Economics and Industry Standing Committee

The Management of Western Australia's Freight Rail Network

Report No. 3
October 2014

Legislative Assembly
Parliament of Western Australia

Committee Members

Chairman	Mr I.C. Blayney, MLA Member for Geraldton
Deputy Chairman	Hon F.M. Logan, MLA Member for Cockburn
Members	Mr P.C. Tinley, AM, MLA Member for Willagee
	Mr J. Norberger, MLA Member for Joondalup
	Mr R.S. Love, MLA Member for Moore

Committee Staff

Principal Research Officer	Dr Loraine Abernethie, PhD
Research Officer	Mr Michael Burton, BEc, BA (Hons)

Legislative Assembly
Parliament House
Harvest Terrace
PERTH WA 6000

Tel: (08) 9222 7494
Fax: (08) 9222 7804
Email: laeisc@parliament.wa.gov.au
Website: www.parliament.wa.gov.au/eisc

Published by the Parliament of Western Australia, Perth.
October 2014.
ISBN: 978-1-925116-28-1

(Series: Western Australia. Parliament. Legislative Assembly. Committees. Economics and Industry Standing Committee. Report 3)

328.365

Economics and Industry Standing Committee

The Management of Western Australia's Freight Rail Network

Report No. 3

Presented by

Mr I.C. Blayney, MLA

Laid on the Table of the Legislative Assembly on 16 October 2014

Chairman's Foreword

I am pleased to present the Economic and Industry Standing Committee's report from its Inquiry into the current lease arrangements and management of the Western Australian freight rail network.

The important role the state's entire freight network plays in Western Australia is widely acknowledged. An integrated, safe and efficient freight system creates employment, facilitates economic growth and, particularly in regional Western Australia, is critical to communities' wellbeing. The Western Australian freight rail network is an essential part of this integrated freight network, with the importance of having as much freight on rail as possible well recognised by government and industry. Rail should, and will, fulfil an increasingly important role in the economic and social development of the state.

The government's aim in selling Westrail's freight business and leasing the infrastructure was clear and well-intentioned, particularly its express wish to dispose of the business on a vertically integrated basis. The lease document, in particular, establishes that the revenue from related entities of the lessee must be accounted for in determining the economic or uneconomic status of less viable lines. Not only did this acknowledge that some lines were less viable, but demonstrated the accepted need, and means, to keep them operating.

Unfortunately, though, the lease instrument, the regulatory regime and the Public Transport Authority's (PTA's) management of the lease has not allowed the government's vision to be realised. The lease instrument did not give the government any rights in the on-selling of the above rail business, a situation which led to the loss of the vertically integrated business arrangement. The *Railways (Access) Code 2000* (WA), which confers oversight and regulatory functions on the Economic Regulation Authority (ERA), aims to facilitate negotiations between the lessee and access seekers. However, the Code does not allow the ERA a role in setting access prices. The application by CBH Group in December 2013 is the first access proposal relating to the freight rail network to trigger the formal involvement of the ERA in considering the lessee's floor and ceiling prices. In seeking access to the freight rail network, Karara Mining found the Code to be ineffective and negotiated directly with Brookfield Rail. As part of this process, and at Brookfield Rail's request, Karara Mining agreed that the Code could not be applied for the duration of their 15-year agreement. It seems that the Code is not as effective as it might be and, in some circumstances, may actually jeopardise development.

Throughout its role as the public authority responsible for managing the lease and ensuring the lessee was meeting its lease obligations, the PTA has taken a 'light touch'

approach to provide the lessee with quiet use and enjoyment of the below rail infrastructure. This approach has proven to be less than effective in ensuring the condition of the lines and the entire freight rail network remain at a standard that could be reasonably expected under the terms and intent of the lease.

When combined, these factors have resulted in a situation where certain lines have been placed into a new category or standard called 'care and maintenance'. Based on the government's agreement to lease variations to date, it is a matter of serious concern that other line sections may be similarly placed into care and maintenance.

Currently, the government's rail freight network policy is largely based on the 2009 *Strategic Grain Network Report* (SGNR). Much evidence has been presented to show that the assumptions on which this report was based no longer hold true. Certainly, its assumptions in relation to the impact of deregulation on the export grain market have not yet been realised. This has been compounded by the failure of government to fully or properly implement the Brookton Strategy recommended in the SGNR.

The freight rail network is clearly an issue that people care a great deal about. The Committee was presented with a significant amount of evidence, some of which was not directly related to its terms of reference. This meant that the Committee was not able to address those issues. For example, the Committee heard that to transport grain from Miling to Kwinana was $20.55 per tonne compared to $26.50 by road. Similarly, the average cost to transport grain from Bruce Rock was around $22 per tonne for rail, whereas for road it may well be $27 per tonne. Furthermore, these road rates do not include the cost of road upgrades and maintenance. As they were not included in the Inquiry terms of reference, the Committee was not able to undertake comparisons of the true cost of either road or rail freight, a cost that would include health, safety and community impacts.

Another major issue revealed during the Inquiry was the lack of transparency around the lease instruments, the lease variations and the obligations of both parties to the lease. This generated a high level of anxiety and concern, particularly as misinformation and speculation spread. This situation is far from ideal. Following careful consideration of requests for evidence to be treated as closed, the Committee determined that as much information as reasonably possible should be in the public domain.

Based on the ownership and management of rail freight networks in other jurisdictions in Australia, it is evident that Western Australia's situation is unique. What is equally evident is that problems associated with owning and maintaining low-volume freight lines have been faced by other Australian states over the past 15 years. Governments' respective efforts at privatising railways have generally not succeeded over entire networks and some States have either bought back leases or provided substantial rescue packages.

If the Western Australian Government supports 'a growing role for rail in the distribution of the freight task' it needs to do more than 'continue to work with all parties' to keep lines operational. It is time for all parties to stop 'being careful with words' and to find a way to ensure the freight rail network continues to be able to play its vital role in state development. Western Australia could do worse than look to the United States and Canada where governments have realised the importance of railway, including short or branch lines, and provided a number of programs to facilitate increased capital investment and encourage their use.

I would like to take this opportunity to acknowledge the hard work of my fellow committee members—Hon Fran Logan, MLA, Mr Jan Norberger, MLA, Mr Peter Tinley AO, MLA and Mr Shane Love, MLA. Without their contributions this complex Inquiry would not have been possible, particularly in such a short time frame. I would also like to thank the Committee's Principal Research Officer, Dr Loraine Abernethie, and Research Officer, Mr Michael Burton, for their assistance throughout this Inquiry.

MR I.C. BLAYNEY, MLA
CHAIRMAN

Contents

Executive Summary i

Ministerial Response vii

Findings and Recommendations ix

Chapter 1 Introduction 1

Introduction 1

The Western Australian freight task 2

Rail freight demand in Western Australia 3

The rail freight network 6

The importance of this Inquiry 8

The Committee 9

Conduct of the Inquiry 9

Requests for evidence to be treated as closed 11

Lease documents 11

Information relating to costs, access fees and maintenance costs 12

Committee consideration of requests for evidence to be closed 15

Difficulties in obtaining evidence 15

Chapter 2 Rail Matters 23

Introduction 23

Confidence in the agricultural sector and the regions 24

Safety 27

The Freight Rail Network is a State asset 31

Lack of transparency 33

Concluding remarks 35

Chapter 3 Freight Rail Network Policy 37

Introduction 37

Government provision of infrastructure as a public good 39

Competition, market failure and monopolies 39

Monopoly providers of public goods 39

Profit maximisation versus the public interest 40

The disposal of the government's freight rail business 41

The decision to sell Westrail's freight business and lease the track network 41

Sale and lease of Westrail: A whole-of-business transaction 43

The disappearing $400 million commitment 45

Separation of above and below rail operations 47

Have the original objectives for the sale and lease been met? 50

Track standards, capacity and service continuity 51

Legislative limitations on the disposal of corridor land 51

Lease conditions for track standards 52

Maintaining and operating marginally profitable lines 55

Grain line strengthening and re-sleepering 56

Chapter 4 The Strategic Grain Network Review 67

Introduction 67

The Freight and Logistics Council of Western Australia 67

The Strategic Grain Network Committee's review of Western Australia's grain freight supply chain 68

Findings of the SGNR 69

Tiers 1, 2 and 3 71

The Brookton Strategy 72

CBH Group's entry into above-rail operations 75

The contemporary relevance of the SGNR 76

A long-term solution? 82

Chapter 5 Regulation of Western Australia's freight rail network 85

Western Australia's 'Railway Access Regime' 85
Background information 88
A negotiate–arbitrate model 89
Floor and ceiling costs 92
Historic use of the *Railways (Access) Code 2000* (WA) 93
Reviewing the *Railways (Access) Code 2000* 94

Chapter 6 Access Agreements 97

Introduction 97
Case study 1: The CBH Group access proposal 98
Case study 2: The Karara Railway 108

Chapter 7 Management of the Freight Rail Network by the Public Transport Authority 117

Regulation of the freight rail network is essential 117
The role of the Public Transport Authority 118
The Public Transport Authority's view of its performance 120
A light touch 122
Quiet use and enjoyment 124
Managing standards 126
What can happen when a private company is engaged to provide a public good? 130
The surrender of uneconomic lines? 139
A frozen asset 150
Legislative Limitations on the disposal of corridor land 155
Section 12(6) and the Koolyanobbing—Esperance line 155
Section 12(7) and the Kwinana–Parkeston line 159
The Miling Line 161
Managing the concerns of other stakeholders 165
Through to 2025 and beyond … 172

Chapter 8 The Impact of the Current Freight Rail Network Policy on Local Governments 179

Increased truck movements on roads 179
Road quality 181
Investment in roads and cost shifting 185

Chapter 9 Freight Rail Networks in Other Jurisdictions 191

Introduction 191
A common problem in Australia 191
Victoria 191
New South Wales 192
Queensland 193
South Australia 193
Tasmania 194
Why is it so difficult? 196
Case Study: United States Short Lines 198
United States short line railways 199
The *Staggers Rail Act of 1980* (US) 201
The short line tax credit 201
Railroad Rehabilitation and Improvement Financing (RRIF) 202
Transport Investment Generating Economic Recovery (TIGER) grants 203
US policy and investment in freight rail networks 203

Chapter 10 The Freight Rail Network and State Development 207

Introduction 207
Loss of state control over a state asset 208
Lack of transparency 208
Regulation of the freight rail network 210
Return condition of the state asset 211
The way forward 212

Appendices 217

Appendix One	Inquiry Terms of Reference	217
Appendix Two	Committee's functions and powers	219
Appendix Three	Submissions received	221
Appendix Four	Status of documents provided to the Inquiry	223
Appendix Five	Hearings	227
Appendix Six	Glossary	231
Appendix Seven	Timeline of key events	239
Appendix Eight	Wheatbelt water use efficiency	241
Appendix Nine	Responding submissions	243

Executive Summary

In divesting itself of its Westrail freight business, the Western Australian Government sold the freight business, rolling stock, terminals and maintenance facilities, and leased the land corridor and below rail railway infrastructure through a 49-year lease. At present, the Public Transport Authority (PTA) is responsible for managing the freight rail network lease. This Inquiry investigated whether the current lease arrangements and management of the Western Australian Freight Rail Network facilitate or hamper state development.

Given the geographic size of Western Australia (WA) and the types of industries on which its economy depends, the freight rail network is of enormous significance to the state, its economy and communities. **Chapter 1** provides information on WA's freight task and rail freight demand, and outlines why the Committee views this Inquiry to be important.

The Committee received a number of requests for documents to be treated as closed evidence. The Committee carefully considered each of these requests and decided to make the majority of evidence public. Throughout the Inquiry the Committee encountered difficulty in obtaining information, something which reinforced sentiments expressed by others providing evidence to the Inquiry in relation to the lack of transparency surrounding the freight rail network lease and management. Chapter 1 also outlines the Committee's consideration of these matters.

As **Chapter 2** demonstrates, the management of the freight rail network is clearly a matter of importance to the communities served by the network. This was reinforced in evidence to the Inquiry, particularly that gathered on the Committee's visit to the Wheatbelt. The Committee was stuck by the enormous confidence growers and others have in the regions and the strength of their belief that the freight rail network is fundamental to their success. The Committee also heard concerns in relation to safety—particularly when there is increased road freight movements due to line closure—the condition of the network, which remains a State-owned asset, and the lack of transparency surrounding the original lease and subsequent variations and agreements.

Historically, in Australia, governments have provided infrastructure such as roads and railways where the efficiencies of marketplace competition could not be realised. In recent times, one strategy governments have used to try to capture market efficiencies in the provision of infrastructure is through privatisation. This can create tension if the profit maximisation goal of business and the public interest goal of government are not aligned. **Chapter 3** outlines the initial sale and lease of the Westrail freight business in 2000 as a whole-of-business transaction as one such strategy. It also discusses the

subsequent lease variations and agreements to date. In doing so, the Chapter traces the initial intentions of government in taking this step, through to the government's willingness as recently as 2012 to continue contributing to the upkeep of lines, to the current government position of not providing further support to Tier 3 lines on the basis that they are uneconomic. Chapter 3 should be read in conjunction with Chapter 7, which discusses the PTA's management of the lease.

Much of the Western Australian Government's current policy on the freight rail network is based on a 2009 report titled Strategic Grain Network Report (SGNR). **Chapter 4** details the reasons behind the commissioning of the SGNR and summarises its findings. It is the SGNR that developed the categories Tier 1, Tier 2 and Tier 3 for the rail network, with the tiers referring to different levels of economic efficiency and, therefore, viability. A major recommendation of the SGNR, which recommended no further funding for the Tier 3 lines, was the Brookton Strategy. As an alternative to Tier 3 lines, the Brookton Strategy was to facilitate the transfer of over half a million tonnes of grain freight onto rail at Brookton and Kellerberrin from farms in the Kwinana South zone. As Chapter 4 notes, the Brookton Strategy has not been fully implemented.

Throughout the Inquiry the Committee heard concerns about the current relevance of the SGNR. Of particular concern was, first, that the assumptions on which the report was based might no longer hold and, second, that the Tier 3 lines had closed and the Brookton Strategy had not been progressed. CBH Group's entry into above-rail freight operations has also significantly changed the WA's grain freight landscape. These issues are also discussed in Chapter 4.

As Chapter 3 notes, in situations where a government monopoly is, in effect, privatised, it is essential that there is adequate regulation to ensure the public interest is not marginalised by the profit maximisation goal of private enterprise. Government regulation can be through legislation or through government policy. **Chapter 5** details the legislative regime in WA and Chapter 7 examines regulation through the implementation of government policy. Chapter 5 outlines the Railway Access Regime, comprised of the *Railways (Access) Act 1998* (WA) and the *Railways (Access) Code 2000* (WA) (the Code). This regime was developed to facilitate negotiations between operators of above rail infrastructure (the rolling stock) and the operator of the below rail network (the track and other infrastructure). The Economic Regulation Authority (ERA) has Code oversight and regulatory functions under the Regime. The ERA has no role in establishing specific access prices.

Access to WA's freight rail network is provided through a negotiate–arbitrate model, with access seekers free to negotiate terms, including price, outside the Code. The Code envisages that negotiated, mutually agreeable access fees will be somewhere between the floor and ceiling prices for the proposed access. It is only when negotiations fail that the ERA becomes involved. Chapter 5 points to some of the

limitations in the regulatory regime for the freight rail network, and notes that CBH Group's access proposal made under the Code is the only access proposal for the freight rail network that has triggered the formal involvement of the ERA.

While Chapter 5 outlines the regulatory regime that is in place, **Chapter 6** notes that in the almost 13 years since the Code was established, only two applications for access to the rail freight network have been made under the Code, with one of them being withdrawn. Since 2006, though, the operator has successfully negotiated 20 access agreements. While this could be a sign that the success of commercial negotiations has largely made the Code redundant, this is not necessarily the case. As the two case studies in Chapter 6 show, the lack of applications under the Code seems to indicate its impotence to assist negotiations.

The first case study in Chapter 6 relates to CBH Group's 2013 formal access proposal under the Code. In June 2014 the ERA, rather than approving Brookfield Rail's floor and ceiling costs, determined those costs in relation to CBH Group's access proposal. This, in itself, indicates the need for government regulation of access to the freight rail network, not least because the determination of costs made by the ERA demonstrated the costs proposed by Brookfield Rail to be excessive. Furthermore, rather than lend certainty to the negotiation process, the lengthy and largely non-transparent process of assessing access applications makes it easier to understand why more applications have not been made through the Code.

The second case study in Chapter 6 outlines the process through which Karara Mining gained access to the freight rail network. The Code proved to be of no assistance to Karara Mining in seeking access to the freight rail network, and in different circumstances, this may have actually jeopardised the deal that was struck. Ultimately, Karara Mining was left carrying all the risk of the $450 million upgrade to the Geraldton line. If there had been a more effective regulatory regime in place, that risk could have been shared. Furthermore, not only was the deal negotiated outside the Code, the Code is expressly excluded from the agreement that was reached. That is, Karara Mining has ceded its right to engage the provisions of the Code for the duration of their 15-year agreement with Brookfield.

Chapter 7 begins with noting that regulation of the freight rail network is essential due to the absence of competition to the lessee, that is, to Brookfield Rail. This chapter examines the management of the lease by the PTA as the second means of regulation of the network, and should be read in conjunction with Chapter 3, which outlines government policy on the freight rail network.

While the PTA and the Department of Transport have separate roles, the execution of those roles seems difficult to separate. Effectively, the responsibilities of the PTA under the *Government Railways Act 1904* (WA) are shared between these two entities within

the Transport Portfolio. As Chapter 7 notes, PTA is responsible for overseeing the lessee's adherence to the provisions of the lease and subsequent variations and agreements. PTA is, in effect, the landlord of the leased freight rail network, while Brookfield Rail is the tenant. PTA's role is fundamental to the long-term functionality of the network.

While PTA presents quite a positive view of its performance in managing the freight rail network, the Committee has formed a less positive view. Chapter 7 outlines the Committee's concerns in relation to the PTA's management, a management that has been largely reactive and passive. This is exemplified in PTA's interpretation of critical clauses of the lease, particularly its 'light touch' approach so as to afford the lessee quiet use and enjoyment of the leased infrastructure. Chapter 7 also outlines a number of concerns in relation to the maintenance and upgrade of track performance standards.

This Inquiry has revealed the negotiations that led to the placement of Tier 3 lines into a 'care and maintenance', a performance standard created in June 2010. This represented a major shift in government policy. These negotiations also point to the inadequacy of the lease instrument to effectively protect the State's interests in the context of the current lease ownership. The situation exemplifies how the lease is not always strictly relied upon and how some processes, in fact, have been undertaken independent of the lease. Somewhat ironically, it also demonstrates that the provisions of the lease agreement can be renegotiated and amended, a reality that is in contrast to PTA's stated position that 'the lease is the lease is the lease' and cannot be changed. While Chapter 7 acknowledges that the actions of PTA in some circumstances should be balanced against the positive outcomes that flowed from the SGNR process, the current lease arrangements and the management of the lease has allowed sections of the freight rail network to become a frozen state asset.

Chapter 7 also reveals two problems with the implementation of specific provisions of the *Rail Freight System Act 2000* (WA). These relate to section 12 of the Act, which concerns legislative limitations on the disposal of corridor land. The first, s 12(6), relates to the Koolyanobbing–Esperance line. Due to inadequate drafting, this section has been deemed to be unenforceable. What concerns the Committee is that no action has been taken to rectify this legislative impasse and that it appears that market forces, rather than good management, has resulted in that track being of a standard to meet market requirements. The second issue concerns s12(7), which relates to legislated upgrades to the Parkeston–Kwinana line and the subsequent increase in performance standards. This work was completed in 2010, but the PTA confirms that not only will any increase in performance standards be determined in the five-yearly cycles set out in the lease, any upgrade will only be triggered once the line exceeds 25 tonnes per axle freight capacity. This means that the performance standards may never be upgraded, something not envisaged by the legislation.

Chapter 7 also includes discussion of the Miling line as an example of PTA's approach to performance standards. While PTA advises that the lessee is responsible for the maintenance of the Miling line and cannot unilaterally remove it from service by placing it into care and maintenance, there is concern that this line could end up in the same position as the Tier 3 lines. Similarly, while PTA advises that any request to place the Miling line into care and maintenance would need to be in accordance with the lease provisions regarding surrender of lines, the process that led to the closure of the Tier 3 lines did not follow these provisions.

PTA's management of the concerns of stakeholders is also discussed in Chapter 7, largely through a case study of a particular situation in Glen Iris where residents are experiencing high levels of noise and vibration from traffic on the rail network. While the Committee acknowledges that there are two opposing views to the PTA's management of this issue, it is concerning that there is no solution to the problem in sight. The Committee acknowledges that the situation is a result of a failure of planning and that lessons have apparently been learned from this situation. It is hoped that PTA's taking a leadership role in planning for further railway lines will prevent similar situations from occurring.

Chapter 7 also outlines PTA's approach to future challenges in relation to the freight rail network and issues relating to its end-of-lease condition.

Throughout the Inquiry significant concern was expressed by local governments and community members about the impact of increased truck movements on roads. This is a major issue for local governments who must raise revenue for the upkeep of local roads. As **Chapter 8** shows, there is concern about the quality of roads, the quality of maintenance and upgrade works, and the capacity of roads to handle increased heavy truck traffic. The situation for many local governments is severe in that adequate road preservation expenditure alone is beyond the limits of their revenue raising capacity. It is clear that there is a funding shortfall to adequately maintain a safe and efficient integrated road-rail freight network and that local governments have not been able to generate sufficient revenue for required road works. The allocation of roads to either state or local government jurisdictions is also a concern for some regions. Clearly, something needs to change to ensure an economical, efficient and safe integrated freight transport network in Western Australia.

This Inquiry has revealed that the situation in relation to the ownership, operation and management of WA's rail freight network is unique in Australia. To demonstrate this, **Chapter 9** provides a brief description of the situation in Queensland, New South Wales, Victoria, South Australia and Tasmania. Chapter 9 also outlines the way in which investment incentives have led to a resurgence in capital spending on, and use of, United States' short line railways. This has not only made them viable, but has led to increased freight capacity on those lines. Chapter 9 notes the significant increases in

capital expenditure on the short lines since 2002. These increases have largely been facilitated by four government initiatives. First, the *Staggers Rail Act 1980* (US) allows large companies to sell underperforming branch lines to local entrepreneurs. Second, the short line tax credit provides an incentive for private investment in rail infrastructure. Third, the Railroad Rehabilitation and Improvement Financing program provides direct loans and loan guarantees to finance the development of railroad infrastructure. Fourth, the Transport Investment Generating Economic Recovery grants allow the US Department of Transport discretion to provide grants to invest in road, rail, transit and port projects. While the situation in the US differs from that in WA, the US short line policies are instructive in what is possible to be achieved if government's transport policy is focussed on stimulating competition.

