Western Australian farmers are environmental stewards, owning, managing and caring for 48 per cent of Western Australia's land mass.

Australian wide, farmers are at the frontline of delivering environmental outcomes on behalf of the Australian community, with 6.8 million hectares of agricultural land set aside by Australian farmers purely for conservation/protection purposes.