Chapter 10 observes that the situation in relation to the lease and management of the freight rail network means that government practice has fallen short of implementing its strategy for an integrated freight transport network. The State has lost effective control of a major strategic asset; there is a very low level of transparency about the lease provisions and lease management, which generates significant anxiety and mistrust; the regulatory regime is largely ineffective in ensuring state development; and the return condition of the network is far from certain. The State faces considerable risk from the current situation. It is clear that the lease needs to be reviewed and renegotiated so that the rail freight network can optimise its potential contribution to the future development of Western Australia.

Ministerial Response

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Economics and Industry Standing Committee directs that the Minister for Transport, Minister for Regional Development and the Minister for Finance report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

Findings and Recommendations

Finding 1 **Page 47**

The decision to sell the marshalling yards to the then above rail operator acts as a barrier to entry to new above rail operators.

Finding 2 **Page 54**

Placing a line into 'care and maintenance' means there is no longer a requirement to maintain that line to an operational standard. This results in minimal obligations for the lessee.

Finding 3 **Page 54**

The development of the reduced standard 'care and maintenance' in the July 2010 *Project Agreement for Capital Works Dedicated Narrow Gauge Lines* signals a significant shift in government policy.

Finding 4 **Page 54**

There is no clear trigger mechanism in the lease or subsequent amendments for the government to recommission the lines placed into care and maintenance.

Recommendation 1 **Page 54**

The Western Australian Government not allow any further lines to be placed into care and maintenance.

Recommendation 2 **Page 54**

The Western Australian Government work with the lessee to include a trigger mechanism that will allow the recommissioning of lines already placed into care and maintenance.

Finding 5 **Page 65**

The lease and the variations are unnecessarily complex, which has resulted in limited capacity to achieve the objectives and intent of the original government policy.

Finding 6 **Page 65**

The lease would have better served the interests of the state if it had had some of the characteristics of a State Agreement, including a greater level of transparency and accountability.

Finding 7 **Page 83**

Failure to fully implement the Brookton Strategy has significantly reduced the effectiveness of the grain freight strategy outlined in the *Strategic Grain Network Report*.

Finding 8 **Page 83**

CBH Group's entry into the above rail operations market has fundamentally altered Western Australia's grain freight landscape.

Finding 9 **Page 83**

The *Strategic Grain Network Report* is no longer an appropriate document on which to base Western Australia's grain freight policy.

Recommendation 3 **Page 84**

The Western Australian Government re-examine its grain freight strategy and develop associated policies to ensure the state's freight infrastructure will meet future requirements.

Finding 10 **Page 88**

The fact that parties to access agreements have not utilised the *Railways (Access) Code 2000* (WA) does not necessarily indicate the existence of a robust, contestable market for access to Western Australia's freight rail network.

Finding 11 **Page 90**

The Western Australian Railways Access Regime does not allow the Economic Regulation Authority to have a role in establishing specific access prices. That is, the Economic Regulation Authority does not set prices for rail access in Western Australia.

Finding 12 **Page 91**

It is not possible to evaluate the usefulness of the Western Australian Railways Access Regime in resolving a dispute between an access seeker and the lessee as the arbitration process has never been completed for any access proposal.

Finding 13 **Page 91**

The Economic Regulation Authority's regulation of the freight rail network differs significantly from its regulation of the state's electricity and gas networks.

Finding 14 **Page 93**

Under the *Railways (Access) Code 2000* (WA), the floor cost is calculated as the additional cost incurred by the operator in allowing access to a particular line for 12 months, while the ceiling cost is the cost of replacing that line with a newly constructed line that meets the expected level of service.

Finding 15 **Page 96**

The *Railways (Access) Code 2000* (WA) was clearly intended to be a fundamental part of the Rail Access Regime. Its dormancy should have been cause for an earlier review of its usefulness.

Recommendation 4 **Page 96**

The Economic Regulation Authority's 2015 review of the *Railways (Access) Code 2000* (WA) include a critical evaluation of why so few access seekers have sought to use the Code.

Finding 16 **Page 99**

The value in seeking public submissions in the process of determining appropriate floor and ceiling costs for access to the freight rail network in Western Australia is questionable, particularly in light of the confidentiality provisions of the *Railways (Access) Code 2000* (WA).

Finding 17 **Page 116**

The *Railways (Access) Code 2000* (WA) is not an adequate regulatory mechanism for access proposals requiring an upgrade to the network.

Recommendation 5 **Page 116**

The *Railways (Access) Code 2000* (WA) review of June 2015 needs to include a review of its effectiveness in third party access requiring capital upgrades.

Recommendation 6 **Page 116**

Part 4A of the *Railways (Access) Code 2000* (WA) be amended to make it clear that while parties are free to negotiate outside the Code, they are not able to expressly prohibit the future operation of the Code under an access agreement.

Finding 18 **Page 118**

The Western Australian freight rail network, which is subject to a 49-year lease, is a natural monopoly.

Finding 19 **Page 122**

The freight rail network is a natural monopoly and the lease instrument places the operation of that natural monopoly into private hands. The Public Transport Authority's approach to managing the lease does not recognise that more effective regulation is necessary to avoid abuse of market power by the lessee.

Chapter 1

Finding 20 **Page 127**

The lessee of the freight rail network is required to commission a review of its operational performance every five years—a process that requires a detailed assessment of the capacity and performance of the network.

Finding 21 **Page 127**

Since 2000, two reviews of the capacity and performance of the freight rail network have been undertaken as required in the lease. Though the 2005 review was tabled in Parliament in 2007, the 2010 review has never been publicly available. There is no basis for this information not to be made public.

Recommendation 7 **Page 128**

Freight rail network capacity and performance reviews be tabled by the Minister for Transport as soon as practicable after their production.

Recommendation 8 **Page 128**

The Minister for Transport table the safety review report on Tier 3 rail lines in the Legislative Assembly.

Finding 22 **Page 138**

The lessee's decision to not renew any access agreement for the Trayning to Merredin, York to Quairading, Katanning to Nyabing and Tambellup to Gnowangerup lines in June 2009 was, in effect, a withdrawal of those lines from service.

Finding 23 **Page 138**

The lessee's withdrawal of the Trayning to Merredin, York to Quairading, Katanning to Nyabing and Tambellup to Gnowangerup was not undertaken pursuant to any specific provision of the lease.

Finding 24 **Page 138**

The lessee's ability to suspend lines in June 2009 without consequence is an example of the inadequacy of the lease instrument to protect the state's interests.

Recommendation 9 **Page 139**

The Western Australian Government revises the lease instrument to ensure that lines are not able to be suspended from use without consequence.

Finding 25 **Page 152**

The meaning of the term 'care and maintenance' gives no indication as to what is expected of the lessee.

Recommendation 10 **Page 152**

The definition of the term 'care and maintenance' should be amended to specify the obligations of the lessee and how lines placed into care and maintenance are to be maintained.

Finding 26 **Page 161**

The Public Transport Authority's 'light touch' approach to managing the lease has proven inadequate for ensuring the freight rail network is adequately maintained.

Recommendation 11 **Page 161**

The Public Transport Authority takes a more proactive approach to its responsibilities in managing the freight rail network lease.

Finding 27 **Page 164**

The process for securing performance standard upgrades achieved through private negotiations is inadequate for ensuring the freight rail network is maintained to a useful standard over the life of the lease.

Recommendation 12 **Page 164**

The Western Australian Government work with the lessee to establish a process by which upgrades to performance standards achieved through private negotiations are maintained.

Finding 28 **Page 172**

Protection of the private interests of parties who live or operate in close proximity to rail corridors is important. To date, planning has failed to recognise this.

Recommendation 13 **Page 172**

The Public Transport Authority takes a leadership role in planning future land use along rail corridors.

Finding 29 **Page 178**

Re-sleepering of the freight rail network will be required at least once more before the end of the lease term.

Recommendation 14 **Page 178**

The Western Australian Government addresses the issue of re-sleepering responsibility beyond the current phase of investment.

Finding 30 **Page 190**

There is a funding shortfall to deliver an economical, efficient and safe integrated road-rail freight network.

Chapter 1

Finding 31 **Page 190**

Many local governments do not have the revenue raising capacity to allow them to generate sufficient income to meet required road upgrade and maintenance costs.

Finding 32 **Page 190**

Failure to provide appropriate funding to local governments impacted by the closure of Tier 3 lines amounts to cost shifting on the part of the state government.

Finding 33 **Page 190**

The allocation of roads to either state or local government jurisdiction has not been reviewed since 1995.

Recommendation 15 **Page 190**

The Western Australian Government conduct a cost impact study for local governments affected by the closure of grain freight lines.

Recommendation 16 **Page 190**

Main Roads Western Australia schedule a review of its allocation of roads to either state or local government jurisdiction, similar in scope to those conducted in 1976 and 1995, as a matter or priority.

Finding 34 **Page 210**

There is a lack of clarity surrounding the management and funding responsibilities of the State and the network maintenance and capital works obligations of the lessee.

Recommendation 17 **Page 210**

The uncertainty surrounding funding decisions relating to the State's investment in the freight rail network and the lessee's network maintenance and capital works obligations needs to be addressed as a matter of priority

Recommendation 18 **Page 210**

The Public Transport Authority implement the necessary lease management procedures to ensure that the lessee will be able to meet its re-sleepering requirements on the entire freight rail network throughout the remaining term of the lease.

Recommendation 19 **Page 214**

The Western Australian Government undertakes urgent negotiations with Brookfield Rail to allow access to Tier 3 lines.

Recommendation 20 **Page 214**

In the absence of an agreement allowing access to Tier 3 lines, the Western Australian Government investigates and pursues all means to recover those lines.

Recommendation 21 **Page 214**

The Minister for Regional Development clarify whether Royalties for Regions funding can be made available for upgrades to the freight rail network and, if so, what process is in place to allow access to that funding.

Finding 35 **Page 215**

The natural monopoly status of the freight rail network together with the current regulatory regime promotes a cost plus approach to access pricing and less than optimal efficiency.

Recommendation 22 **Page 215**

The lessons learned from the sale and lease of the freight rail network be taken into account in any future privatisation of State-owned enterprises, particularly those which could constitute a natural monopoly.

Chapter 1

Introduction

What sort of regulations do we want to put in place so large and mighty firms will act in society's interest?

Mr Tore Ellingson, Chairman of the Economic Sciences Prize Committee, awarding the 2014 Nobel Prize in Economics to Professor Jean Tirole, October 2014

Introduction

1.1 The aim of this Inquiry is to determine whether the current lease arrangements and management of the Western Australian freight rail network, comprising Tiers 1, 2 and 3 lines, facilitate or hamper state development.

1.2 The importance of an efficient freight sector, its relationship to economic growth, and, therefore, state development, is well recognised. For example, the *Western Australian regional freight transport network plan* states that:

> *an effective freight transport network is essential for the long-term development of Western Australia. A strong freight network ensures remote, regional and metropolitan businesses and communities have reliable access to goods and services. It underpins the capability to move these goods efficiently and sustainably into, around and out of the State thereby making a substantial contribution to the overall prosperity and liveability of Western Australia.*[1]

1.3 Similarly, a discussion paper commissioned by Infrastructure Partnerships Australia notes that 'the operation of the national freight sector is integral to the wellbeing of all Australians—and its efficiency has a direct impact on national and individual prosperity'.[2] The discussion paper also cites the Australian Logistics Council's view that the Australian and global economies depend on transport and logistics, and that 'without transport and logistics (T&L) Australia doesn't move'.[3]

1 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, 2013, p 16.

2 Infrastructure Partnerships Australia, *Meeting the 2050 Freight Challenge*, report prepared by PriceWaterhouseCoopers, Sydney, 2009, p 2.

3 Australian Logistics Council, National Strategy for Transport & Logistics (2008–2015), cited in Infrastructure Partnerships Australia, *Meeting the 2050 Freight Challenge*, report prepared by PriceWaterhouseCoopers, Sydney, 2009, p 2.

1.4 Infrastructure Partnerships Australia notes the interdependence between freight infrastructure and economic growth, stating that 'economic growth increases the demand for freight infrastructure. Equally, freight infrastructure allows and supports economic growth'.[4]

1.5 This point was acknowledged by then Minister for Transport, Hon Troy Buswell, MLA, who stated that 'as Western Australia's population and economy continue to grow strongly, so too does the scale of the freight task in our regions'.[5]

1.6 The *Western Australian regional freight transport network plan* notes the greater than four per cent per annum average growth in the Western Australian economy over the past decade. Alongside this growth, there has been an increased 'demand for the movement of freight within the State's regions, with regional freight demand outstripping national averages over the same ten-year time period'.[6]

1.7 According to the Western Australian Local Government Association (WALGA), due to Western Australia's (WA's) geographic size, 'its isolation from other Australian States and Territories and the dispersed location of its agricultural, mining, production and population centres', the efficiency and effectiveness of the freight transport system 'is paramount'.[7]

The Western Australian freight task

1.8 WALGA describes the freight transport task in WA as 'substantial'.[8] This substantial freight task is predicted to increase significantly. The Department of Transport's *Western Australian regional freight transport network plan* states that 'the growth pressures facing Western Australia's regional transport network have never been greater'.[9]

1.9 According to this Plan, by 2031, WA's 'regional road freight task will be around 2 times what it was in 2010', with the WA inter- and intra-state freight task increasing 'from 20+ billion tonne kilometres per annum to 40 billion tonne kilometres per annum'.[10]

4 Infrastructure Partnerships Australia, *Meeting the 2050 Freight Challenge*, report prepared by PriceWaterhouseCoopers, Sydney, 2009, p 4.
5 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, 2013, p 3.
6 ibid, p 21.
7 Western Australian Local Government Association, *Inquiry into the integration of regional rail & road freight transport & their interface with ports. A submission by the Western Australian Local Government Association*, May 2005, p 2.
8 ibid.
9 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, 2013, p 8.
10 ibid, p 8 and p 9.

1.10 While the state's 'regional freight transport network, in both distance and coverage, is dominated by the road system',[11] the *Western Australian regional freight transport network plan* also predicts that 'the rail freight task serviced by the State's rail freight network, managed by Brookfield Rail, will be 2.25 times what it was in 2010'.[12]

1.11 Rail freight, which is suited to transporting bulk commodities over both long and short distances, has 'traditionally dominated the freight market for agricultural and mining commodities'.[13] Rail freight also has a 'specialised role in servicing ports and other dedicated facilities where operators favour rail over road'.[14]

Rail freight demand in Western Australia

1.12 Given that freight demand is interdependent with the level of economic activity and 'a direct function of the types of industries in a region'[15] it is useful to briefly examine the two major export-commodity-based industries that drive demand for bulk rail freight, namely mining and agriculture.

1.13 In resource-rich states, 'expansion of the mining industry has provided the source of much of the infrastructure expansion and subsequent rail freight task'.[16] For example, coal exports in Queensland and New South Wales depend on the railway network to transport coal from mine sites to ports. New lines, such as the 69 kilometre Newlands–Goonyella line, with increased line capacity, have facilitated significant increases in exports.[17]

1.14 In WA, the export of iron ore from mines in the Pilbara region necessitated the building of railway networks to move ore to ports at Dampier, Cape Lambert and Port Hedland. By 2012, BHP Billiton, Rio Tinto and Fortescue Metals Group had built over 2,040 kilometres of railway.[18]

1.15 In the Mid West, Karara Mining Pty Ltd constructed an 85 km rail line to allow its magnetite ore to get to the existing freight rail network and be delivered to Geraldton

11 Western Australian Local Government Association, *Inquiry into the integration of regional rail & road freight transport & their interface with ports. A submission by the Western Australian Local Government Association*, May 2005, p 2.

12 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, 2013, p 8.

13 Infrastructure Partnerships Australia, *Meeting the 2050 Freight Challenge*, report prepared by PriceWaterhouseCoopers, Sydney, 2009, p 14.

14 ibid.

15 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, 2013, p 21.

16 Department of Infrastructure and Transport, *Statistical Report. TrainLine 1*, Commonwealth of Australia, Canberra, June 2012, p 7.

17 ibid.

18 ibid. BHP Billiton's 208 kilometre Goldsworthy–Port Hedland line opened in 1965; Rio Tinto's Tom Price—Dampier line opened in 1966; and Fortescue Metals Group's Cloudbreak Mine–Port Hedland line opened in 2008.

port, with the first train-load of ore despatched to port in August 2012.[19] Aurizon report that in 2012–2013 it hauled 24.7 million tonnes of iron ore from Karara's operations.[20] This is clearly represented in Brookfield Rail Pty Ltd's (Brookfield Rail's) anticipated exponential growth in the Mid West to 2030, 'concentrated on the Morawa–Mullewa–Narngulu–Geraldton arc'.[21]

1.16 Regional WA also represents a major agricultural sector. The estimated value of the state's agricultural production for 2010–2011 was $5.4 billion, approximately 85 per cent of which was exported.[22] The Department of Agriculture and Food states that the Western Australian 'grain industry is a major contributor to the agrifood sector and the Australian economy'.[23] WA's largest agricultural sector is the grains industry, with wheat being the major crop in the south west. WA grain exports for 2012–2013 totalled over $3.1 billion, with wheat accounting for 70 per cent of this.[24]

Table 1.1: State production: major crops[25]

Period	Wheat		Barley		Canola		Total	
	area '000 ha	prod. kt	area '000 ha	prod. kt	area '000 ha	prod. kt	area '000 ha	prod. kt
2013–2014*	5,015	10,500	1,350	3,800	1,297	1,800	7,662	16,100
2012–2013*	4,875	6,645	1,210	2,214	1,287	1,316	7,372	10,175
2011–2012	5,156	11,045	1,246	2,761	969	1,232	7,371	15,038
Total 2011–2014	15,046	28,190	3,806	8,775	3,553	4,348	22,405	41,313
Five year average to 2012–2013	4,844	7,817	1,307	2,417	1,043	1,094	7,194	11,328

*ABARES estimates

19 Mr Tim Netscher, Managing Director & CEO, Gindalbie Metals Ltd, 'First Train-load of Karara iron Ore', *Securities Exchange announcement and media release,* Gindalbie Metals Ltd, 14 August 2012.

20 Hockridge, Lance, Managing Director and CEO, and Neate, Keith, EVP and CEO, Aurizon, *FY2013 results presentation*, Presentation to ASX Limited, 19 August 2013, p 34. Available at: http://www.aurizon.com.au/Downloads/Aurizon%20Full%20Year%20Results%202013.pdf. Accessed on 3 July 2014. See also: Submission No. 16 from Aurizon, 17 April 2014.

21 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, 2013, p 9.

22 ibid, p 11.

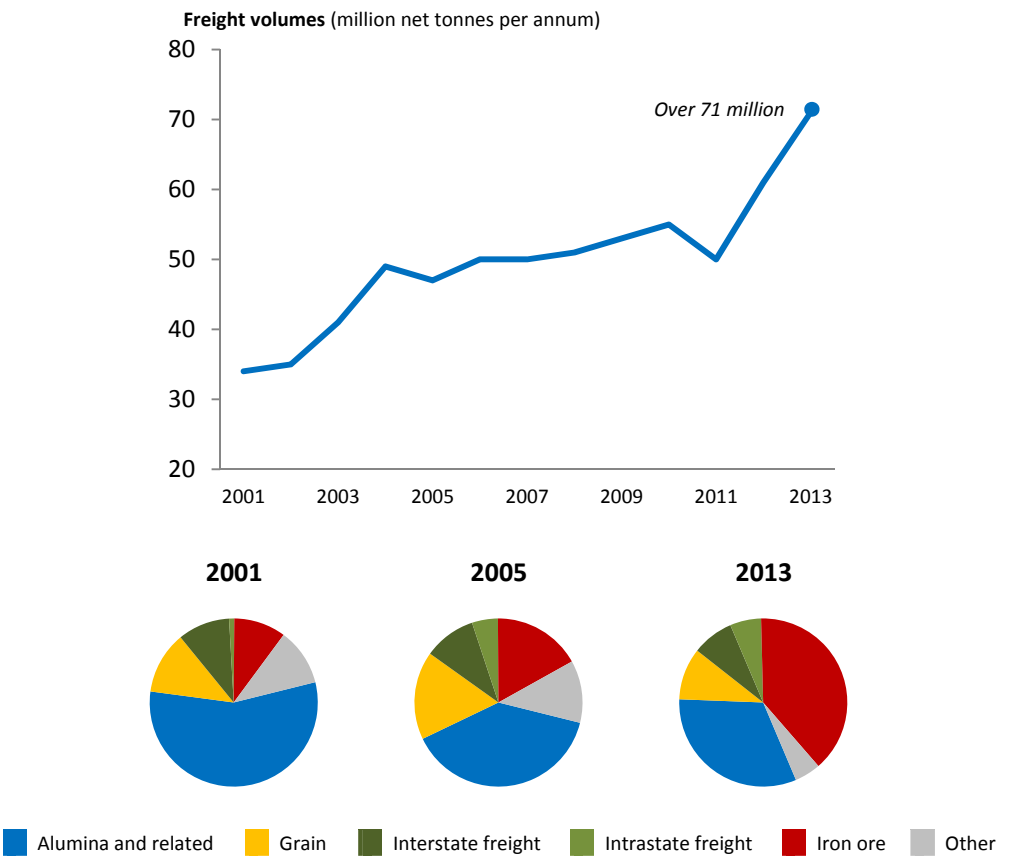
23 Department of Agriculture and Food, *Snapshot of Western Australia's grain exports*, nd, np. Available at: https://www.agric.wa.gov.au/barley/snapshot-western-australias-grain-exports. Accessed on 27 June 2014.

24 ibid.

25 Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES), *Australian crop report, February 2014*, Department of Agriculture, Commonwealth of Australia 2014.

1.17 Brookfield Rail states that WA's grain production 'varies between six and 15 million tonnes per annum, with the last three harvests setting new records for total production'.[26] Approximately 50 per cent of this grain production is transported by rail, with the grain freight rail task 'spread across 65% of Brookfield Rail's network'.[27] According to CBH Group's *Annual Report 2013*, it 'moved 6.52 million tonnes by rail during the 2012–13 year to one of its four port terminals, up from an average of 6.05 million tonnes'.[28] Brookfield Rail has calculated that its network 'transported grain at an annualised rate of over 10 million tonnes to WA ports'.[29]

Figure 1.1: Freight type and volume on the freight rail network, 2001–2013[30]



26 Brookfield Rail Pty Ltd, *Grain freight rail network fact sheet*, nd, p 1. Available at: http://www.brookfieldrail.com/assets/br_files/Resources/140603%20BR%20Grain%20Frieght%20Rail%20Fact%20Sheet%20FINAL.pdf. Accessed on 27 June 2014.

27 ibid.

28 CBH Group, *Annual report 2013*, p 12.

29 Brookfield Rail Pty Ltd, *Grain freight rail network fact sheet*, nd, p 1. Available at: http://www.brookfieldrail.com/assets/br_files/Resources/140603%20BR%20Grain%20Frieght%20Rail%20Fact%20Sheet%20FINAL.pdf. Accessed on 27 June 2014.

29 CBH Group, *Annual report 2013*, p 12.

30 Sourced from: Brookfield Rail Pty Ltd, *Brookfield Rail About us*, p 3. Available at: http://www.brookfieldrail.com/assets/br_files/Communications%20Material/140530%20BR%20Corporate%20Fact%20Sheet%20FINAL.pdf. Accessed on 27 June 2014.

1.18 The Committee heard evidence from the Shire of Bruce Rock and from farmers in the South West and Great Southern regions that through the application of science and technology farmers are producing more kilograms of wheat per millimetre of rain.[31]

1.19 It is clear that the mining and agricultural industries generate particularly large freight tasks, with growth likely in both sectors. As noted above, Brookfield Rail expects considerable growth in its Mid West operations. In addition to this, the *Western Australian regional freight transport plan* suggests that the Goldfields–Esperance and South West regions will be the focus for growth projects, with capacity upgrades required for the Leonora to Esperance and Collie to Bunbury lines. The Plan also notes that iron ore freight demand will increase to around 40 per cent of the total rail freight task by 2030, up from its current approximately 20 per cent.[32]

1.20 In discussing these growth predictions, the Department of Transport acknowledges that the 'State-owned regional rail freight network is extensive', but also recognises that 'the distribution of the resources sector, and potential changes in supply chains in the south of Western Australia, may require the development of new rail links or the activation of historic corridors'.[33]

The rail freight network

1.21 As noted above, this Inquiry is concerned with the management of the Western Australian freight rail network, comprising Tiers 1, 2 and 3 lines. While the network is discussed in detail throughout this report, it is useful here to outline the extent of this network. It is also important to note that the Inquiry is concerned with the entire freight rail network, which is a multi-user network that transports over 70 million tonnes of freight including iron ore, coal, alumina, bauxite, grain and general interstate freight.[34]

1.22 The freight rail network is comprised of approximately 5,000 kilometres of track—including standard, narrow and dual gauge—and associated railway infrastructure in the southern regions of the state.[35] The network transports freight from regional centres in the Bunbury–Geraldton–Kalgoorlie–Esperance arc, primarily taking export

31 See, for example: Shire of Bruce Rock, Transcript of Evidence, 27 May 2014, p 2; Great Eastern Country Zone, Transcript of Evidence, 27 May 2014, p 2.

32 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, 2013, p 9.

33 ibid.

34 Brookfield Rail Pty Ltd, *Grain freight rail network fact sheet*, nd, p 1. Available at: http://www.brookfieldrail.com/assets/br_files/Resources/140603%20BR%20Grain%20Frieght%20Rail%20Fact%20Sheet%20FINAL.pdf. Accessed on 27 June 2014.

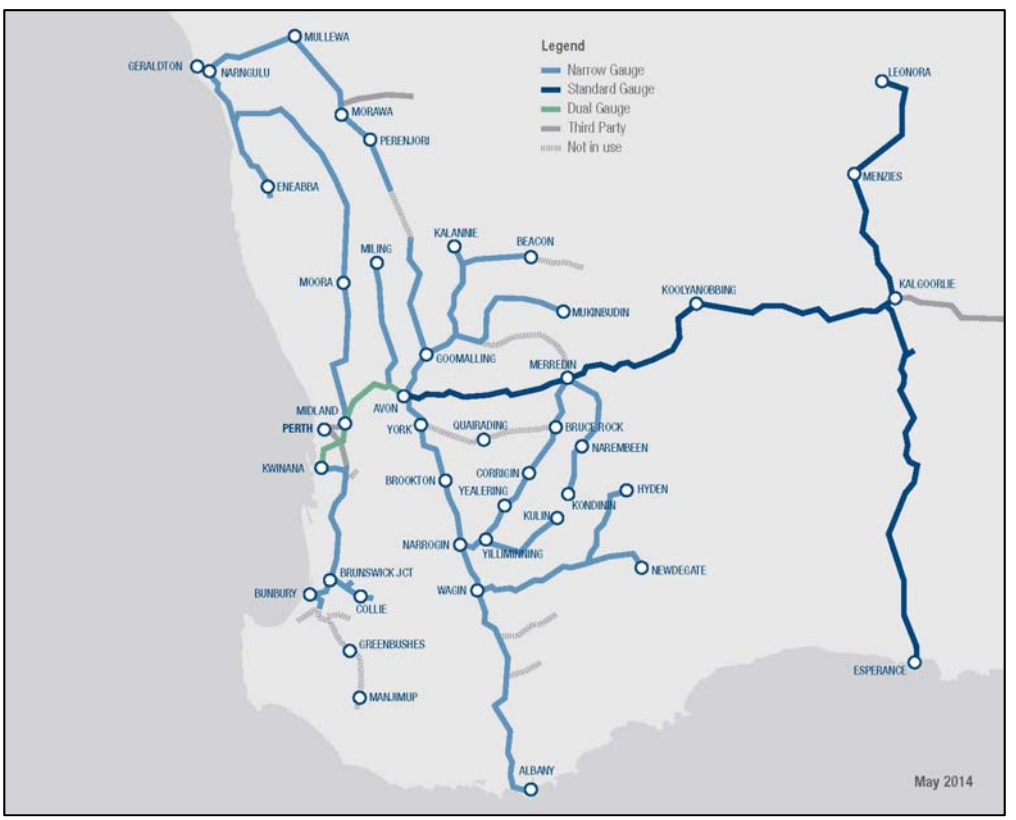
35 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 13.

products to the ports of Geraldton, Bunbury, Albany, Esperance and Fremantle.[36] The standard, narrow and dual gauge lines that make up the network are described in ss 1–48 of Schedule 1 of the *Railways (Access) Code 2000*.

1.23 The freight rail network does not include the following:

- the private railways in the Pilbara used to transport iron ore to ports;
- the State-owned metropolitan passenger rail system; and
- the transcontinental railway east of Kalgoorlie, which is operated by the Commonwealth Government.

Figure 1.2: Map of the WA freight rail network, delineated by gauge[37]



1.24 The freight rail network is a State asset. In its *Annual Report 2012–2013* the Public Transport Authority (the PTA) assigned the network an At Fair Value of $5,153 million,

36 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, 2013, p 23.

37 Sourced from: Brookfield Rail Pty Ltd, *Brookfield Rail About us*, nd, p 2. Available at: http://www.brookfieldrail.com/assets/br_files/Communications%20Material/140530%20BR%20Corporate%20Fact%20Sheet%20FINAL.pdf. Accessed on 27 June 2014.

accumulated depreciation of $3,963 million and the Carrying Amount or Book Value of $1,190 million.[38]

1.25 While remaining in State ownership, the freight rail network was leased in 2000 to a private rail operator under a 49 year lease. The current operator/lessee is Brookfield Rail, a Brookfield Infrastructure Partners company. This parent company operates a portfolio of utilities, energy and transport operations in North and South America, the United Kingdom, Europe and Australia.[39] Brookfield Infrastructure Partners is headquartered in Hamilton, Bermuda, with units traded on the New York and Toronto Stock Exchanges.

1.26 According to the Department of Transport, Brookfield Rail 'operates the network as an open-access, multi-user network', providing 'track infrastructure and train control services' and 'negotiating commercial access with end users and above-rail service providers'.[40]

1.27 The leases under which Brookfield Rail operates the freight rail network are discussed in more detail throughout this report.

The importance of this Inquiry

1.28 There are a number of reasons why the Committee viewed this as an important issue, one that should be the subject of an Inquiry.

- First is the importance of the network to state development, particularly given the existing and predicted freight task.
- Second, while the network is subject to a 49-year lease, it remains a significant and valuable State asset, owned by the government on behalf of Western Australians.
- Third, the negotiations between CBH Group and Brookfield Rail have seemingly reached an impasse, with the Economic Regulation Authority (the ERA) being involved for the first time in a floor and ceiling cost determination as provided in the under the *Railways (Access) Code 2000*.

38 Public Transport Authority, *Annual Report 2012–2013*, Government of Western Australia, Perth, 2013, p 144. At Fair Value is a market based measurement representing the price that would be received on the sale of the asset. The Carrying Amount is the original cost less any costs such as depreciation made against the asset.

39 Brookfield Infrastructure Partners LP, *Investor Fact Sheet*, nd. Available at: https://www.brookfieldinfrastructure.com/. Accessed on 3 July 2014. See also: http://www.brookfieldrail.com/about-us/about-brookfield/.

40 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, 2013, p 23.

- Fourth, the Auditor General's 2013 report noted a number of concerns in relation to the management of the lease.
- Fifth, at the time this Inquiry was initiated, Tier 3 lines were earmarked for placing into care and maintenance, something which happened on 30 June 2014.
- Sixth, there is concern in relation to the potential for Tier 2 lines to be similarly placed into care and maintenance.
- Seventh, there is a lack of transparency and considerable public confusion and anxiety in relation to the provisions of the lease and the roles and responsibilities of all parties to the lease.
- Eighth, there seems to be a resurgence of rail in the freight market in other jurisdictions such as the United States and the United Kingdom, which raises the question of why, in Western Australia, some lines have become non-operational.
- Ninth, the lease and subsequent variations and agreements appear to put Brookfield Rail, a natural monopoly provider, in the position of 'holding all the aces', to the potential detriment of state development.

1.29 In light of the above, the Committee determined to undertake its Inquiry in an effort to clarify matters and find ways to resolve some of the issues raised.

The Committee

1.30 The Economics and Industry Standing Committee (the Committee) is a portfolio-related Committee of the Legislative Assembly of the Parliament of Western Australia. The Committee was appointed on 9 May 2013.

1.31 Pursuant to the Legislative Assembly's Standing Order 287(3) the Speaker determined that the Committee would have the portfolio responsibilities of: State Development, Mines and Petroleum, Fisheries, Regional Development, Lands, Tourism, Transport, Commerce, Science, Housing, Racing and Gaming, Planning, Energy, Water, Heritage, Agriculture and Food, Forestry and Small Business.[41]

Conduct of the Inquiry

1.32 In accordance with Standing Order 287(2), on 12 March 2014 the Committee resolved to undertake an Inquiry into whether the current lease arrangements and management

41 Hon. Michael Sutherland, MLA, Speaker of the Legislative Assembly, Western Australia, Western Australia, *Parliamentary Debates* (Hansard), 16 April 2013, p 36.

of the Western Australian freight rail network comprising Tier 1, Tier 2 and Tier 3 lines facilitates or hamper state development.

1.33 This Inquiry relates to the oversight of several of the Committee's inter-related portfolio responsibilities, including State Development and Transport. The Terms of Reference for the Inquiry are contained in Appendix One.

1.34 Advertisements outlining the Inquiry and calling for public submissions were placed in *The West Australian*, the *Countryman* and the *Merredin Wheatbelt Mercury*.

1.35 As well as advertising the Inquiry, the Committee invited submissions from specific state government agencies and other major stakeholders in the state's rail freight task.

1.36 In total, the Committee received 42 submissions.[42] Due to the nature of the Inquiry, submissions from particular stakeholder groups often made similar points. Given this, and its relatively short timeframe, the Committee decided to quote only a small sample in relation to each topic or issue. This is not intended to diminish the importance of those submissions not directly referred to or quoted from. They remain an important factor in the Committee's consideration of the issues and helped inform the Committee's findings and recommendations.

1.37 The Committee also conducted documentary research and held 18 formal evidence hearings, 17 of which were public and 1 closed.[43] A number of these hearings were held in the Shire of Bruce Rock, where the Committee took evidence from local government representatives, the Wheatbelt Railway Retention Alliance and local growers in the region.

1.38 The Committee wishes to thank the Shire of Bruce Rock for the use of its Town Hall on 27 May 2014 and for its assistance in setting up the venue.

1.39 The Committee issued media releases for public hearings and notice of these was placed on the Parliament's web site. Subsequent transcripts of the public hearings were also made available on the Parliament's web site.

1.40 On 28 May 2014 the Committee received a guided tour of a number of CBH sites and facilities in the Wheatbelt. This allowed the Committee to see first-hand the condition of the lines and to learn more about the handling of grain in the supply chain.

1.41 The Committee appreciates CBH Group providing this opportunity.

42 Submissions to the Inquiry are listed in Appendix Three.

43 Formal hearings are listed in Appendix Five.

Requests for evidence to be treated as closed

Lease documents

1.42 The Committee requested and received from Brookfield a copy of the lease documents and lease variation documents, including the capital works programme. Brookfield Rail accepted that the original lease documents, not including the schedules and appendices, were in the public arena. Brookfield Rail applied to the Committee to have the schedules and appendices to the original lease documents and all lease variation documents restricted as closed evidence.

1.43 The main grounds for Brookfield Rail's request were:

- disclosure of the schedules detailing initial performance standards and penalty provisions would create an unrealistic picture of the company's network responsibilities. Current performance standards are quite different from the initial standards and subsequent clarification would require the publication of further confidential information.
- disclosure would create problems for the company in relation to negotiating debt financing.
- details of the initial performance standards, which are contained in the schedules and appendices, have been superseded and the current performance standards of the lines detailed on Brookfield Rail's website.
- the PTA has denied at least one Freedom of Information (FOI) request from CBH Group for disclosure of the lease schedules and variations. This decision was upheld by the Information Commissioner.
- The commercial sensitivity of the capital works programme, which contains provisions for grain line access fee caps imposed upon Brookfield Rail in exchange for public funding of line re-sleepering.
- Details of the capital works programme would prejudice the company's position in current negotiations with CBH Group.[44]

1.44 The Committee notes that the lease documents contain confidentiality provisions. Clause 1.2 defines what is included in the term 'Confidential Information' and clause 38.1 states that 'No Confidential Information may be disclosed by a party to any person' except in certain circumstances outlined in clauses 38.1 (a) to 38.1 (e). Under clause 38.1 (c) a party to the lease may disclose confidential information if 'required to do so by law or a stock exchange'. A request by a Parliamentary Committee under s (4) of the *Parliamentary Privileges Act 1891* (WA) is such a lawful request.

44 Brookfield Rail Pty Ltd, *Transcript of Closed Evidence*, 21 May 2014.

1.45 In relation to the FOI request for disclosure of lease documentation, the Committee notes that the Information Commissioner held that clauses 1.2 and 38.1 'have a broad application'.[45] Paragraph 26 of the Information Commissioner's Decision notes that clause 8(1) of the *Freedom of Information Act 1992* (WA) (the FOI Act) 'provides that matter is exempt if its disclosure (otherwise than under the FOI Act or another written law) would be a breach of confidence for which a legal remedy could be obtained'—including damages and injunctions—in an action for breach of contract.[46] It was also noted that clause 8(1) 'is not subject to a public interest test'.[47]

1.46 In brief, because the confidentiality clauses 'impose an express obligation of confidentiality upon each of the parties to the Leases', and disclosure of the requested documents to CBH under the FOI Act would constitute a breach of those obligations, the Information Commissioner's decision was not to allow CBH's FOI application for release of documents. That is, under the FOI Act, the Commissioner had no choice but to disallow the application.

Information relating to costs, access fees and maintenance costs

1.47 As part of the Inquiry, on 20 June 2014 the Committee sought information relating to line access, access fees and maintenance costs for the financial periods 2002–2003 to 2012–2013. On 8 July 2014, Brookfield Rail provided the requested information on the specific lines to which CBH Group had access and the others parties who had access to those lines.[48] At this time, Brookfield advised that the information requested in relation to access fees paid by CBH Group and the amount Brookfield Rail had expended in line maintenance for those financial periods was 'confidential to both Brookfield Rail and to CBH Group'.[49] Furthermore, Brookfield Rail stated that 'public disclosure of this information would cause prejudice to Brookfield Rail and possibly to CBH Group'.[50]

1.48 Brookfield Rail requested that the Committee accept information on access fees and maintenance expenditure as *in camera* evidence. On consideration, the Committee declined to restrict the information as *in camera*, but did agree to accept it as closed evidence.

1.49 Information was also sought from the PTA to demonstrate various aspects of their management of the lease. During a hearing, PTA was asked to provide a copy of the May 2010 audit report. In the interests of procedural fairness, PTA was also asked to

45 Information Commissioner, *Re Co-operative Bulk Handling Limited and Public Transport Authority* [2011] WAICmr 26, paragraph 26. Available at: http://www.foi.wa.gov.au/PDF_Decs/D0262011.pdf. Accessed on 1 July 2014.
46 Information Commissioner, *Re Co-operative Bulk Handling Limited and Public Transport Authority* [2011] WAICmr 26, paragraph 25.
47 ibid.
48 Submission No. 34 from Brookfield Rail Pty Ltd, 8 July 2014, p 1.
49 ibid, p 2.
50 ibid, p 2.

advise whether it wanted to make application to the Committee to consider documents it had provided prior to the hearing, such as minutes of meetings, management plans and audit report, as closed evidence. PTA's response at the hearing was as follows:

> *Brookfield would not enjoy seeing their minutes of meetings, I think, in the public domain.*[51]
>
> *Certainly their [Brookfield Rail's] view would be that all of this is in relation to leased railway infrastructure and it is confidential information in accordance with the lease.*[52]

1.50 Specifically in relation to the May 2010 audit report, PTA advised that:

> *again, because it has got information specifically in relation to performance standards, Brookfield would object to that. They would class that as confidential information.*[53]

1.51 PTA subsequently was given a list of documents it had provided and, for those documents it wanted the Committee to consider as closed evidence, asked to outline the reasons why PTA thought this restriction should apply, for the whole document or particular sections of documents as appropriate.

1.52 While the Committee appreciated PTA's comments that Brookfield Rail would like to keep all documents confidential, PTA was specifically asked to state the reasons why PTA believed the documents should be considered as closed evidence.

1.53 PTA's response was that it 'is bound by clause 38 of the lease which requires that no Confidential Information may be disclosed by a party to any person except in specified circumstances'.[54] As noted above, a request by a Parliamentary Committee under s (4) of the *Parliamentary Privileges Act 1891* (WA) is a lawful request, and therefore a specified circumstance under the lease.

1.54 PTA also advised that it:

> *has liaised with Brookfield Rail on this matter and they have advised that some of the information provided as detailed in the table below is Confidential Information in accordance with the lease.*[55]

---

51 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 20.

52 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 25 June 2014, p 20.

53 ibid.

54 Mr David Browne, Executive Director, Safety and Strategic Development , Public Transport Authority, Email, 4 July 2014.

55 ibid.

1.55 PTA claimed confidentiality in relation to a number of documents it had provided the Committee on the grounds that they contained detailed costings and operational information that was confidential to Brookfield.

1.56 On 30 June 2014, the ERA made a determination of costs relevant to the access proposal made by CBH Group in December 2013. The ERA's notice of determination stated that, following consultation with Brookfield Rail and CBH Group, it would release a redacted version of the determination. The Committee sought a complete and unredacted version of this determination from the ERA.

1.57 The ERA advised the Committee that there was a detailed confidentiality regime in place and asked that it not be required to produce the determination to the Committee. As the Committee considered this information was essential to the Inquiry, it summonsed the ERA to provide a complete and unredacted copy of the determination.

1.58 On 16 July 2014, Brookfield Rail wrote to the Committee advising that the ERA's determination was 'the subject of a strict confidentiality regime … imposed by the ERA and expressly agreed to by both Brookfield Rail (**BR**) and Co-operative Bulk Handling (**CBH**)'.[56]

1.59 Brookfield Rail set out the confidentiality regime that applied to the determination and expressed concern that disclosure of any part of the determination, other than in line with the confidentiality regime itself, may:

- undermine the regime;
- allow the determination to be used for purposes for which it was not intended under the Railways (Access) Code 2000 (the Code);
- prejudice good faith negotiations and arbitration under the Code;
- result in the ERA breaching its confidentiality requirements under the Code; and
- prejudice Brookfield Rail's ability to negotiate with current and potential access seekers.[57]

1.60 Karara Mining Ltd (Karara Mining) also requested that its submission to the Inquiry be accepted as closed evidence on the basis that confidentiality was required:

- to ensure compliance with disclosure obligations in Australia and China; and
- to satisfy confidentiality requirements of contractors and suppliers.

56 Mr Paul Larsen, Chief Executive Officer, Brookfield Rail Pty Ltd, Letter, 16 July 2014.
57 ibid.

1.61 The Committee's consideration of requests for information to be restricted as closed evidence is outlined below.

Committee consideration of requests for evidence to be closed

1.62 Throughout the Inquiry the Committee heard considerable evidence in relation to the lack of transparency of the lease documents. While this is discussed further in Chapters 2 and 10, it is important to note here that the lack of transparency has created considerable confusion, anxiety and misinformation in the community.

1.63 The Committee also learned that the 2005 compliance audit report was tabled in the Legislative Assembly on 14 June 2007.[58] The Committee is not aware of any adverse consequences of the tabling of this report.

1.64 In light of the above, and with full consideration of Brookfield Rail's request, the Committee has determined that publication of the lease schedules and appendices, and all lease variation documents, including the *Project Agreement for Capital Works* is in the public interest.

1.65 In relation to the ERA determination, the Committee's decision to publish the independent costings provided by the ERA's consultant, Engenium, was superseded by the ERA's publication of a redacted version of its determination. The Committee sees this as a positive step by the ERA as this information should be in the public domain, something that is anticipated in the Code.

1.66 In relation to the information provided by the PTA and the Department of Transport, the Committee has decided to publish a number of documents and to accept others as closed evidence. A list of documents provided is contained in Appendix Four.

1.67 The Committee accepted Karara Mining's submission as closed evidence.

1.68 Brookfield Rail and the PTA were advised of the Committee's decision. A copy of their responses are contained in Appendix Nine.

Difficulties in obtaining evidence

1.69 A general lack of transparency of information and a lack of clarity around the respective roles of the lessee and the PTA have been shown to be major issues. As noted previously, these will be discussed further in this report. At this point, though, the Committee notes that this problem has been exacerbated by a seeming reluctance on the part of stakeholders to give information to the Committee and to have that information placed in the public domain. It also seems that the rights and powers of a

58 Legislative Assembly, Parliament of Western Australia, *Review of WestNet Rail's compliance with the initial performance standards of the track infrastructure leases*, Parl. Paper 2793, Perth, 14 June 2007.

parliamentary committee as provided under the *Parliamentary Privileges Act 1891* (WA) are not well understood.

1.70 While the Minister declined the Committee's invitation to attend a hearing, he did provide a submission to the Inquiry in August 2014. In this submission, the Minister 'trust[s] that the Public Transport Authority (the PTA) submission provided comprehensive advice on the recent strategic direction and policy decisions relating to the network lease and the PTA management of the network'.[59] While the PTA's submission did provide some advice in relation to these matters, the Committee found it necessary to obtain further information throughout the Inquiry.

1.71 On 27 June 2014 the Committee requested from the Department of Transport copies of the Ministerial Briefing Notes provided to the Hon Dean Nalder, MLA, Minister for Transport, in relation to the rail freight network. The Department advised that the package of information was being collated, but before providing the information to the Committee the Department would need to check with their legal section about any legal requirements and inform the Minister.[60]

1.72 On 4 July 2014 the Committee asked the Department to confirm that it would be providing the requested briefing notes that day as requested. The Department advised that they were doing a final check to ensure that all briefing notes were there, and confirmed that they would be provided that day. The documents were not received by the Committee. The Department assured the Committee that it was happy to cooperate with the Inquiry, but needed to give the Minister an opportunity to approve the provision of information as this was required under the Public Sector Commissioner's Circular. On the 8 July 2014, the Committee was informed that the Department was seeking advice from the Public Sector Commissioner and from the State Solicitor's Office in relation to providing the requested briefing notes.[61]

1.73 On 18 July 2014 the Committee received a letter from Mr Reece Waldock, the Director General of the Department. This letter advised that the department had 'conducted a search of its records and identified a number of briefing notes that potentially fall within the scope of [… the Committee's] request'.[62] Mr Waldock further advised that those briefing notes could be divided into three categories.

> *(1) Significant Issues Briefing Notes prepared for the Minister for Transport (the Minister) when he was first appointed to the Transport*

59 Submission No. 38 from Hon Dean Nalder, MLA, 8 August 2014, p 4.

60 Ms Sue McCarrey, Deputy Director General, Department of Transport, Electronic Mail, 1 July 2014.

61 Mr Nathan Riches, Manager, Office of the Director General, Department of Transport, Electronic Mail, 8 July 2014.

62 Mr Reece Waldock, Director General, Department of Transport, Letter, 18 July 2014, p 1.

> *portfolio and provided to him through the Cabinet Services Branch of the Department of the Premier and Cabinet;*
>
> *(2) Contentious Issues Briefing Notes prepared for the Minister for use in Parliament; and*
>
> *(3) Ministerial briefing notes provided to update the Minister on the Tier 3 Grain Rail Lines.*[63]

1.74 Furthermore, Mr Waldock expressed:

> *some very serious concerns about providing the types of documents set out in paragraphs (1) and (2) above to you. It seems to us that these types of documents contain, by their very nature, information which relates to policy and as such the request is more properly addressed to the Minister rather than the Department.*[64]

1.75 The Director General asked the Committee to confirm whether or not its request for briefing notes intended to capture all those in the three categories mentioned.

1.76 On 4 August 2014 the Committee wrote to the Director General confirming that it was requesting all briefing notes in all three categories. In addition to this, in the light of information received in the interim, the Committee requested that the Department also provide Ministerial Briefing notes provided to the Minister for Transport in relation to the freight rail network lessee's 2007 approach to government and all subsequent discussions and correspondence between government and the lessee in relation to the re-sleepering of the narrow gauge lines, including Briefing Notes relating to the July 2010 *Project Agreement for Capital Works Dedicated Narrow Gauge Lines*.

1.77 On 8 August 2014, the Department advised that, 'due to the significant increase in the scope of … [the Committee's] request' it would not be able to provide the documents by the requested date. The Department also advised that the:

> *Director General will be required to brief the Minister for Transport on all of the documents that fall within the scope of your request, additionally the Minister for Transport will be required to consult with the previous government through the leader of the Opposition, and the previous Minister for Transport, Hon Simon O'Brien; prior to the release of any documents to the committee.*[65]

63 Mr Reece Waldock, Director General, Department of Transport, Letter, 18 July 2014, p 1.
64 ibid.
65 Mr Nathan Riches, Manager, Office of the Director General, Department of Transport, Electronic Mail, 8 August 2014.

1.78 At that time the Department anticipated the Committee's request would be 'likely to be met by 25 August 2014'.[66] The Department again reassured the Committee it was happy to cooperate with the Committee, but needed to follow the guidelines in the Public Sector Commissioner's Circular.

1.79 On 29 August 2014 the Department of Transport provided its response to this request and other requests for information made to the designated PTA liaison officer, Mr David Browne.

1.80 The documents provided by the Department on 29 August did not contain all those requested by the Committee. Furthermore, two of the documents were redacted. Mr Waldock advised that 'the Minister has since been briefed on this matter and has agreed with my assessment that the Transport portfolio agencies should only provide the requested documents that fall into category 3 to the Committee'.[67]

1.81 This correspondence also advised that one of the documents requested by the Committee contained 'legal advice to the Minister, and is privileged and not provided to the Committee'.[68]

1.82 Mr Waldock also stated:

> *more generally, I would note that while the Transport portfolio agencies are happy to assist the Committee in its work in any way we can, the process that has currently been adopted to seek information has been somewhat piecemeal and confusing. It would be appreciated if the Committee and its staff could address all requests to me, as the CEO or Director General of all of the relevant agencies and, if possible, identify all the documents sought prior to making the request so that we only have to undertake one search of the records.*[69]

1.83 On 10 September 2014, the Committee wrote to Mr Waldock acknowledging receipt of the documents provided and reiterating its request to provide all documents in a complete and unredacted form. The Director General was advised that if the request was not met, the Committee would authorise a summons to be issued.

1.84 On 17 September 2014, Mr Waldock and other officers from within the transport portfolio attended a hearing. At that time, Mr Waldock provided a written response to the Committee's latest request. This response made a number of points:

66 ibid.
67 Submission No. 39 from Department of Transport, 29 August 2014, p 1.
68 ibid, p 2.
69 ibid, p 3.

- in dealing with the Committee's requests, the department had 'acted in accordance with the terms [of] the Public Sector Commission's (sic) Circular 2010–03';
- the Minister for Transport had directed the Director General not to provide the Significant Issues Briefing Papers to the Committee 'prepared for him when he was first appointed to the Transport portfolio and provided to him through the Cabinet Services Branch of the Department of the Premier and Cabinet';
- information in the Significant Issues Briefing Papers relates to 'matters of high level policy which are usually discussed between Ministers at a Cabinet level. This material falls within the terms of Procedural Rule 13 of the Speakers Procedural Rules and we have confirmed with the Minister that questions concerning these documents and the contents of these documents should be put to the Minister';
- the Minister for Transport had instructed the Director General not to provide the Contentious Issues Briefing Notes which are 'prepared by the Department to assist the Minister to prepare for Question Time and Debates in Parliament'; and
- the case presented to the Information Commissioner in *Re Saffioti and the Minister for Transport*, 'while only analogous …. does allow the Committee some insight into the nature of CIBNs [Contentious Issues Briefing Notes] and why it is not appropriate for these types of documents to be disclosed by me in response to a request from the Committee'.[70]

1.85 This response also requested that two documents provided be dealt with *in camera* as one contained commercial in confidence material and the other contained incorrect or incomplete information.

1.86 The Committee faced similar difficulties in obtaining a copy of what it believed were tender documents for the initial sale and lease of the Westrail business, which it requested on 13 August 2014.[71] On 29 August 2014, Mr Waldock advised that the sale 'was not part of a tender'; rather, it involved a pre-sale and sale process.[72] The Department, though, did not provide a copy of these documents.

1.87 When questioned on this during a hearing the Department confirmed that it does have a copy of these documents and stated that its reason for not providing a copy to the

70 Submission No. 40 from Department of Transport, 17 September 2014, p 1.

71 The Committee's understanding was based on comments made by the Department of Transport and on the many references to a tender process in the Auditor General's 2013 audit of the management of the rail freight network.

72 Submission No. 39 from Department of Transport, 29 August 2014, p 2.

Committee was that they had not been requested.[73] The Committee's letter to the Department requesting a copy of the tender documentation is dated 13 August 2014.

1.88 The PTA did not see its failure to provide a copy of the documents as obstuctionist or simply splitting hairs. Rather, Mr Browne explained that:

> *the documentation surrounding the sale of the freight business and subsequent leasing of the rail freight infrastructure is contained in a compactus. We have reams and reams of documents, so clearly it is impractical to provide all of that documentation. Much of that documentation is cabinet-in-confidence as well, so a process would have to be gone through. In the short term, I do not think it was splitting hairs at all.*[74]

1.89 The Committee found it necessary to obtain the pre-sale and sale documentation from another source.

1.90 There are a number of important points to be made in relation to this unsatisfactory state of affairs, particularly in relation to the Committee's request for briefing notes.

1.91 The Department's categorisation of briefing notes unnecessarily complicated the issue. The manner in which the Department chose to interpret and act on the Committee's requests does not alter the fact that the Committee's fundamental requests for documentation did not change.

1.92 The Department's response, albeit based on advice from the Public Sector Commissioner and the State Solicitors Office, demonstrates a lack of understanding of the powers of a Parliamentary Committee and of the Inquiry process. This is exemplified in the following.

1.93 First, understandably, the Department was guided by the Public Sector Commissioner's Circular entitled *Policy for Public Sector Witnesses Appearing Before Parliamentary Committees*. The Committee is aware of the Circular and acknowledges that the officers of the transport portfolio acted in accordance with its directions. The Committee notes, though, that at 1.3 the circular states: 'it is a fundamental principle of government that Parliament is supreme, in that it has authority over all matters and things within its jurisdiction'.[75] This Circular places public servants in a very difficult position in situations where a Parliamentary Committee requests information, but the

73 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 2.

74 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, pp 2–3.

75 Public Sector Commission, *Policy for public sector witnesses appearing before parliamentary committees*, Public Sector Commissioner's Circular Number 2010–03, 29 March 2010.

Minister directs them not to comply with that lawful request. The Circular does not excuse public servants from complying with a Committee request.

1.94 Second, while 'there is no binding High Court Authority finding that parliamentary privilege does prevail over legal professional privilege' there is 'persuasive authority'.[76] Provision of documentation protected by legal professional privilege to a Parliamentary Committee does not constitute a loss of that privilege. Furthermore, as the legal advice was given to the Minister, he could choose to waive that privilege.

1.95 Third, the Speaker's Procedural Rule 13 states:

> *An officer of a department of the State or of the Commonwealth will not be asked to give opinions on matters of policy, and will be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister.*[77]

1.96 It seems that the Department and its advisors have chosen to interpret this rule to mean that they are not able to provide the Committee with 'high level policy' information when, in fact, the Speaker's rule excuses public servants from answering questions that require them to provide an opinion on policy. To provide information is not to provide an opinion on that information or policy.

1.97 Fourth, the Department does not seem to be aware that the restrictions that apply to Freedom of Information process do not apply to Parliamentary Committees, which have broader powers than the Information Commissioner. Furthermore, while the Director General only claimed the Information Commissioner's decision in *Re Safiotti and the Minister for Transport* to be analogous, the department has relied on that as a reason not to provide information. The Information Commissioner's decision was in relation to a request from a member of parliament, not a Parliamentary Committee and in no way demonstrates why it is not appropriate for the department to comply with the Committee's request.

1.98 Fifth, Mr Waldock's comments on the Committee's process for gathering evidence shows a general lack of understanding of the progressive and reiterative nature of a Parliamentary Inquiry. While the Committee acknowledges that this process would, at times, frustrate agencies, it is an unavoidable function of conducting inquiries.

1.99 Overall, the Department's approach to providing information to the Committee seems to contradict the sentiment evident in the Minister's submission, as noted above.

---

76 Ms Margaret Quirk, MLA, Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 18 September 2014, p 4 of pp 6590c–6597a.

77 Legislative Assembly, Parliament of Western Australia, Speaker's Procedural Rule 13. Questions relating to matters of policy, 2008, p 128.

1.100 The difficulties encountered by the Committee in obtaining information to assist with this Inquiry not only causes significant delays, it has the potential to undermine the work of the Parliament of Western Australia. The Committee is concerned that Ministers and agencies will see this as a precedent whereby they hold themselves excused from providing information to Committees.

1.101 By virtue of the *Parliamentary Privileges Act 1891* (WA) the Committee has the power to call for persons, papers and records. Generally, the Committee is able to do this through a cordial, less formal, process, which makes for a more effective and efficient Inquiry. The issuing of a summons is largely seen as a last resort, a step not taken lightly. Given the highly legal-technical approach adopted by the Department in this Inquiry, perhaps its officers and advisers do not fully appreciate the Committee's powers. It would be unfortunate if the Committee needed to resort to issuing summonses in the first instance to obtain information deemed necessary to its work. Rather, the Committee would prefer to be confident that government agencies are interested in furthering the transparency and scrutiny that is essential to good governance.

1.102 The unwillingness of the Minister to allow public servants to provide information to the Committee compounds the lack of transparency that exists in relation to the government's management of the freight rail network. This has heightened the Committee's awareness of this issue which has been highlighted throughout this Inquiry.

Chapter 2

Rail Matters

Introduction

2.1 In Chapter 1 the Committee outlined the reasons why the management of the freight rail network is an important issue for Western Australia (WA), one that should be the subject of an Inquiry. Throughout the Inquiry, and particularly through discussions with community members and growers from the Wheatbelt and the Great Southern Agricultural region, the Committee gained a much better insight into just how important the freight rail network is to regional areas—not just for the economy, but for the well-being of the community.

2.2 The Committee was reminded of former Minister for Transport, Hon Murray Criddle, MLC's statement that selling the freight network was less about money that it was about 'ensuring the long term best interests of the State's industries and communities'.[78]

2.3 The Western Australian Local Government Association (WALGA) also noted the importance of the rail network to the regions stating that 'local Governments and their communities will be significantly affected by any decision to close rail lines in the Wheatbelt region'.[79] For WALGA, by adopting the position that the use of the rail lines is a commercial matter, the state government is 'den[ying] the opportunity for Wheatbelt communities to have a say in transport policy that directly affects them'.[80] Furthermore, for WALGA, 'this inappropriate because the State Government is the owner of the rail network and determines the level of investment that goes into the network'.[81]

2.4 The following presents a brief outline of the main issues raised in evidence to the Committee and clearly demonstrates why rail matters to the people of Western Australia, why it is more than just about money.

78 Hon Murray Criddle, MLC, (Minister for Transport), *Rail Freight System Bill gets second reading in the Legislative Assembly*, Media Statement, Government of Western Australia, Perth, 3 June 1999.
79 Submission No. 13 from Western Australian Local Government Association, 17 April 2014, p 3.
80 ibid.
81 ibid.

Confidence in the agricultural sector and the regions

2.5 It is very clear that there is a strong sense of community in regional WA, and a good deal of determination and confidence in the long-term future of the agricultural sector. This is epitomised by the words of Mr Richard House:

> *I am very much thinking of the future in our industry. I have got sons that are going to come on. We have been family farming there for three generations. In the last 20 years, grain grown per millimetre of rain has doubled in grain growing, and I think in the next 20 years, it will double again. That is through necessity; that is the way our industry has been going in the last 20, and it will have to keep doing it if we are going to survive.*[82]

2.6 For Mr House, 'looking at the future, the future is not tomorrow; to me the future is 10, 20, 30, 50 years. We plan to be here forever'.[83] According to Cr Rodney Forsyth, Delegate of the Great Eastern Country Zone, argued that 'farmers are ahead of the game. They are innovators and that is why they are still here'.[84]

2.7 This optimism about the future is firmly grounded in confidence in increased crop yields. For example, Mr House argued that farmers 'are going to keep growing more and more grain, … the growth in grain production is coming. It is not going to stop'.[85] Mr Taylor stated that 'here we are today, 26 June 2014, agriculture is finally taking its place on the world stage'.[86]

2.8 Cr Stephen Strange, President of the Shire of Bruce Rock, also noted the 'very proud 100-year history' of Bruce Rock, which he described as 'a very sound production area; very consistent'.[87]

2.9 The evidence presented to the Committee suggests strongly that increased crop yield is a result of innovations in science and technology, and farming practices. For example, while acknowledging that bad years occur and that there has been a tendency away from livestock and toward grain production, Cr Strange explained that:

> *last year was the record year by far, and we actually saw a culmination of science and technology that has evolved, probably over the last 15 years, come to the fore, where we really have had up and down seasons and we have not seen that come out in production since. So I*

82 Mr Richard House, Farmer, *Transcript of Evidence*, 26 June 2014, p 1.
83 ibid, p 3.
84 Cr Rodney Forsyth, Delegate, Great Eastern Country Zone, *Transcript of Evidence*, 27 May 2014, p 3.
85 Mr Richard House, Farmer, *Transcript of Evidence*, 26 June 2014, p 5.
86 Mr Cam Taylor, Farmer, *Transcript of Evidence*, 26 June 2014, p 3.
87 Cr Stephen Strange, President, Shire of Bruce Rock, *Transcript of Evidence*, 27 May 2014, p 2.

> *think last year, we did see what is possible in areas such as Bruce Rock, and many in the wheatbelt are very, very similar to us. … I am talking about water usage rates and kilos of grain per millimetre of rain. Full credit to the new generation of farmers coming through; they have grasped the technology and science and they are seeing the benefits of this. … with less than average rain, we can grow at least an average crop. So I would not like any of the committee members to think if it is a dry year, the wheatbelt or Bruce Rock is not able to perform; it is quite the opposite. With the low rain and the way we manage our water—our soil moisture—certainly, we are able to produce an average crop.*[88]

2.10 This was echoed by Cr Rhonda Cole, Zone President, Great Eastern Country Zone:

> *Obviously, we are doing things so much better. I mean, we have grown some of our best crops out here on six inches, which is really not what we should do. But we are very good at what we do … and we are improving our yields.*[89]

2.11 According to Mr Ian Lane:

> *the farmers are so far ahead of the game that we are literally breaking all the rules. In 1994, if you grew 20 kilos of grain per millimetre of rainfall, you were considered an exceptional producer. The state average in 1994 was 25 kilos per millimetre of rainfall. In 1997, it was 28 kilos per millimetre of rainfall. They ripped up the formula and threw it away.*[90]

2.12 A map produced by the Department of Agriculture and Food showing the percentage change in wheat water use efficiency in 2005–2009 compared to 1996–2000 shows that some Wheatbelt areas have achieved an increase in efficiency of over 30 per cent. These include areas around Boyup Brook, Cranbrook, Boddington, York Beverley, Coorow, Morawa, Mullewa, Chapman Valley and Northampton. Areas around Toodyay, Cunderdin, Moora, Perenjori, Three Springs, Mingenew and Greenough achieved a water use efficiency of between 20 and 30 per cent. Many areas also achieved increases of between 10 to 20 per cent (Corrigin, Bruce Rock, Quairading, Merredin and Dalwallinu, for example) or 0 to 10 per cent (Esperance, Lake Grace, Kulin and Goomalling, for example). While not all areas achieved an increase in water use

88 ibid, pp 2–3.

89 Cr Rhonda Cole, Zone President, Great Eastern Country Zone, *Transcript of Evidence*, 27 May 2014, p 6.

90 Mr Ian Lane, Farmer, *Transcript of Evidence*, 27 May 2014, p 5.

efficiency, the improvements in the Wheatbelt water use efficiency overall has been positive.[91]

2.13 The Committee received evidence that others did not share the optimism of those in the regions. For example, in discussing submissions to the Strategic Grain Network Committee (SGNC), Mr Ian Lane described the Department of Agriculture's submission in the following terms:

> *Don't worry about tier 3 railway lines. Under climate change, they'll be gone. Don't worry about them in 20 years; they'll be gone.*[92]

2.14 However, according to Mr Lane, what the Department of Agriculture did not consider is the shift to grazing crops:

> *With our ability to use stored summer moisture, feed it off, get it through the frost period and harvest it, as proven last year, and will be proven this year and next year, we are the most efficient dryland farmers in the world and we will continue to be that because we have to to survive.*[93]

2.15 On 14 August 2014, Hon Dean Nalder, MLA, Minister for Transport, advised the Legislative Assembly that he had been to visit the Wheatbelt and the Great Southern region.[94] The Minister 'acknowledged that farming practices have changed dramatically over the past 30 years with the consolidation of farms, reduction in sheep numbers, increased cropping programs, larger farm machinery and trucks, and the introduction of liming to reduce acidity of the soil'.[95] The Minister also reported that 'it was exciting to see that there was optimism in the bush that [… he had] not seen in decades'.[96]

2.16 Despite this optimism and excitement, the Minister stated that:

> *discussions centred on the need for the agricultural sector to have a longer term view on where the industry is going and to plan better to break the reactive approach to roads and transport solutions. A number of shire members shared with me their vision for economic growth and the steps they are taking to achieve their set goals. I am a*

91 Department of Agriculture and Food, *Western Australia percentage change in wheat WUE 2005–2009 compared to 1996–2000*, Western Australian Agriculture Authority, 2010. The Committee notes that improved water use efficiency is just one of a number of factors that contributes to improved crop yields.

92 Mr Ian Lane, Farmer, *Transcript of Evidence*, 27 May 2014, p 5. The agriculture portfolio was the Department of Agriculture and Forestry, and is now the Department of Agriculture and Food.

93 Mr Ian Lane, Farmer, *Transcript of Evidence*, 27 May 2014, p 5.

94 Hon Dean Nalder, MLA, Minister for Transport, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 August 2014, p 5309.

95 ibid, p 5310.

96 ibid, p 5310.

> *great believer in local content and local employment, and was encouraged to meet with shires that are proactively driving projects forward to increase productivity and local employment.*[97]

2.17 The Minister's submission to this Inquiry exhibited a more cautious tone. In discussing changes that had occurred since 2009, the Minister states that:

> *it is important to appreciate that changes over the short term will not necessarily persist over time and it is prudent to await greater stability in the wider system before new long-term solutions, which will take significant time to implement, are agreed.*[98]

2.18 The Minister's comments are in stark contrast to those of the President of the Shire of Bruce Rock who stated that the region is:

> *in the box seat for a very, very good season this year and, of course, that amounts to tonnes of grain and the movement of that grain. With that and, we believe, over the next probably five to 10 years, with the rainfall even below average, we are on the cusp of something pretty special in grain growing, and with the evolution of the new techniques and the science and technology … I believe we could lift our grain production probably in the realms of 15 per cent or so very quickly. I think on the evidence from our dry years, we can prove that.*[99]

Safety

2.19 One of the major issues raised throughout the Inquiry was road safety, with concern centred on two main issues. First, the closure of Tier 3 lines will result in greatly increased numbers of truck movements on the roads. Second, the roads and the measures being taken to upgrade them are not adequate to handle the increased truck traffic; that is, they are not fit for purpose.

2.20 The Wheatbelt already experiences a high road toll. The Wheatbelt Railway Retention Alliance (WRRA) advised that for the period 2001–2010, '740 people have been killed or seriously injured in wheatbelt south …. A rate of 312.6 fatalities or seriously injured per 100 000'.[100] This rate is 'the highest rate in Western Australia, way beyond any

97 ibid, p 5310.
98 Submission No. 38 from Hon Dean Nalder, MLA, Minister for Transport, 8 August 2014, p 4.
99 Cr Stephen Strange, President, Shire of Bruce Rock, *Transcript of Evidence*, 27 May 2014, p 3.
100 Mr Graeme Fardon, Executive Member, Wheatbelt Railway Retention Alliance and CEO, Shire of Quairading, *Transcript of Evidence*, 27 May 2014, p 5. See also: Submission No. 19 from Wheatbelt Railway Retention Alliance, 17 April 2014, p 5.

other region and also wheatbelt north has similar fatality rates'.[101] Cr Forsyth, a delegate of the Great Eastern Country Zone, confirmed that while the Wheatbelt south 'has the highest fatality rate in the state; north of that line in our zone is the second highest. They are not good. Safety is of paramount importance'.[102]

2.21 Statistics from the Office of Road Safety also demonstrate the very high rates of fatalities or serious injuries resulting from road crashes. Statistics for the Wheatbelt North, Wheatbelt South, Great Southern and Metropolitan regions are provided in Table 2.1. Office of Road Safety data for 2013 also show that the Wheatbelt had a fatality rate of 28.8 people per 100,000 persons, with 15 fatalities on Wheatbelt roads during that year.[103]

Table 2.1: Killed or seriously injured (KSI) in selected regions[104]

Region	No of people KSI 2012	No of people KSI 2003–2012	KSI rate per 100,000 population 2003–2012
Wheatbelt North	145	1,466	297.2
Wheatbelt South	67	730	314.1
Great Southern	82	825	142.1
Metropolitan	1,655	19,422	121.5

2.22 Cr Stephen Strange, President of the Shire of Bruce Rock, also noted road safety as a most important issue, 'a massive issue', with statistics for the area being 'horrific'.[105] Cr Strange advised that 'there have been a lot of near misses around the place, and in statistical terms they do not count for much, but of course it only takes a split second and that can be a fatality'.[106]

2.23 The WRRA estimate that the closure of Tier 3 lines will result in between 57,000 and 85,000 additional truck movements on the roads 'which already have the highest road toll in W.A.'[107] Mr Graeme Fardon, CEO of the Shire of Quairading, advised that there are 'an extra 9 000 road train movements leaving Quairading wheat bin and the associated smaller bins', which equates to 250,000 tonnes. While 30,000 tonnes of this

101 Mr Graeme Fardon, Executive Member, Wheatbelt Railway Retention Alliance and CEO, Shire of Quairading, *Transcript of Evidence*, 27 May 2014, p 5. See also: Submission No. 19 from Wheatbelt Railway Retention Alliance, 17 April 2014, p 5.

102 Cr Rodney Forsyth, Delegate, Great Eastern Country Zone, *Transcript of Evidence*, 27 May 2014, p 11.

103 Office of Road Safety, *2013 Summary. Preliminary fatality and critical injuries on Western Australian roads*, 2014, p 10. Available at: http://www.ors.wa.gov.au/Stats/Annual/annual-prelim-crash-stats-2013.aspx. Accessed on 1 October 2014.

104 Office of Road Safety, *Statistics*. Available at: www.ors.wa.gov.au/Statistics. Accessed on 1 October 2014.

105 Cr Stephen Strange, President, Shire of Bruce Rock, *Transcript of Evidence*, 27 May 2014, p 4.

106 ibid, p 4.

107 Submission No. 19 from Wheatbelt Railway Retention Alliance, 17 April 2014, p 5.

is for the domestic market and will travel mostly into Perth, the balance is for the export market. One hundred per cent of this export market grain will travel on the Cunderdin road. In previous years, 90 to 95 per cent of this would have been transported by rail. Now, however, there is no rail option available. According to Mr Fardon, this will lead to extra 'burdens upon both the state and the local road system'.[108]

2.24 Estimates of increased truck movements vary—and will be discussed further in Chapter 8. Nevertheless, as noted above, the road safety statistics for the Wheatbelt areas are the worst in the state. While none of the statistics resulted from an incident involving a grain truck, any large increase in the number of truck movements on regional roads will necessarily add to road congestion in rural areas. As Mr William Cowan, Vice Chairman, WRRA, advised, the road accident and fatality 'problem will be exacerbated by sticking another 50 000 to 85 000 truck movements on the road'.[109]

2.25 Mr Graeme Fardon explained that he had been at the site of a grain freight truck rollover on the Quairading to Cunderdin road on 16 May 2014. According to Mr Fardon, 'it was very, very fortunate no-one was coming the other way and also fortunate the truck driver was not injured. It was certainly a severe case'.[110]

2.26 In describing the situation on the York to Quairading Road, Mr Mellor, of the Quairading Land Conservation District Committee, stated that on this road:

> *close to York you have all the hay trucks coming into the hay facility and the export trucks that are going out from there, combining with wheat trucks, school buses and just general freight and transport, plus all the petroleum trucks and everything else that goes along that road.*[111]

2.27 Similarly, Cr Eileen O'Connell, President of the Shire of Nungarin, stated:

> *the safety issue over the whole of the road infrastructure in our area is not good. The community is very concerned about it. We have five school buses that travel on that road—it is five or six; … But certainly between Trayning and Merredin there are high school buses as well as primary school buses and that is just for two small shires; what the bigger shires have got with bigger schools and the number of school*

108 Mr Graeme Fardon, Executive Member, Wheatbelt Railway Retention Alliance and CEO, Shire of Quairading, *Transcript of Evidence*, 27 May 2014, p 4.

109 Mr William Cowan, Vice Chairman, Wheatbelt Railway Retention Alliance, *Transcript of Evidence*, 27 May 2014, p 8.

110 Mr Graeme Fardon, Executive Member, Wheatbelt Railway Retention Alliance and CEO, Shire of Quairading, *Transcript of Evidence*, 27 May 2014, p 4.

111 Mr Rowlie Mellor, Treasurer, Quairading Land Conservation District Committee, *Transcript of Evidence*, 27 May 2014, p 2.

> *buses that must be running on there, but then you get emergencies with ambulances and at times we are under pressure to get there—I am an ambulance officer—and being in a situation in which we have had to slow down, which puts more pressure on volunteers.*[112]

> … having grown up in the wheatbelt and having gone to school here and having had children go to the school here, and now being a grandparent of children here, the school bus and the trucks is very, very real. As a child growing up—I did the same for my children—if the roads looked a bit icky on that day, you would run them to school. But the trouble is that when the trucks are potentially emptying the bins, as well as at harvest, it is not feasible to do that. You cannot just avoid that dangerous week or so when the roads might be busy. It is an all-year-round thing. It is a very real risk. You have seen the photos of the bus and the truck. They are sort of designed to be emotive. But that is not the same as knowing that your child is passing that truck going along; and the drops on the side of the bitumen are like this. As councils, we can do our very best, particularly on the school bus routes. But there is a limit to what you can do, and those roads deteriorate very, very quickly when they are being used at those busy seasonal times.[113]

2.28 The other major concern in relation to road safety and extra truck movements on the road was the condition of the roads themselves and their capacity to handle the extra traffic. Cr Eileen O'Connell expressed concern at the damage to the roads as a safety issue, stating that:

> *it is not just the Nungarin to Merredin bit; … I would anticipate that the same thing is happening to all the roads. Nungarin, Trayning and Merredin shires are lucky in the fact that the roads that they are using is Main Roads road, so the only effect on Nungarin is the fact that they did, about 2011, up what the farmers were paying. It was cheaper for them to then travel to Mukinbudin or Merredin, which was further, and of course then they used our gravel roads, which are totally unsuitable to moving grain with the size of trucks they were using.*[114]

2.29 In relation to the upgrade of roads to allow them to carry heavy freight vehicles, the Committee heard evidence that the work being done was inadequate. Concern was

112 Cr Eileen O'Connell, President, Shire of Nungarin and Delegate, Great Eastern Country Zone, *Transcript of Evidence*, 27 May 2014, p 11.

113 Cr Rhonda Cole, Zone President, Great Eastern Country Zone, *Transcript of Evidence*, 27 May 2014, pp 8–9.

114 Cr Eileen O'Connell, President, Shire of Nungarin and Delegate, Great Eastern Country Zone, *Transcript of Evidence*, 27 May 2014, p 4.

expressed about the lengthy delays in obtaining roadside vegetation permits, something which led to a piecemeal approach to the work.[115]

2.30 The method of upgrading roads through adding 'band-aid' or 'licorice' strips to each side of the existing road was criticised in evidence. While, for example, $10.5 million had been committed over three years to strip-widen the York to Quairading road, the failed base on the existing road remains in the middle.[116]

2.31 In relation to the York to Quairading road, Mr Rowlie Mellor also advised that the road 'was not suited to heavy traffic'.[117] Mr Mellor stated that:

> *even though money is being spent on the Quairading–York Road on bandaid strips to widen it on either side, the bandaid strips are very ineffective as you will see when you are driving back through the Greenhills area, where you will see that the bandaid strip and the main tarmac is coming apart. You have multiple sites with little bits of roadwork happening on the 67 kilometres between Quairading and York, but then you combine that with the additional traffic that is running through.*[118]

> We have a small hospital in our area at Kununoppin, which is between Trayning and Nungarin. We do a lot of transfers from Kununoppin to Merredin or from Nungarin to Merredin. It is quite dangerous on that road, particularly if you are dealing with a spinal victim who is also a priority 1, which is life-threatening. At night-time it is not too bad because you can drive on the wrong side of the road until you see a vehicle coming. The road has deteriorated so badly. I assume that that is happening to other roads.[119]

2.32 The issue of extra truck movements and road upgrades will be discussed further in Chapter 8.

The Freight Rail Network is a State asset

2.33 The status of the freight rail network as 'a key infrastructure asset owned by the State' was recognised by the Auditor General in his report, *Management of the rail freight network lease: Twelve years down the track*.[120] State-ownership of the network was

115 Mr Graeme Fardon, Executive Member, Wheatbelt Railway Retention Alliance and CEO, Shire of Quairading, *Transcript of Evidence*, 27 May 2014, p 5.

116 ibid.

117 Mr Rowlie Mellor, Treasurer, Quairading Land Conservation District Committee, *Transcript of Evidence*, 27 May 2014, p 2.

118 ibid.

119 Cr Eileen O'Connell, President, Shire of Nungarin and Delegate, Great Eastern Country Zone, *Transcript of Evidence*, 27 May 2014, p 11.

120 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 28.

also referred to in submissions to the Inquiry as an important issue. According to the Agribusiness Council of Australia:

> *that the long term protection and enhancement of the public asset (i.e. the rail freight network) is paramount. Even under conditions of outsourcing such an asset under a long term lease, the WA Government must ensure that the asset is returned in a good or better condition than it was at the beginning of the lease.*[121]

2.34 Similarly, WALGA, in discussing the government position on the Brookfield Rail–CBH Group issue, stated that 'the State Government is the owner of the rail network and determines the level of investment that goes into the network'.[122]

2.35 For some, such as Mr and Mrs Tuckwell, grain growers in the Wheatbelt, expressed concern that the network, as a State asset, had been leased to a company with headquarters overseas. As noted in Chapter 1, Brookfield Rail's parent company is Brookfield Infrastructure Partners, which is headquartered in Hamilton, Bermuda, with units traded on the New York and Toronto Stock Exchanges.

2.36 According to Mr and Mrs Tuckwell, 'the WA Government should not have to put money into rail lines that are leased and operated by a private corporate, particularly because part of that money goes directly to Canadian shareholders as a management fee'.[123] These growers felt that they 'are being held to ransom by an overseas owned corporate that is owned by our competitors (in this case–Canada)'.[124]

2.37 While Mrs Tuckwell accepted that it was Brookfield Rail's role to 'make money for their shareholders', she also argued that it is 'our government's role is to make sure the infrastructure is there so that the exporters—in this case the grain growers—can get their product to the export market'.[125]

2.38 The WRRA questioned the 'integrity [… of] an agreement which can deliver so much in profits to overseas shareholders whilst costing Western Australians so dearly'.[126] According to this organisation, not only does this agreement impact on WA growers, it also 'denies WA businesses and communities the benefit of funds which should be circulating within the economy rather than being removed from the economy and sent off shore'.[127]

---

121 Submission No. 9 from Agribusiness Council of Australia, 16 April 2014, p 1. See also: Submission No. 2 from Mrs M Kevill, 2 April 2014.
122 Submission No. 13 from Western Australian Local Government Association, 17 April 2014, p 3.
123 Submission No. 5 from Mr and Mrs Tuckwell, 15 April 2014, p 1.
124 ibid, p 2. See also: Mrs L Tuckwell, Grain Grower, *Transcript of Evidence*, 27 May 2014, p 4.
125 Mrs L Tuckwell, Grain Grower, *Transcript of Evidence*, 27 May 2014, p 4.
126 Submission No. 19 from Wheatbelt Railway Retention Alliance, 17 April 2014, p 12.
127 Submission No. 19 from Wheatbelt Railway Retention Alliance, 17 April 2014, p 12.

2.39 Mr Michael Rainsford, a consultant with experience heavy and light rail operations and services, also expressed concern about the involvement of foreign corporations in State assets, stating his belief that:

> *that an incorrect decision was made in year 2000 to handball our assets to foreign corporations with little experience in the region of operations and other agendas in mind, detrimental to the well-being and the economy of our State, which has been transferred over time to other international corporations and operated outside the scope of the Network terms of reference.*[128]

Lack of transparency

2.40 One of the greatest causes of frustration in the community in relation to the freight rail network is the lack of transparency surrounding the original lease documents and the subsequent amendments to the leases. This has led to considerable anxiety in the community, as demonstrated by the following.

> *There are a lot of sceptical people out there about what is going on. As soon as you do not give information, everyone jumps to conclusions.*[129]

> *Obviously, if you cannot see the detailed lease agreement, you have no idea what you are up against, so immediately you are hobbled a bit, are you not? You have one hand tied behind your back. So we feel we do not know what we are fighting against. … As I understand it, the maintenance is not put out to tender, so again, there is no transparency there: Is the job being done properly? Who is making sure it is being done properly?*[130]

> *I think in some ways it [obtaining a copy of the lease] is an act of faith, to know that we are not being forgotten and shafted. It is almost a conspiracy theory—'Why can't we see it?' I do not want to know what they pay and I do not think any of us do. It is just who the hell is supposed to look after these railway lines? It is as basic as that. When you are not being privy to something like that, you sort of think there is a problem. But there very likely is not. It is just that whilst you are not*

128 Submission No. 6 from Mr M Rainsford, 16 April 2014, p 1.
129 Mr Richard House, Farmer, *Transcript of Evidence*, 26 June 2014, p 4.
130 Mr Jane Fuchsbichler, Coordinator, Wheatbelt Railway Retention Alliance, *Transcript of Evidence*, 27 May 2014, p 7.

> *able to know the answer, that question just leaves a really gut-wrenching feeling there as to, 'Why won't they say?'*[131]

> *We can perhaps see—we are only speculating, most of us, what is in the lease—what a poor document it is, where perhaps Brookfield hold all the aces and may be quite happy to wind down the rail network into care and maintenance and just use the main lines.*[132]

2.41 The problem was also expressed in terms of the impact of the lack of transparency on competition. According to Ms Jane Fuchsbichler, Coordinator, WRRA, 'we have a monopoly that is controlling the whole grain freight rail network and so there is no free and open competition there. Because of the lack of transparency and confidentiality, that makes it even tougher'.[133]

2.42 The Western Australian Farmers Federation also saw the lack of transparency as a frustration to business. According to the Federation's President, Mr Dale Park:

> *when we are looking for efficiencies in an industry, we either have transparency, which we have almost none of in the Brookfield system, or you have competition. One of the problems is that with the grain on rail freight, we have neither. There is no competition and there seems to be no avenue for other people to actually participate.*[134]

2.43 According to Mr Park, in a situation such as that existing with grain freight in WA where there is no competition, 'if you do not have competition then you have to have some transparency. You have to have total transparency if you are going to see where the costs are, and we have a situation where that has not happened'.[135]

2.44 Commenting on separate statements by the Premier and Hon Jim Chown, MLC, that they were 'not sure what was in the [Brookfield Rail] contract', Mr Rowlie Mellor stated that 'this is a contract that is having a large effect on our community, and I want to know who does know what is in the contract'.[136]

2.45 Nevertheless, despite the frustration caused by the fact that the lease documentation was not in the public realm, the people providing evidence to the Committee genuinely

131 Cr Rhonda Cole, Zone President, Great Eastern Country Zone, *Transcript of Evidence*, 27 May 2014, p 9.
132 Cr Stephen Strange, President, Shire of Bruce Rock, *Transcript of Evidence*, 27 May 2014, p 11.
133 Mr Jane Fuchsbichler, Coordinator, Wheatbelt Railway Retention Alliance, *Transcript of Evidence*, 27 May 2014, p 12.
134 Mr Dale Park, President, Western Australian Farmers Federation, *Transcript of Evidence*, 13 June 2014, p 2.
135 ibid, p 5.
136 Mr Rowlie Mellor, Treasurer, Quairading Land Conservation District Committee, *Transcript of Evidence*, 27 May 2014, p 2.

want to resolve the issues they are facing. This is clearly represented in the following statements:

> *We know where we are at. What we have to do is go forward. Opening up the lease agreement cannot change the past, but we can probably go forward and change the future…. . I believe if we just put the cards on the table and let us solve the problem going forward. If there has been a mistake, or something has been written wrong, or times and things have changed, then the lease agreement, back when it was written, was probably fine, but we have moved on. We should put the cards on the table and actually solve this problem as a team, as a whole state—growers, politicians, both sides of the party—because it is beyond politics, I believe*.[137]

2.46 Similarly, Mr Mellor suggested 'that the WA government, CBH and Brookfield get together to find out what is in the contract because if we know what is in the contract … then they can take steps to remedy the situation'.[138] The Shire of Bruce Rock also sees the need to move forward. Shire President, Cr Stephen Strange believes that the lease should be made public. Cr Strange acknowledged that 'there will be red faces, mainly from previous governments involved in setting up the lease, but we have got to get over that for the benefit of this industry'.[139] For Cr Strange, the way forward is with

> *government playing the biggest role in getting the stakeholders together. It is not about throwing $100 million at tier 3; it is about partnerships between industry and government. But the tier 3, or the rail network, is a government-owned asset and they have a responsibility to work through that and develop that outcome. That is the way we see it. I do not just talk about CBH in this; there may be other players perhaps interested in that lease as well or being involved.*[140]

Concluding remarks

2.47 There is no doubt that the freight rail network is of the utmost importance to the communities through which it passes. The above has demonstrated that there is also no doubt that there is a huge amount of anxiety and concern in the regions in relation to the network, generally, and the closure of Tier 3 lines, in particular.

137 Mr Richard House, Farmer, *Transcript of Evidence*, 26 June 2014, p 4.
138 Mr Rowlie Mellor, Treasurer, Quairading Land Conservation District Committee, *Transcript of Evidence*, 27 May 2014, p 2.
139 Cr Stephen Strange, President, Shire of Bruce Rock, *Transcript of Evidence*, 27 May 2014, p 11.
140 ibid.

2.48 The Committee was impressed with the optimism, confidence and determination of the people who gave evidence to this Inquiry. It is very clear that for people in the agricultural regions, their industry and their communities have a sound and productive future, with the ability and resilience to ride out the 'bad years'.

2.49 Having met with growers and local government representatives in May and June, the Committee was disappointed in the Minister for Transport's statement in his August submission to the Inquiry. As noted above, the Minister's view is that the recent crop yields may not continue over the long term and, therefore, it is sensible to wait for 'greater stability in the wider system' before developing solutions to current problems.

2.50 This response is problematic for two main reasons. First, it does nothing to find a solution to current problems impacting upon the rail freight network and those who rely on it. Second, lines have been closed and, notwithstanding the fact that they are in care and maintenance, once this occurs it is very difficult to re-open them. The Committee's view is that the Minister should work to resolve this situation now, rather than wait until some indeterminate time in the future.

2.51 The evidence in this chapter also demonstrates the local communities' concerns about road safety, particularly the heightened risks from increased grain truck movements. While this Inquiry is not specially addressing road safety or the economic and human costs of increased heavy traffic, the concerns expressed in evidence are deeply felt. In areas where the road accident and fatality statistics are the highest in WA, road safety has to be a primary consideration in any government policy decision.

2.52 The lack of transparency surrounding the lease documents and subsequent lease amendments is an issue that is keenly felt by those providing evidence to the Inquiry. It is also an issue that the Committee has given a good deal of very careful consideration. In any contract to which government is a party, and particularly one involving an important and valuable public asset, there is a need to balance reasonable commercial-in-confidence requirements with having sufficient information in the public realm to allow stakeholders to make informed decisions and to curtail the spread of misinformation and speculation. In this light, the Committee has decided to table certain documents with this report and, thus, make them publicly available. This is discussed further in Chapter 1.

Chapter 3

Freight Rail Network Policy

Introduction

3.1 In June 1999, the Rail Freight System Bill, which allowed the government to lease Westrail's track network and sell the freight business to a private sector operator, was undergoing its second reading in the Legislative Assembly. At that time, then Minister for Transport, Hon Murray Criddle, MLC, issued a media statement saying that 'one of our key aims is to get more freight off road and on to rail. There are continuing environmental and safety benefits in attracting freight to rail'.[141] According to Mr Criddle, 'the decision to sell Westrail's freight business was not simply about money because this consideration was secondary to ensuring the long term best interests of the State's industries and communities'.[142]

3.2 The state government's April 2013 *Western Australian regional freight transport network plan* lists one of its strategic directions as 'supporting a growing role for rail in the distribution of the freight task'.[143] This plan also states that 'continu[ing] to work with all parties to facilitate a sustainable arrangement to keep Tier 3 lines operational' is a government priority in securing the future of the grain rail network.[144]

3.3 In October 2013, in response to a question about the closure of the freight rail network's Tier 3 lines, then Minister for Transport, Hon Troy Buswell, MLA, stated that for the lines to be viable 'a commercial arrangement is needed between the operator and the user'.[145] Furthermore, Mr Buswell encouraged 'CBH and Brookfield Rail to resolve those issues, because they are their issues', stating that CBH should 'work hard and come to a commercial arrangement'.[146] Similarly, the current Minister for Transport, Hon Dean Nalder, MLA, advised the House that the line closures were 'a

141 Hon Murray Criddle, MLC, (Minister for Transport), *Rail Freight System Bill gets second reading in the Legislative Assembly*, Media Statement, Government of Western Australia, Perth, 3 June 1999.
142 ibid.
143 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, April 2013, p 57.
144 ibid.
145 Hon Troy Buswell, MLA, Minister for Transport, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 October 2013, p 9 of pp 4824c–4835a.
146 ibid.

commercial agreement between two parties […] Essentially, we are leaving it to the two parties to work out'.[147]

3.4 On Saturday 12 July 2014, Hon Dean Nalder, MLA, was reported as 'pushing Brookfield to sub-lease the Tier 3 lines in a significant shift in the Government's previous hands off approach to the issue'.[148] On 7 August 2014, it was also reported that the Minister had met with stakeholders in Bruce Rock, Quairading and Beverley where he 'reiterate[d] that he would like to see Brookfield lease the Tier 3 lines to CBH'.[149]

3.5 Referring to the SGNR and the government's investment through the Grain Freight Improvement Program, the Minister's submission to this Inquiry states that:

> *the Government considers that investment in the freight railway network is fundamentally the responsibility of Brookfield Rail, which has a 49 year lease over the network, and the operation of the network is a commercial matter between Brookfield Rail and its clients.*[150]

3.6 This chapter outlines the changes in government policy that led from the government's June 1999 policy position to the current situation. In doing so, it draws heavily on the policy development timeline provided in the Auditor General's 2013 audit report, *Management of the rail freight network lease: Twelve years down the track*.[151] A timeline of events can be found at Appendix Seven.

3.7 The outline of government policy is separated into two separate, yet interrelated, aspects: the decision to dispose of the government's freight business; and track standards, capacity and service continuity.

3.8 Before examining the government's freight rail policy, though, it is useful to briefly outline governments' traditional role in the provision of infrastructure as a public good, and situations where privatisation of infrastructure has resulted in a monopoly situation.

147 Hon Dean Nalder, MLA, Minister for Transport, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 2 April 2014, p 1977b.

148 Thompson, Brad, 'Brookfield, CBH world apart on rail charges', *Weekend West*, 12 July 2014, p 105.

149 Hinkley, Bobbie, 'CBH presses on with rail sub-lease option', *Farm Weekly*, 7 August 2014, p 6.

150 Submission No. 38 from Hon Dean Nalder, MLA, Minister for Transport, 8 August 2014, p 1.

151 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013.

Government provision of infrastructure as a public good

Competition, market failure and monopolies

3.9 In economics, it is generally held that competition between marketplace rivals functions to produce market efficiency through greater numbers of goods being delivered to more people at lower prices.[152] Where competition exists, profit maximisation serves the public interest by incentivising cost (and price) minimisation. The Australian economy is largely organised around market competition, with many of our laws and government policies aiming to promote and enhance competition among producers of goods and services.[153]

3.10 Sometimes, however, marketplace competition may be either impractical or impossible. Generally speaking, competition is compromised when industry entry barriers are high, with new firms finding it difficult or perhaps impossible to enter the market.[154] This means that the efficiencies of competition cannot be realised. Economists regard such situations as instances of market failure.[155]

3.11 A widely-recognised form of market failure is a monopoly, a situation where there is only one supplier of a specific commodity and, therefore, the monopoly firm has no competitors.[156]

Monopoly providers of public goods

3.12 One situation in which market failure, particularly in the form of a monopoly provider, exists is in the provision of public goods. Examples of public goods include such things as lighthouses, national defence, national parks and roads. Generally speaking, then, public goods are critical pieces of social infrastructure. Yet because of their nature, the free market will either fail to provide public goods or else provide them in a highly inequitable manner, with adverse social consequences.[157]

3.13 Market failure is especially relevant to countries such as Australia which face particular challenges due to their geographic size. Here, it is often more efficient for the entire industry's production to be concentrated in one company. This situation results in what is known as a 'natural monopoly'.[158]

---

152 Katz, Michael and Rosen, Harvey, *Microeconomics*, McGraw Hill, Boston, 1998, pp 329–330.
153 See, for example, Parts II and IV of the *Competition and Consumer Act 2010* (Cth).
154 Katz, Michael and Rosen, Harvey, *Microeconomics*, McGraw Hill, Boston, 1998, p 331.
155 Gravelle, H and Rees, R, *Microeconomics*, Longman, London, 1998, p 518.
156 ibid, p 269.
157 For a definition of a public good, see: Gravelle, H and Rees, R, *Microeconomics*, Longman, London, 1998, p 525; and Katz, Michael and Rosen, Harvey, *Microeconomics*, McGraw Hill, Boston, 1998, p 617.
158 Katz, Michael and Rosen, Harvey, *Microeconomics*, McGraw Hill, Boston, 1998, p 432.

3.14 The most obvious example of a natural monopoly is the distribution of electricity to consumers: because of the associated infrastructure requirements, the cheapest way to facilitate this distribution is to have only one company do it.[159] Indeed, the markets for access to much of Australia's logistics infrastructure (such as power lines, roads and railways) are natural monopolies.

3.15 Historically in Australia, the role of addressing the market failure in the provision of public goods has been taken by governments, with various strategies implemented to capture the efficiency of competitive markets. In contemporary times, this goal has often been pursued via privatisation. The lease of Western Australia's freight rail network to a private operator, and the associated sale of above-rail infrastructure, in 2000 is, in effect, an example of such a government strategy.[160]

3.16 When privatisation occurs, the provision of some public good or service changes from being the responsibility of a State-owned business to that of a privately-owned business. Understandably, 'private businesses are more likely to focus on profit' because State-owned businesses often need to pursue numerous, often contradictory, social and economic objectives.[161] Placing a State-owned business into private hands 'can be bad if the profit-maximising activities of the private business hurt society'.[162] Equally, however, it can be 'good when those activities are aligned with society's interests'.[163] Consequently, 'the trick with privatisation is to align private profit making incentives with the [interests] of society'.[164]

Profit maximisation versus the public interest

3.17 When a government monopoly is privatised, it is important that the public interest is not overwhelmed by the goal of profit maximisation. This can be achieved in one of two ways: either through competition or through regulation.

3.18 However, while the monopoly provider is able to supply a market more efficiently than might otherwise be the case, the public interest may not be served if the monopoly provider fully exploits its market power. Because private businesses generally focus on profit, this is a likely outcome when a natural monopoly is served by a private operator. Here, consumers will have no alternative but to pay the price set by the operator.[165] In such a situation, effective government regulation is critical. As Professor Stephen King

159 Katz, Michael and Rosen, Harvey, *Microeconomics*, McGraw Hill, Boston, 1998, p 432.
160 It is important to note that the rail freight network has not been privatised, that is, it has not been sold. It remains a State asset that is leased to a private operator.
161 King, Stephen, *A privatised monopoly is still a monopoly, and consumers pay the price*, 24 June 2014. Available at: http://theconversation.com/a-privatised-monopoly-is-still-a-monopoly-and-consumers-pay-the-price-28384. Accessed on 4 August 2014.
162 ibid.
163 ibid.
164 ibid.
165 ibid.

explains, 'if competition is not possible … privatisation and regulation is a compromise solution'.[166] The importance of regulation through legislation and government policy is discussed in Chapters 5 and 6.

The disposal of the government's freight rail business

The decision to sell Westrail's freight business and lease the track network

3.19 The May 2000 *Westrail Freight Information Brochure* was developed to present the Western Australian Government Railways Commission's freight business for sale and lease. The sale items included:

- *Westrail Freight's existing business including current customer contracts*
- *A long term lease over the land corridor and railway infrastructure, including the track*
- *Other assets and liabilities of Westrail Freight including rollingstock, terminals and maintenance facilities. No cash and no borrowings or debt are included in the sale*
- *All the shares in a special purpose company which will employ Westrail Freight employees* at the time of the sale.[167]

3.20 The decision to sell Westrail's freight business and lease the freight rail network was intended to realise a number of benefits to government and the wider community.

3.21 The anticipated benefits of selling the freight business included:

- the introduction of 'an efficient, innovative specialist private rail operator committed to the sustainability of rail transport in a competitive market and willing to make the necessary investments to improve rail's market share';
- 'a renewed stimulus for increased rail freight tonnages, better services, decreased freight rates and increased investment in rail infrastructure and rolling stock';
- a reduction in the 'community costs', such as 'the environmental costs of greater fuel use and the resultant pollution, higher road maintenance costs, and the social costs of road congestion and road crashes';
- the potential for rail to capture as much as possible of the forecast greatly-increased bulk freight demand over the coming decade and so 'avoid a massive increase in heavy truck traffic'; and

166 ibid.

167 Rail Freight Sale Task Force, *Westrail Freight information brochure,* Western Australian Government, Perth, May 2000, p 1.

- the 'potential to capture or recapture freight from road transport'.[168]

3.22 The major benefit of leasing the track network, rather than selling the rail corridor and track, was that it would:

> *ensure that these strategic state assets remain in public ownership and allow the State to maintain ultimate control over track standard and capacity and service continuity, to the extent of being able to intervene to ensure continuation of services in the public interest if necessary*.[169]

3.23 The decision to lease the below rail business to the purchaser of the freight business, and thus provide a vertically integrated operation, was to allow for:

> *maximum economies of scope and scale;*
>
> *maximum responsiveness to customers' needs and new opportunities;*
>
> *integrated above and below rail investment;*
>
> *capital investment in the infrastructure greater than government can provide; and*
>
> *minimisation of costs on low volume routes.*[170]

3.24 According to the Auditor General, 'government viewed the long-term lease arrangements as reducing risk to the state by retaining 'step in' rights for the State in limited circumstances, while providing flexibility and certainty for private sector operators'.[171] The Committee notes, however, that the government's 'step in' rights are at the discretion of the lessee.

3.25 In addition to the above benefits, the sale proceeds would allow the government 'to retire a significant amount of state debt, and reinvest in vital state social and economic infrastructure'.[172] Nevertheless, according to Hon Hendy Cowan, MLA, the transaction was 'not just about the money'; obtaining the best price for a state asset was 'secondary to ensuring that the long-term best interests of the state's industries and communities are served'.[173]

---

168 Hon Hendy Cowan, MLA, Deputy Premier, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 1999, p 8771.

169 ibid.

170 ibid.

171 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 15.

172 Hon Hendy Cowan, MLA, Deputy Premier, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 1999, p 8772. The Auditor General reported that the rail freight system debt to the Treasury Corporation and the Commonwealth was approximately $1 billion.

173 Hon Hendy Cowan, MLA, Deputy Premier, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 1999, p 8772.

3.26 In brief, the disposal of Westrail Freight through a combination of sale and lease was intended to 'optimise the financial return to the State, while also promoting the State's strategic needs and objectives'.[174]

3.27 On the basis of this policy position, the government introduced the Rail Freight System Bill 1999, which, following its passage through Parliament, became the *Rail Freight System Act 2000* (WA). This Act provided the authority to put the government's policy into effect.

Sale and lease of Westrail: A whole-of-business transaction

3.28 In December 2000, the government disposed of Western Australian Government Railways (WAGR), which traded as Westrail, by leasing out the freight rail network under two 49 year leases and, at the same time, selling the rolling stock. The lease instruments are the *Rail Freight Corridor Land Use Agreement (NarrowGauge) and Railway Infrastructure Lease*, and the *Rail Freight Corridor Land Use Agreement (StandardGauge) and Railway Infrastructure Lease*. With the exception of the title, the two lease documents contain mirror provisions, and throughout this report any reference to 'the lease' refers to both leases unless specifically noted.[175]

3.29 The sale and lease was a whole-of-business transaction, with the buyer *and* the lessee being the Australian Railroad Group Pty Ltd (ARG), a vertically integrated railway company comprised of two separate legal entities: Australian Western Railroad (the buyer) and WestNet Rail (the lessee).[176] The objective of selling to a vertically integrated railway company was expressly mentioned in the lease document's Recital E. This states that, amongst other things, the objectives of the agreement include:

> *(b) …. disposing of the Freight Business on a vertically integrated basis; and*
>
> *(c) ensuring that a person using or occupying that part of the Network comprised of standard gauge track has a financial or legal interest in the continued maintenance and operation of the narrow gauge track.*

174 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 15.

175 The lessee of the narrow gauge lines and infrastructure was WestNet NarrowGauge Pty Ltd while the lessee for standard gauge lines and infrastructure was WestNet StandardGauge Pty Ltd.

176 Submission No. 20 from CBH Group, 17 April 2014, p 7; Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 15; and Economic Regulation Authority, 'Access, Rail Access, Brookfield Rail'. Available at: http://www.erawa.com.au/access/rail-access/brookfield-rail/. Accessed on 9 July 2014. ARG was a joint venture between WA-based Wesfarmers and US-based Genesee & Wyoming Inc.

3.30 Vertical integration was significant in the determination of whether a line was uneconomic as defined in the lease. Clause 1.9 clearly states that in determining whether the maintenance of a line was uneconomic, the Avoidable Costs of maintaining that line for a three year period needed to be exceeded by 'all the additional revenue reasonably expected to be derived (directly or indirectly) by the Network Lessee and its *Related Entities* from the use of the Line'.[177]

3.31 Thus, as noted by the Auditor General, the ARG corporate structure allowed freight contract revenue 'to be taken into account when assessing whether a line should be regarded as uneconomic under the lease'.[178]

3.32 The issue of vertical integration was also raised during the second reading of the Rail Freight System Bill 1999. Hon Hendy Cowan, MLA, acknowledged that 'some people have been pressing for vertical separation of Westrail into a track owner and a train operator'.[179] Nevertheless, 'the clear advice to the Government is that this would lead to a loss of efficiency, to the detriment of users, the economy and ultimately the State as a whole'.[180] Mr Cowan also referred to the Productivity Commission draft report, *Inquiry into progress in rail reform*, which concluded that 'vertical separation is unlikely to deliver any significant competitive gains for low volume regional railways' and, 'far from improving the performance of low volume regional railways, vertical separation may actually impair it'.[181]

3.33 While the clear intention was to have the above and below rail parts of the freight business owned and operated as part of a vertically integrated business, it is important to note that while the both the above and below ground businesses were owned by ARG, 'they were both separate legal entities'.[182] This means that the above ground operations are not covered by the lease in any way.

3.34 It is clear that the intention to dispose of the Westrail freight business was to obtain the maximum price possible.[183]

3.35 The Public Transport Authority (PTA) suggests that 'this was done to obtain the best value for money price for the overall sale, as the Wesfarmers-Genesee Wyoming bid

177 Emphasis added. Avoidable Costs is defined in Clause 1.2. The avoidable cost of a line is the difference between the long-term maintenance costs of the entire network and the long-term costs of the network not including the line in question.

178 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 23.

179 Hon Hendy Cowan, MLA, Deputy Premier, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 1999, p 8771.

180 ibid.

181 ibid.

182 Ms Susan McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 3.

183 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 17 December 2014, p 4.

offered an up-front price for the freight business but also an up-front payment of the total rent for the 49 year network leases'.[184]

3.36 The sale and lease of the Westrail Freight realised $586.7 million, $292.5 million of which was prepaid rent for the 49 year lease of the network, with the anticipation of further investment by the lessee.

The disappearing $400 million commitment

3.37 In announcing the successful bidder, the Minister for Transport stated that as well as the up-front payment, ARG had 'undertak[en] to invest $400 million in the track and rolling stock over the next five years—with $280 million of that amount being spent within the first three years'.[185] In effect, as the Minister stated, this transaction would yield 'a net benefit of $985 million to the State of Western Australia'.[186]

3.38 This $400 million undertaking was not incorporated into the lease document.

3.39 The Auditor General's 2013 report notes that 'a range of documents state that the successful bid included a proposal by the bidder to spend $400 million in capital investment during the first five years of the lease', but that this was never included in the lease or other binding agreement.[187] The Auditor General also stated that the documents reviewed during the audit did not explain why this was the case; it 'remains unclear'.[188]

3.40 When questioned by the Committee as to why the $400 million was not incorporated into the lease document, Ms Sue McCarrey, Deputy Director General, Department of Transport, explained that the 'the original draft of the lease agreement actually went out as part of the tender documentation. It was obviously drawn up in advance and it was put out'.[189] Ms McCarrey further explained that 'the $400 million commitment was made after they had been through that process, the winning bidder had been determined and an announcement was made by the government'.[190] The Committee notes, though, that tender documentation can be amended during the course of negotiations, and, as will be demonstrated below, that this occurred during negotiations for the ARG lease.

184 Submission No. 27 from Public Transport Authority, 26 March 2014, p 3.
185 Hon Murray Criddle, MLA, (Minister for Transport), *Government announces winning bid for Westrail freight business*, Media Statement, Government of Western Australia, Perth, 30 October 2000.
186 ibid.
187 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 25.
188 ibid.
189 Ms Susan McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 19.
190 ibid.

3.41 The Committee requested from the Department of Transport a copy of the tender documentation that resulted in ARG's successful bit for Westrail. On 29 August 2014, Mr Reece Waldock advised that 'the sale of the freight rail business and lease of rail freight infrastructure was not part of a tender'.[191] According to Mr Waldock:

> *The sale involved:*
>
> *I. A pre-sale process; the promotion of the transaction to potential purchasers.*
>
> *Advertisements were placed on 31 May 2000, calling for expressions of interest in the sale of Westrail's freight business and an Information Brochure was sent to interested parties.*
>
> *II. The sale process;*
>
> *i. An Information Memorandum was sent to parties who had submitted an expression of interest inviting them to submit non-binding indicative bids.*
>
> *ii. Due diligence and final offers.*
>
> *iii. Execution and completion.*[192]

3.42 When questioned further on this matter, Mr Waldock stated that the reference to a tender had been 'over talked' and what the Department had intended to do was 'make it very clear that it was not a tender process per se; it was a different sale arrangement, which the taskforce pursued with cabinet support'.[193]

3.43 Ms McCarrey further advised that 'that information [about the $400 million] from the consortia at the time' was contained in a media release issued once the agreements had been signed.[194] Therefore, and according to Ms McCarrey's research, that commitment was never intended to be part of the lease.

3.44 It should be noted, though, that the PTA or the Department of Transport were not involved in the sale process or in drafting the lease.[195]

3.45 However, as the government media release cited above demonstrates, the Minister for Transport clearly expected ARG's $400 million commitment to be fulfilled. It seems, then, that there was an expectation by both parties to the agreement that this $400 million above the sale and lease value would be invested by ARG. This might be

191 Submission No. 39 from Department of Transport, 29 August 2014, p 3.
192 ibid.
193 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 17 December 2014, p 2.
194 Ms Susan McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 19.
195 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 17 December 2014, p 9.

interpreted as a legal obligation on the part of the lessee to make that investment regardless of whether it was in the lease document itself.

3.46 What is not clear is what efforts were made by government to ensure that ARG delivered on its commitment. Nor is it clear at precisely what stage ARG first mentioned this intended investment. It is difficult to accept that the first mention would have been on the day the sale and lease was made. While Ms McCarrey stated that 'ARG certainly put a certain amount of investment over the years',[196] no information has been provided that shows how much of the $400 million was invested by ARG during the time it was the lessee or that reassures the Committee that any effort was expended by government in monitoring ARG's efforts in that regard.

Separation of above and below rail operations

3.47 In 2006, ARG, trading as WestNet Rail, which had been purchased for $586.7 million in 2000, was sold. The above rail assets, including rolling stock, terminals and maintenance facilities, went to Queensland Rail, which is now Aurizon.

3.48 The May 2000 Information Brochure lists the rolling stock as including:

- 95 diesel electric locomotives—87 were currently active and 30 were delivered in 1998; and
- a fleet of approximately 2,600 wagons.

3.49 Terminals included those located at Forrestfield, Kwinana, Avon, Picton, West Kalgoorlie, Kalgoorlie, Narngulu, Merredin, Esperance and Albany. Most of these 'include track to facilitate train marshalling, maintenance and locomotive and wagon storage … buildings, housing, maintenance facilities, regional operational management and locomotive operator bases'.[197]

3.50 The bundling of the terminals into the above ground sale effectively meant the sale of an asset that was complementary to the freight rail network. For example, the terminal at Avon is a strategically placed terminal that would be of value to the operators of the grain freight lines. It being part of the above rail infrastructure possibly acts as a barrier to entry to above rail operators into the market.

Finding 1

The decision to sell the marshalling yards to the then above rail operator acts as a barrier to entry to new above rail operators.

196 Ms Susan McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 19.

197 Government of Western Australia, *Westrail Freight information brochure*, May 2000, p 7.

3.51 The rail network lease was sold to Babcock & Brown Infrastructure for $835.5 million.[198] The freight rail network, with Babcock & Brown as lessee, continued to trade as WestNet Rail.

3.52 During the period 2009–2011, the ownership of the lease underwent a number of changes. This complex series of events is succinctly detailed in the Auditor General's 2013 report as follows:

> *In 2009 Babcock & Brown Infrastructure became Prime Infrastructure when parent company Babcock and Brown was facing bankruptcy. In August 2010 Prime merged with Brookfield Infrastructure, a limited partnership with world-wide investments in infrastructure assets. In 2011 WestNet Rail started operating as Brookfield Rail, and is currently wholly owned by Brookfield Infrastructure.*[199]

3.53 At present, Brookfield Rail Pty Ltd remains the lessee of the freight rail network. In relation to the above rail business, in December 2010 CBH Group announced that it had awarded the US-based Watco Companies Group (Watco) its long-term grain rail contract.[200] Prior to that time, Aurizon 'was the only intrastate above rail operator on the network managed by Brookfield Rail'.[201]

3.54 The separation of the above and below rail operations represented a significant and fundamental departure from the government's vertically integrated model outlined in the lease and in Parliamentary debate. As the Auditor General explained, WestNet Rail, as lessee of the network, would no longer receive 'profit from related entities carrying freight over those lines. As a result, it became less attractive to continue operating some lines'.[202]

3.55 PTA has also submitted that when Babcock and Brown Infrastructure purchased ARG:

> *and on-sold the above rail freight business to Queensland Rail in 2006, revenue from the above rail operations which was now no longer a related entity of West Net, was not included in the test for 'Uneconomic' maintenance. This made it easier for WesNet (sic) to*

198 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 16.

199 ibid. See also: Submission No. 20 from CBH Group, 17 April 2014, p 7. As noted in Chapter 1, Brookfield Infrastructure Partners is headquartered in Hamilton, Bermuda, with units traded on the New York and Toronto Stock Exchanges.

200 Submission No. 20 from CBH Group, 17 April 2014, p 8; and Watco Companies, *Western Australia*, np, nd. Available at: http://www.watcocompanies.com/Railroads/WA/WA.htm. Accessed on 10 July 2014.

201 Submission No. 16 from Aurizon Operations Limited, 17 April 2014, p 1.

202 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 16.

> *meet the 'Uneconomic' component of the surrender tests, should they have elected to do so.*[203]

3.56 Given the emphasis placed on the vertical integration of the rail freight business at the time of its disposal, the Committee sought information from PTA in relation to the change in policy. PTA advised that there was no government policy or decision:

> *to allow or not allow the sale of the above-rail and below-rail businesses to different entities that did not have the same ultimate parent company. Government had not maintained a right in the network leases to require Government consent before the below-rail lease operations by the network lessee could be assigned or transferred or before there could be a 'change in control' of the network lessee, WestNet.*[204]

3.57 According to the PTA:

> *the State's right to refuse consent to a change in control of the network lessee or an assignment or transfer by the network lessee to a third party was originally in the lease document but was removed during negotiations with the preferred respondent (Wesfarmers/ Genesee Wyoming consortium).*[205]

3.58 In clarifying this matter, Ms McCarrey advised that the instructing officer for the legislation was not an employee of any section of the transport portfolio. Rather, 'the instructing officer was actually the executive officer for the cabinet subcommittee, so as part of the taskforce'.[206] In 2006, the agency's:

> *internal legal counsel looked at whether there was anything the state government could do to prevent that on-sale. Our legal response was that no, we could not. In fact, under the lease they did not even need to get permission from the state government of the day.*[207]

3.59 It seems that the government was notified of the sale on the day of the sale.[208]

3.60 The fact that the Westrail Freight business had been disposed of through both sale and lease agreements also contributed to the ease with which ARG was able to on-sell the above rail business to Queensland Rail.

---

203 Submission No. 10 from Public Transport Authority, 17 April 2014, p 2.
204 Submission No. 27 from Public Transport Authority, 26 March 2014, p 2.
205 ibid, p 3.
206 Ms Susan McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 3.
207 ibid.
208 ibid.

3.61 As demonstrated throughout this report, this has had major consequences for the operation of the freight rail network.

Have the original objectives for the sale and lease been met?

3.62 A committee of Cabinet, known as the Rail Freight Sale Taskforce, was established to manage the sale and lease of the rail freight business and network. In its final report to government 18 months after the sale and lease transaction, the Rail Freight Sale Taskforce concluded that the four immediate, Cabinet-approved objectives had been met:

- *securing a purchaser who will introduce innovation and operating efficiencies, grow the business, both in Western Australia and elsewhere and invest in the business (both 'above' and 'below' rail assets)*
- *ensuring a fair resolution of all staff issues*
- *ensuring only legitimate risks and liabilities related to the rail freight industry in Western Australia are retained by government, and that these would be minimised*
- *obtaining the best possible price consistent with the achievement of other sale objectives.*[209]

3.63 The sale and lease of the rail freight business and network certainly helped to reduce State debt. According to Hon Hendy Cowan, MLA, Westrail's total debt was approximately $889 million, with the debt allocated to its freight operations being $531 million.[210]

3.64 Removing itself from the rail freight business, the government was also freed of the responsibility of meeting the day-to-day network running costs. Nevertheless, it remains responsible for expenditure for 'works undertaken in the public interest, which the lessee would not necessarily undertake in its own commercial interest'.[211] No estimate was, or has been subsequently, made by government of the anticipated 'public interest' expenditure. As the Auditor General notes, this means that no assessment can be made of whether funding provided by the state and federal governments, totalling approximately $360 million, was 'in line with the original

209 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 20.

210 Hon Hendy Cowan, MLA, Deputy Premier, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 June 1999, p 9354.

211 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 20.

objective that only "legitimate risks and liabilities" would be retained by the State, and that these would be minimised'.[212]

3.65 Nevertheless, as will be discussed throughout this report, not all of the objectives for the sale and lease of the freight rail network have been realised. For example, it seems that government has not retained ultimate control over the standard, capacity and service continuity of the lines, that the government is exposed to particular risks in relation to end-of-lease issues, and that some provisions of the *Rail Freight System Act 2000* (WA) have not been met by the lessee.

Track standards, capacity and service continuity

3.66 The disposal of the rail corridor land was subject to a number of track standard conditions under s 12 of the *Rail Freight System Act 2000* (WA).[213] The lease document also contains a number of provisions relating to track standards, capacity and service continuity. These are mainly contained in Section 1—Purpose and interpretation; Section 15—Maintenance obligations; and Section 16—Surrender of lines.

Legislative limitations on the disposal of corridor land

3.67 Section 12 of the *Rail Freight System Act 2000* (WA) places limitations of the disposal of corridor land, including, under s12(2) that any interest to be disposed of can only be a leasehold interest. There are two provisions of s 12 that are of particular interest to the Committee.

3.68 First, s 12(6) of the *Rail Freight System Act 2000* (WA) requires any disposal (lease) to include an upgrade of the Koolyanobbing—Esperance line to stipulated standards 'if the holder of the land has a contract under which more than 3 million tonnes of freight per year are to be carried on the track between Kalgoorlie and Esperance'. Section 12(6)(a) provides that within two years of the land-holder (the lessee) entering into such a contract, the Koolyanobbing—Esperance track was to be upgraded to a 'standard suitable to allow rolling stock of a 23 [tonne] axle load to travel along it at a maximum speed of 80 km per hour for an average speed of 60 km per hour'. Under s 12(6)(b), the track was to be maintained to that upgraded standard during the term of the lease.

3.69 According to the Auditor General, PTA found the Koolyanobbing—Esperance line upgrade, as required under s 12(6) of the *Rail Freight System Act 2000* (WA), to be unenforceable due to problems with the drafting of the legislation. First, under s 12(3) corridor land can only be disposed of to a company whose main business is to provide

212 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 21.

213 'Disposal', here, refers to leasing the network.

and maintain railway operations and 'is not involved in providing train services'.[214] This means that because the lessee is not able to contract to carry freight, this threshold can never be triggered. The threshold of a single contract for 3 million tonnes of freight per year is unlikely to be reached and, thus, the second condition also would not be met.

3.70 Second, s 12(7) of the *Rail Freight System Act 2000* (WA) relates to the disposal of the standard gauge corridor land between Kwinana and Parkeston. Here, the lessee is to ensure that the track was upgraded to allow 21 tonne axle load rolling stock to travel along the line at a maximum speed of 115 km per hour, and 25 tonne axle load rolling stock to travel at a maximum speed of 80 km per hour.[215] Section 12(7)(b) also requires the upgraded standard on the Kwinana–Parkeston (Kalgoorlie) line be maintained over the term of the lease.

3.71 In relation to the Section 12(7)(b) requirement for increased standards on the Kwinana–Parkeston line, the Auditor General reported that this upgrade was completed in 2010, but that the performance standards had not been amended to reflect the increased standards.

3.72 Issues relating to these two sections of the *Rail Freight System Act 2000* (WA) are discussed further in Chapter 7 on PTA's management of the freight rail network.

Lease conditions for track standards

3.73 Under clause 15.2 of the lease, the lessee is required to 'maintain, replace and repair and upgrade all Leased Railway Infrastructure so that it is Fit for Purpose' during and at the end of the lease period. Under clause 1.2 of the lease, fit for purpose means that the leased railway infrastructure is in a physical condition that:

- meets the requirements of rail users, including third parties under Access Agreements, and under State Agreements and customer contracts;
- meets the requirements of the ss 12(6), (7) and (8) of the *Rail Freight System Act 2000* (WA); and
- complies with the *Rail Safety Act 2010* (WA).

214 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 24. What it means to be 'involved in providing train services' is defined in s 12(4) of the *Rail Freight System Act 2000* (WA).

215 The upgrade was also to ensure that 1,800 metre long trains could cross at all crossing loops that existed at the time of the disposal. Section 12(7)(a)(iii) provides that those improvements are carried out in accordance with any program developed by the holder of the land in co-operation with the Australian Rail Track Corporation Limited.

3.74 However, the lease does not contain 'objective and external design standards to describe what kind of rail line' would meet rail users' requirements.[216] Rather, fit for purpose is directly related to the performance standards contained in the lease. As clause 15.3 states, the Minister and the lessee agree that fit for purpose of the leased railway infrastructure, as listed in Schedule 4 of the lease, means that the infrastructure is 'in the physical condition necessary to meet the Initial Performance Standards or any other standard agreed to by the Minister and the Network Lessee from time to time'.

3.75 Schedule 4, which up until now, has not been publicly available, provides detailed performance standards for each section of track in the network. The Schedule 4 performance standards, which reflect the network condition at the time it was originally leased, consists of specifications in relation to the 'weight, length and speed of trains that the track must be capable of carrying, as well as the type of ballast, sleeper and rail installed on each section of line'.[217]

3.76 Under clause 15.7, the lessee, at each five year anniversary, is to submit a maintenance plan showing 'the works, repairs, replacements, maintenance, additions and other things' reasonably expected as necessary to keep the leased railway infrastructure fit for purpose, 'based on the then prevailing Performance Standards, and to ensure that the Leased Railway Infrastructure will be returned to the Minister in a condition no worse than the Return Condition'.

3.77 Return Condition, under clause 1.2, means 'that each part of the Leased Railway Infrastructure is Fit for Purpose at the expiration of the Term'. This is very different from saying that the lines have to be returned in the same condition they were in the year 2000, which is a view commonly held in the community.

3.78 Clearly, the lease anticipated that performance standards may be changed. Changes in performance standards must be agreed to by both parties and, if necessary, a dispute resolution process established under the lease may be used. Clauses 15.21 to 15.26 set out the responsibilities of the lessee and the Minister in relation to changes in the performance standards.

3.79 As per clause 15.21, one year prior to the five-year anniversary of the lease, the lessee must commission an independent, expert review of its compliance with the performance standards. Clause 15.22 provides that between three and six months prior to the five-year anniversary the Minister or the lessee may propose 'an amendment or addition to or replacement of' a performance standard(s). There are two conditions to be met here:

216 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 28.

217 ibid.

(a) compliance with any or all of those standards will no longer result in any Leased Railway Infrastructure being Fit for Purpose; or

(b) the network Lessee may comply with a lesser standard and still meet its obligations under clause 15.2.

3.80 As noted above, clause 15.2 requires the line to be fit for purpose as defined in clause 1.2. Therefore, performance standards can be raised or lowered provided there is agreement by both parties to the lease and such change means the infrastructure will meet rail users' requirements and any legal obligations. This is a particularly important provision, one that allowed the performance standards on Tier 3 lines to be reduced to 'care and maintenance'. This significant shift in government policy is discussed further below.

Finding 2

Placing a line into 'care and maintenance' means there is no longer a requirement to maintain that line to an operational standard. This results in minimal obligations for the lessee.

Finding 3

The development of the reduced standard 'care and maintenance' in the July 2010 *Project Agreement for Capital Works Dedicated Narrow Gauge Lines* signals a significant shift in government policy.

Finding 4

There is no clear trigger mechanism in the lease or subsequent amendments for the government to recommission the lines placed into care and maintenance.

Recommendation 1

The Western Australian Government not allow any further lines to be placed into care and maintenance.

Recommendation 2

The Western Australian Government work with the lessee to include a trigger mechanism that will allow the recommissioning of lines already placed into care and maintenance.

3.81 Clause 15.17 of the lease refers specifically to the grain network and relates to the lessee's commitment to completing the Grain Line Strengthening Plan. This is also discussed further below.

3.82 Under clause 15.26 of the lease, both parties agreed that performance standards for the entire network and for each part thereof would 'set standards which will result in the Network and each part of it being Fit for Purpose'.

Maintaining and operating marginally profitable lines

3.83 Lease Recital E states that one of the objectives of the government in entering into the lease was to 'ensur[e] that a person using or occupying that part of the Network comprised of *standard gauge* track has a financial or legal interest in the continued maintenance and operation of the *narrow gauge* track'.[218]

3.84 At the time the lease was drafted, then, the government understood two important points: first, some of the narrow gauge lines would probably not be profitable for the lessee; and second, the purely commercial imperative of whole-of-network profit maximisation would result in the deterioration of marginal sections of the network and, ultimately, the early closure of lines.[219]

3.85 As discussed above, the government sought to maintain the continuity of the more marginal lines through the sale and lease of the freight business and network infrastructure as a whole-of-business transaction. Also, as noted above, the lease included performance standards and provided for the adjustment of those standards to keep the lines fit for purpose to meet the needs of all rail users.

3.86 A further mechanism in the lease intended to provide continuity of services is the provision for the surrender of lines in accordance with clause 16. Clause 16(1) provides that after six years from the start of the lease, that is, after 2006, the lessee may request that the Minister terminate the agreement in relation to a particular line provided three tests are satisfied. First, the lessee must demonstrate that there has been a significant reduction in use during a financial year (clause 16(2)(a)). Second, the continued maintenance of the line or the line section would be uneconomic for the following three years or more (clause 16(2)(b). Third, the lessee is otherwise capable of meeting its lease obligations even if that line was not in use. If all three of these conditions are met, then within three months after the end of the relevant financial year, the lessee may notify the Minister of that fact.

3.87 The terms 'uneconomic' and 'significant reduction in use' have particular meanings under the lease. 'Uneconomic' has been described above. 'Significant reduction in use' in a financial year, as defined in clause 1.2, means either traffic has fallen below 200,000 net tonnes over a line or the net tonnes over a line is less than 50 per cent of the average traffic during the three previous financial years.

218 Emphasis added.

219 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 18.

3.88 It is important to note that for traffic to drop below 200,000 net tonnes it must have at some point been at or over 200,000 tonnes. This is a very different measure than saying traffic is less than 200,000 tonnes. The test was a drop below that threshold or a greater than 50 per cent of average traffic over three previous years.

3.89 The 'significant reduction in use' test supports the intent of the lease agreement to ensure the less viable, small load lines continued to operate unless the freight traffic decreased substantially following the asset lease. In this way, the State would realise the intended social dividend while also ensuring that, at the end of the lease period, the entire freight rail network had been maintained and upgraded to reflect market needs. As Chapter 7 demonstrates, PTA's interpretation and management of the lease has not realised either of these aims.

3.90 If all three of the clause 16.2 tests are satisfied, the Minister may either agree to terminate the agreement for the line or line section (clause 16.5(a)) or propose to the lessee:

> *the payment of moneys or other arrangements with the Network Lessee or other person so that maintenance of the Line by the Network lessee for that term is not Uneconomic.*[220]

3.91 In effect, the Minister's decision is whether to allow the lessee to surrender the line or to subsidise the lessee's operation of the network's marginal lines.

3.92 Clause 16 does not apply to certain major routes, and the lessee is not able to consider surrendering these nominated lines.

3.93 The above sections have set out how the lease was intended to work through 'using competitive market forces to deliver the best possible rail freight network, while leaving the policy decision to either subsidise or shut down marginal lines in the hands of the State'.[221] However, this is not how it has worked in practice. This is very clearly demonstrated in the government's policy on marginal grain lines, as reflected in its decisions on grain line strengthening and re-sleepering.

Grain line strengthening and re-sleepering

3.94 Originally a five-year, $125 million project, the 1996 Grain Line Strengthening Plan 'was expanded in 1998 to include work in the period 2001–2004'.[222] According to the Auditor General, estimated government spending between 1995 and 2000 of over $340

220 Lease clause 16.4(6).

221 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 18.

222 Hon Graham Giffard, MLC, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 19 March 2002, p 8451.

million included 'preventative maintenance and the "grain line strengthening plan" in which "1-in-4" wood sleepers were replaced with steel'.[223]

3.95 As noted above, the lessee agreed to complete the Grain Line Strengthening Plan. In March 2002, Hon Graham Giffard, MLC, advised the Legislative Council that:

> *at the time of the sale approximately $120 million had been spent and Westrail estimated that the remaining work would cost about $50 million. The work is due to be completed in June 2004 but no updated cost estimates are available.*[224]

3.96 Under clause 15.7 of the lease, the Tambellup to Gnowangerup and the Katanning to Nyabing lines were to be completed 'as soon as reasonably possible', with all other work to be completed by 30 June 2004, unless there was a 'Material Change in Circumstances'.

3.97 On 10 May 2004, a Deed of Variation to the narrow gauge lease was entered into by the parties to the lease. This amended clause 15.17 of that lease to extend the time for completion of the Toodyay West to Miling re-sleepering to 31 December 2004 and the Bruce Rock to Bullaring, Bullaring to Yilliminning and Katanning to Nyabing lines by 30 June 2008.

3.98 The original Grain Line Strengthening Plan included replacing 1-in-4 wood sleepers with steel sleepers. Under clause 3 of the May 2004 Deed of Variation, the lessee agreed to completely re-sleeper the Pinjarra Yard to Kwinana Yard line with concrete sleepers, and to do so by 31 December 2005. In accordance with clause 4(6) of the Deed of Variation, re-sleepering of this line was to result in the maximum speed and axle load standard of 160 kilometres per hour at 16 tonnes per axle for rail cars, subject to permanent speed restrictions.

3.99 In 2004 the Grain Infrastructure Group (GIG) was established and comprised 'key investors in the grains logistics system'.[225] The purpose of the GIG was 'to examine the logistics of the WA grain freight network' and 'provide a strategic vision for the infrastructure needs of the grain Industry to the year 2050'.[226] Ultimately, though, the

223 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 14 and p 37.

224 Hon Graham Giffard, MLC, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 19 March 2002, p 8452.

225 Grain Infrastructure Group, *Western Australia's grain freight network review. A window of opportunity*, Grain Infrastructure Group, Perth, March 2008, p i. GIG representation consisted of the Department for Planning and Infrastructure, the Australian Railroad Group, Cooperative Bulk Handling and the Australian Wheat Board. GIG replaced the Grain Logistics Committee.

226 Department of Infrastructure, Transport, Regional Development and Local Government, *Independent review of the Grain Infrastructure Group's freight network review*, report prepared

GIG focused on 'the need to survive over the next ten years, given the dramatic current day changes being faced by the Industry'.[227]

3.100 PTA advised the Auditor General that in 2007 the lessee approached government 'seeking to surrender certain low-traffic uneconomic grain lines from the lease, or to obtain State funding to cover losses expected in the continued operation of these lines'.[228]

3.101 The Committee sought clarification as to whether the government could have terminated the lease for sections of the network at that time. Ms Susan McCarrey's response to the question was 'no'.[229]

3.102 However, in light of the Auditor General's 2013 statement about the lessee's approach to government, the Committee sought further clarification from the PTA. Mr David Browne, Executive Director Safety & Strategic Development, PTA, advised as follows:

> *As stated by Sue McCarrey at the hearing on 25 June, there was never any submission under section 16 of the lease received by the government to terminate the lease in relation to any lines.*[230]

3.103 Instead, as the Committee understands, this approach was through various general discussions between PTA and the lessee, together with some correspondence between WestNet and the Minister for Transport at the time. This correspondence is discussed in more detail in Chapter 7.

3.104 The March 2008 GIG report concluded that while, at market rates, rail could not compete with road, when the below ground infrastructure costs of rail re-sleepering and road upgrades over the next decade were factored in 'the rail viable position based on resource cost' made rail 'more than competitive when compared with the Road viable position'.[231]

3.105 The GIG considered options ranging from no track closures to closing approximately 1,000 km of track. The GIG recognised that the closure of the Katanning–Nyabing,

---

by KPMG, 2009, p 11; and Grain Infrastructure Group, *Western Australia's grain freight network review. A window of opportunity*, Grain Infrastructure Group, Perth, March 2008, p i.

227 Grain Infrastructure Group, *Western Australia's grain freight network review. A window of opportunity*, Grain Infrastructure Group, Perth, March 2008, p i.

228 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 37.

229 Ms Susan McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 3.

230 Mr David Browne, Executive Director Safety & Strategic Development, Public Transport Authority, Electronic Mail, 8 July 2014.

231 Grain Infrastructure Group, *Western Australia's grain freight network review. A window of opportunity*, Grain Infrastructure Group, Perth, March 2008, p i.

Tambellup–Gnowangerup and Merredin feeder lines would result in 'the most efficient supply chain'.[232] The GIG also concluded that:

- the returns to infrastructure and service providers were not sufficient to warrant reinvestment in long-term assets;
- the increasing shift of freight from rail to road reduced the sustainability of the rail system; and
- a $400 million investment in the rail supply chain over five years was necessary to avoid the closure of the whole 2,300 km grain line following the deregulation of grain marketing and the fragmentation of the supply chain.[233]

3.106 Of the $400 million, $200 million was for re-sleepering, with all lines retained, $150 million for rail loading infrastructure and storage facility access, and $50 million in state roads to rail receival sites. Without this investment, all three levels of government would 'need to significantly increase road infrastructure expenditure. Logistic resources would be re-allocated away from the grain industry [and] environmental and community impacts will be significant'.[234]

3.107 Nevertheless, the GIG's position was that:

> *the goal of short term efficiency needs to be tempered by the long term strategic requirements both of the Industry and of the community within which it operates at both state and local levels. With some support from Government all lines can be retained and be used in conjunction with road transport to retain volume on the network and to meet season peaks.*[235]

3.108 Aware that in some places market pricing would favour road over rail, the GIG was 'supportive of mechanisms that can be developed to ensure that tonnes that should be moved by rail remain on rail'.[236] GIG Chairman, Mr Eric Lumsden, reiterated the view that both government and industry deem a sustainable rail system 'to be in the interests of growers and the rural and urban communities because WA is the national leader in bulk grain exports that strengthen state and national economic growth'.[237] Rail transportation, said Mr Lumsden, 'is the state government's first choice as a high

232 ibid, p vii.
233 ibid, p vi; and Submission No. 10 from the Public Transport Authority, 17 April 2014, p 4.
234 Grain Infrastructure Group, *Western Australia's grain freight network review. A window of opportunity*, Grain Infrastructure Group, Perth, March 2008, p vi.
235 ibid, p vii.
236 ibid, p viii.
237 Mr Eric Lumsden, Chairman, Grain Infrastructure Group, 'Foreword', *Western Australia's Grain Freight Network Review. A window of opportunity*, Grain Infrastructure Group, Perth, March 2008.

volume transport option due to rail's real economic, social, safety and environmental benefits' and, as such, 'needs to be supported'.[238]

3.109 In August 2008 the calling of the State election meant that the GIG report was not considered by cabinet. The Auditor General reports that in 2009, 'in the absence of a government decision on whether to fund the cyclical replacement of all sleepers on the grain lines, the lessee began withdrawing some lines from service'.[239]

3.110 Clarification was sought from the PTA in relation to what lines were withdrawn, when they were withdrawn and what procedures were followed in relation to this withdrawal of lines from service.

3.111 The PTA advised that from 16 June 2009 to 25 June 2009, the Trayning to Merredin, York to Quairading, Katanning to Nyabing and Tambellup to Gnowangerup lines were withdrawn from service. According to the PTA, 'this was a decision made by WestNet Rail following a long period of discussion, reviews and WestNet Rail's perception of inaction by successive governments'.[240] Furthermore, and particularly because no submission has been made under section 16 of the lease to surrender lines and there was no agreed reduction in performance standards for those lines, the 'action carried out by WestNet to suspend these lines from service is not covered in the lease'.[241]

3.112 This issue is discussed further in Chapter 7.

3.113 However this occurred, the fact that it could occur demonstrates an inherent problem with the lease. There are no clear remedies if there is a unilateral withdrawal of lines or suspension of lines from service.

3.114 The Committee understands that this situation was then subsumed into the discussions between WestNet Rail and the government in relation to the need for re-sleepering of grain lines and the responsibilities of the lessee in relation to that re-sleepering and the state government's establishment of the Strategic Grain Network Committee (SGNC).[242] This is discussed further below.

3.115 In March 2009, the Commonwealth Government commissioned KPMG to review the 2008 GIG study. In part, this review was to draw:

238 ibid.

239 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 37.

240 Mr David Browne, Executive Director Safety and Strategic Development, Electronic Mail, 23 July 2014.

241 ibid.

242 ibid; and Mr David Browne, Executive Director Safety and Strategic Development, Electronic Mail, 18 July 2014.

> *conclusions about the veracity of the GIG's conclusions and recommendations and to provide advice to the Commonwealth Government on the options that exist to ensure the development of a more sustainable grain freight supply chain in Western Australia.*[243]

3.116 The KPMG review found that:

> *at an overall level, the costs of the proposed investment package are likely to significantly exceed the benefits. … In other words, the costs of maintaining all rail lines are likely to be higher than the additional costs of having more grain freight on the roads and providing capacity to suit.*[244]

3.117 Overall, KPMG found that the business case to support the GIG's conclusions and recommendations was not strong and 'would require placing a very high value on the external costs of greater use of roads than would appear to be justified by the available evidence'.[245] However, as the Auditor General notes, the KPMG report was silent on 'whether the grain lines would be uncompetitive with road freight if the lessee's costs of completing the major re-sleepering works were passed on to rail users in higher access charges'.[246]

3.118 In August 2009, the PTA commissioned and paid for an expert review of the lessee's claims that 'most of the grain lines were uneconomic in 2009'.[247] According to the Auditor General:

> *the review agreed that some sections of the grain network had degraded to the point where they were now unfit for purpose, and that most of the narrow gauge grain network would rapidly become unfit for purpose unless the cyclical re-sleepering works were carried out.*[248]

3.119 It is not clear to the Committee how these sections of the network could have degraded to such an extent that they were no longer fit for purpose as required in the lease, particularly given the maintenance provisions contained in clause 15 of the lease.

---

243 Department of Infrastructure, Transport, Regional Development and Local Government, *Independent review of the Grain Infrastructure Group's freight network review*, report prepared by KPMG, 2009, p 3. The precise date of publication of this report is not known, but consultation was conducted over March and April 2009.

244 ibid.

245 ibid, p 4.

246 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 37.

247 ibid.

248 ibid.

3.120 At a hearing, Mr Mark Burgess, PTA's Managing Director, advised that 'these were never great rail lines to start with. The network developed over a century. Some of those tier 3 lines … were fairly substandard lines when they were constructed'.[249] Furthermore, the PTA advised that the lease contemplated those branch lines 'potentially closing in 2006. … the performance standards are a snapshot of how those lines were performing almost at the last day Westrail was running them, so to speak'.[250] The lines also passed the five-yearly audits undertaken by WorleyParsons, so in 2005 they were meeting the performance standards of the lease.[251]

3.121 Also in mid-2009, and in response to the KPMG report, the state government established the SGNC. The SGNC's report, the *Strategic Grain Network Report* (SGNR), published in December 2009, is discussed in detail in Chapter 4. That report provided the basis of current government policy in relation to the grain lines.

3.122 In brief, the SGNR divided the network into three categories, Tier 1, Tier 2 and Tier 3, based on their economic efficiency and competitiveness with road transport. While finding that rail remains an economically and socially effective means of meeting WA's freight task, the SGNR noted that periodic re-sleepering works were due, which would require a $258 million investment.[252]

3.123 The SGNR recommended that the required total of $164.5 million be invested into the Tier 1 and Tier 2 lines, but that the $93.5 investment required to similarly upgrade Tier 3 lines could not be justified. The SGNR recommended that the $93.5 million would be better spent improving the capacity and efficiency of WA's freight network in other ways. Key among these alternatives was the 'Brookton Strategy'.[253]

3.124 The SGNR recommendation that Tier 3 line re-sleepering not be undertaken was accepted by government and funding was granted to undertake re-sleepering on Tier 1 and Tier 2 lines. However, as Chapter 4 notes, the Brookton Strategy has not been fully implemented.

3.125 According to the Auditor General, in June 2010, the lessee declined 'to enter into an access agreement with a grain freight carrier' as the operation of those grain lines was not economic.[254] The Minister for Transport 'directed PTA to negotiate a resolution on

249 Mr Mark Burgess, Managing Director, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, pp 12–13.
250 Mr Mark Burgess, Managing Director, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 13.
251 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 13.
252 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, p 8 and p 11.
253 ibid, pp 13–14.
254 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 38.

the grain lines, including the unfinished works under the GLSP [Grain Line Strengthening Plan]'.[255]

3.126 In July 2010, the *Project Agreement for Capital Works* was entered into in relation to re-sleepering works on particular line sections to enable performance standards to 'remain at or above the Initial Performance Standard as detailed in the NarrowGauge Lease'.[256]

3.127 This Project Agreement set out the re-sleepering requirements, with a shift from 1-in-4 steel/timber sleepers to a 1-in-2 steel/timber sleeper combination. The agreement also provided for the replacement of failing timber sleepers and the reuse of removed timber sleepers of an adequate standard. The Project Agreement related to 29 line segments—16 in Tier 1 lines, 3 in Tier 2 and 10 in Tier 3.

3.128 The *Project Agreement for Capital Works* 'states that without government funding for re-sleepering works, 67 per cent of the grain network (1 450 kilometres of track including nine Tier 1 and 2 lines) would be placed in non-operational care and maintenance by 2013–14'.[257]

3.129 Care and maintenance is not defined in the original lease, but is introduced into the *Project Agreement for Capital Works* under clause 1.1(10) to mean:

> *a Line Section which, due to the Initial performance Standards not being satisfied and where line speeds are such that it is no longer efficient or safe to transport grain on the Line Section, is no longer maintained to an operations standard.*

3.130 Importantly, though, these lines, once placed into non-operational care and maintenance, remain under the control of the lessee. It is not clear if this is what the SGNR intended by recommending throughout the report that certain lines be 'formally closed'.

3.131 Given the negotiations that were underway at the time, this seems like an ideal time to renegotiate the surrender of certain lines and to remedy the loophole in the lease in relation to the works on the Koolyanobbing—Esperance line, as discussed above.

3.132 The cost to government of the Capital Works program was $258 million, as estimated in the Strategic Grain Network Committee's 2009 report.[258] WestNet's funding

255 ibid.

256 *Project Agreement for Capital Works. Dedicated Narrow Gauge Grain Lines*, Schedule 1: Program of Works, 9 July 2010.

257 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 38.

258 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, p 7.

contribution was $16.5 million in 'cash, and/or materials and/or project management labour, to a cash equivalent value'.[259] Clause 3.2 of the *Project Agreement for Capital Works* states that the $16.5 million was to contribute to works on the Great Southern Railway and the Lakes District.

3.133 Clause 3.4 of the lease provides that the payment of the $16.5 million would 'satisfy WestNet's remaining obligations under the Grain Line Strengthening Plan as detailed in clause 15.17 of the NarrowGauge Lease'. In effect, the *Project Agreement for Capital Works* waived the requirement for the lessee to complete the Grain Line Strengthening Plan and to spend money earmarked for that purpose on other works.[260]

3.134 Analysis conducted by the Office of the Auditor General 'indicates that $29 million of works on the GLSP were outstanding at the time that these works were waived, but the lessee costed the remaining works at $16.5 million'.[261]

3.135 The *2013–2014 Annual Report on State Finances* noted that expenditure on the Grain Freight Re-sleepering Program had been 'lower than budgeted'.[262] The Department of Transport advised that '$23 million of the $156 million underspent is attributed to the Grain Freight Re-sleepering Program'.[263]

3.136 The waiving of the re-sleepering requirements and the creation of the 'care and maintenance' standard indicate a significant shift in government policy in relation to the performance standards of sections of the rail network.

3.137 In June 2012, a Deed of Variation for the standard gauge lease was entered into. Under this Deed, the PTA undertook to upgrade the standard gauge line between Koolyanobbing and West Kalgoorlie and the lessee 'agreed to maintain that upgraded section of railway in the same condition received on the Variation Date'.

3.138 These amendments to the original leases demonstrate the government's willingness to continue contributing to the upkeep of the network to June 2012. That position seems to be as a result of several factors, including the lessee's discussion with government surrounding certain uneconomic grain lines and government reports on the viability or otherwise of the grain lines. The viability of lines clearly impacts upon the continuity of service, something that the government in 2000 wanted to keep in State hands. The government's recent unwillingness to make further investments in the maintenance of

259 Clause 3.3(1) *Project Agreement for Capital Works. Dedicated Narrow Gauge Grain Lines*, Schedule 1: Program of Works, 9 July 2010

260 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 38.

261 ibid.

262 Department of Treasury, 2013–2014 Annual Report on State Finances, Government of Western Australia, Perth, p 210.

263 Mr Reece Waldock, Director General, Department of Transport, Letter, 3 October 2014, p 2.

certain lines and to leave the continuity of service in the hands of the lessee and access proponents also indicates a shift from the original position.

3.139 Hon Dean Nalder, MLA, Minister for Transport, has submitted that:

> *the State Government continues to support operations on, and the funnelling of grain to, commercially viable rail lines, which by definition are not reliant on ongoing Government funding. The State Government has not received a comprehensive business case to suggest the Tier 3 lines are commercially viable. Provided proper procedure is followed and sufficient information is provided for the Government to make an informed decision, the State is willing to review and comment on industry proposals as part of Cabinet and Budget processes.*[264]

3.140 The Committee notes the ongoing government investment in Tier 1 and Tier 2 lines.

3.141 The current policy on the freight rail network remains firmly based on the SGNR. This is discussed further in Chapter 4. The adequacy of the government's current position is discussed in Chapters 7 and 10.

Finding 5

The lease and the variations are unnecessarily complex, which has resulted in limited capacity to achieve the objectives and intent of the original government policy.

Finding 6

The lease would have better served the interests of the state if it had had some of the characteristics of a State Agreement, including a greater level of transparency and accountability.

264 Submission No. 38 from Hon Dean Nalder, MLA, Minister for Transport, 8 August 2014, p 3.

Chapter 4

The Strategic Grain Network Review

Introduction

4.1 In 2009 a committee comprised of key stakeholders in Western Australia's (WA's) grain and freight industries met regularly over a four-month period and 'intensively reviewed grain logistics supply chains [and] infrastructure usage trends', with a view to developing policies appropriate for meeting the needs of the state's current and future grain freight task.[265] That process resulted in a private consultant's report, namely the 2009 *Strategic Grain Freight Network Report* (the SGNR).[266]

4.2 As the SGNR has served as the basis for government policy to the current time, this chapter begins by outlining the history and role of the Freight and Logistics Council of Western Australia, which oversaw the SGNR process. The factors that resulted in the commissioning of the SGNR are also explored. Focus then shifts to some specific aspects of the SGNR, including an overview of its findings and an explanation of the SGNR's classification of lines within the grain freight rail network as Tier 1, Tier 2 or Tier 3.

4.3 A key element within the SGNR is its recommendation that the government implement a series of measures that were collectively described as the 'Brookton Strategy'. However, the Brookton Strategy has not been fully implemented. Furthermore, the procurement by CBH Group in 2011 of $175 million worth of locomotives and rolling stock was a fundamental change to the grain freight landscape in Western Australia (WA). In discussing these factors, this chapter also raises the question as to whether the SGNR has any contemporary relevance.

The Freight and Logistics Council of Western Australia

4.4 WA has a total land area of 2,529,875 square kilometres, which makes it the second largest country subdivision in the world behind the Sakha Republic in Eastern Siberia.[267] This size, combined with the heavily populated coast and remoteness of most key

265 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, p 24.

266 ibid.

267 Geoscience Australia, *Area of Australia—States and Territories*, 18 November 2010. Available at: http://www.ga.gov.au/education/geoscience-basics/dimensions/area-of-australia-states-and-territories.html. Accessed on 27 June 2014.

export industries, makes the need for efficient supply chain logistics especially important—and a particular challenge for the Western Australian Government.

4.5 In March 2009, to help meet this challenge, the then Minister for Transport, Hon Simon O'Brien, MLC, established the Freight and Logistics Council of Western Australia (the Council). The objective was to create 'a forum for industry decision-makers to talk with Government policy-makers at a senior level about supply chain efficiency in this state'.[268] According to the Council, the opportunity it provides to government 'to enrich its policy deliberations with independent industry input is invaluable'.[269]

4.6 Issues brought before the Council, which meets on a monthly basis, arise both from within the Council's membership and from the Minister for Transport, with the aim of forming policy advice that is informed by stakeholder requirements. Issues raised with the Council are progressed through a process of research and/or advocacy. On occasion, the Council undertakes independent research into issues that are affecting, or may affect, supply chain efficiency in WA.

The Strategic Grain Network Committee's review of Western Australia's grain freight supply chain

4.7 At the Minister for Transport's request, one of the first issues considered by the Council was WA's grain freight supply chain logistics. In considering this matter, the Council set up the Strategic Grain Network Committee to undertake a study into the grain freight network. This study was completed over the course of 2009 and in December 2009 the Strategic Grain Network Committee published the results in its report entitled the *Strategic Grain Freight Network Report* (the SGNR). As noted, the SGNR has provided the basis for subsequent government policy to the current time. For example, as recently as June and August 2014 the SGNR was drawn upon by the Minister for Transport, Hon Dean Nalder, MLA, in Parliament to answer questions regarding current government transport policy.[270]

4.8 In brief, the basis for the commissioning of the SGNR was twofold: the 2008 deregulation of Australia's grain export market; and the fact that the vast majority of the 2,135 kilometres of WA's rail freight network over which grain was conveyed was in need of re-sleepering.[271] The view was that if the cost of this re-sleepering was passed

268 Freight and Logistics Council of Western Australia, *About the Council*. Available at: http://freightandlogisticscouncil.wa.gov.au/about-the-council/. Accessed on 27 June 2014.

269 ibid.

270 Hon Dean Nalder, MLA, Minister for Transport, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 June 2014, pp 4583–84; and 14 August 2014, pp 5309–10. See also: Ms Susan McCarrey, Deputy Director General, Department of Transport, Transcript of Evidence, 17 September 2014, p 15.

271 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, p 7.

on to rail users in the form of higher access fees, conveying grain freight over rail would have become prohibitively expensive. This would have resulted in the burden of the freight task being borne by Western Australian roads. It was acknowledged that the Western Australian Government would need to invest capital into the freight rail network to effectively subsidise the cost of rail access.[272] The SGNR represented an investigation by government into how best to make this investment.

Findings of the SGNR

4.9 In considering how best to meet the state's grain supply chain challenge, the Strategic Grain Network Committee divided the statewide freight task into four distinct 'zones', and articulated specific freight strategies to meet the requirements of each of those zones. The SGNR contains 24 findings each pertaining to the economics of conveying grain freight to the ports of Geraldton, Kwinana and Albany over the relevant parts of WA's rail network. Findings 1–8 are quite broad in scope and refer to the investigation undertaken by the Freight and Logistics Council generally, and the freight policy principles that informed the review. Findings 9–19 are more specific, pertaining either to individual lines or network segments; in many instances, these specific findings are more akin to recommendations made by the Freight and Logistics Council as a result of its consideration of the overall freight rail network. Findings 20–24 are effectively recommendations as to how policies might be developed and implemented to meet the needs of the future freight task in WA.[273]

4.10 It is not necessary for the SNGR findings to be repeated here. In a general sense, the SGNR found that:

- maintaining a strong and efficient rail network in WA is, in general, an economically and socially effective way to meet the needs of the state's freight task;[274]
- while there is a good business case for the government to commit public money to the long-term retention of many freight lines, the same cannot be said for all freight rail lines;[275]
- the deregulation of grain handling and marketing had 'profoundly affected the economics of the grain network', by making road freight a more cost-effective method in some areas;[276]

272 Ms Susan McCarrey, Deputy Director General, Department of Transport, *Transcript of Briefing*, 10 February 2014, pp 3–4.
273 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, pp 8–10.
274 ibid, p 8.
275 ibid, p 8.

- any investment of public money into upgrading the rail network should be made so as to enhance the efficiency of the network by delivering economies of scale;[277]

- a total of $164.5 million should be invested in upgrading those rail lines which bear long-term retention;[278]

- a further $93.5 million would be required if the entire rail network were to be upgraded, but any such investment would be an inefficient allocation of resources;[279]

- approximately $320 million of public money should be invested into a 'substantial program of road works', in grain-growing areas;[280]

- the Western Australian Government should, as a priority, invest money into upgrading the 'core [rail] network', in preference to road network upgrades;[281]

- lines that are not able to be used in an economically efficient way should be closed and, to ameliorate the effect of these closures, the WA Government would need to fund upgrades to the road network to enable it to cope with the likely increase in road grain freight, and upgrades to grain storage and rail loading facilities in Brookton and Kellerberrin;[282]

- the WA Government should commit to funding 'recommended investments' in the core rail network 'for at least the next 10 years', so as to 'provide a stable policy climate to encourage private sector investment in grain supply chain assets';[283] and

- an overall road freight network strategy should be devised and implemented so as to reduce the network of routes used for road grain freight movements.[284]

276 ibid, pp 8-9.
277 ibid, p 8.
278 ibid.
279 ibid.
280 ibid, p 10.
281 ibid, pp 9–10.
282 ibid, p 9.
283 ibid, pp 9–10.
284 ibid, pp 8–10.

Tiers 1, 2 and 3

4.11 A key element of the SGNR is its division of the grain line sections of the Western Australian rail network into three 'tiers' according to economic efficiency. Explaining the logic of this system of classification, the SGNR notes that:

> *[t]he [WA] rail network comprises a system of line sections heavily used close to ports, and more sparsely used moving into the wheatbelt extremes. Parts of the rail network are already so thinly used as to be redundant. Other parts carry substantial enough volumes to consider them essential … In between are the sections for which a choice between road and rail investment can be made on financial and economic grounds.*[285]

4.12 Based on this logic, the SGNR coined the terms 'Tier 1', 'Tier 2' and 'Tier 3' to describe the various line sections of the grain line of WA's rail freight network.

4.13 **Tier 1** lines were described as 'core line sections that form the basic structure of the network'. These lines were 'mostly carrying heavy volumes', and able to offer a competitive advantage over road as a method of freight conveyance.[286]

4.14 **Tier 2** lines were described as 'branchlines where rail services are viable based on current access rates and above-rail costs'. These lines were economically competitive with road networks and, as such, their ongoing maintenance represented an 'investment choice' for government: funding could either be directed into maintaining these lines or else upgrading the parallel road network in the alternative.[287]

4.15 **Tier 3** lines were described as 'branchlines mainly with light track, inefficient loading arrangements and low volumes'. Noting that these lines were not competitive with road networks, the SGNR stated that '[i]n the new deregulated export grain market environment, these lines will cease to be used'.[288]

4.16 The SGNR, though, may have overestimated the full impact of deregulation of the export grain market. Furthermore, the effects of the deregulation are ongoing.

4.17 Having classified the various components of the freight rail network into these three tiers, the SGNR then noted that the freight rail network in its entirety was 'at or near the point … where periodic resleepering works are due'.[289] The SGNR estimated that to finance this necessary maintenance:

285 ibid, p 11.
286 ibid.
287 ibid.
288 ibid.
289 ibid, p 8 and p 11.

- Tier 1 lines would require an investment of $121.2 million;
- Tier 2 lines would require an investment of $43.3 million;[290] and
- Tier 3 lines would require an investment of $93.5 million.[291]

4.18 On the basis of the assessed viability of each of the three line classifications, and in line with the overall SGNR finding that rail is an economically and socially effective way to meet the needs of WA's freight task, the SGNR recommended that the required total of $164.5 million be invested into the Tier 1 and Tier 2 lines, but that the investment required to similarly upgrade Tier 3 lines could not be justified on the basis of their use. The SGNR accordingly recommended that the $93.5 million required to upgrade Tier 3 lines would be better expended in enhancing the capacity and efficiency of WA's freight network in other ways. Key among these alternatives was the 'Brookton Strategy'.[292]

The Brookton Strategy

4.19 The SGNR outlines the Brookton Strategy as the preferred option for the Kwinana South zone, which is where the majority of Tier 3 lines are located. As such, the Brookton Strategy stood as the SGNR's direct alternative to upgrading these Tier 3 lines. To curtail an increase in road grain freight to port that would result from the closure of Tier 3 lines, the Brookton Strategy would facilitate the transfer of more than 500,000 tonnes of grain freight onto rail at Brookton and Kellerberrin from farms in the Kwinana South zone.[293]

4.20 The Kwinana South zone, defined as the area bounded by Northam, Narrogin, Kondinin and Merredin, is spanned by several narrow gauge rail lines. In assessing the viability of these lines, the SGNR noted that these lines 'run very indirectly to the [Kwinana] port, [and add] at least 100 km over the mostly direct route from most bin sites'.[294] Furthermore, transit to port on two of the lines required transhipment of grain onto standard gauge lines at Merredin, and it was noted that there were 'few fast loading sites in the area'.[295]

4.21 Prior to grain export deregulation, grain freight pricing in WA had been system-wide, which effectively saw the higher rail freight cost within the Kwinana South zone cross-subsidised. The SGNR noted that the change to 'site-based' pricing—which arose as a consequence of deregulation—'the non-competitiveness of [Kwinana South zone] sites

290 This did not include investment on the Miling line, which was ongoing at the time.
291 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, p 8 and p 11.
292 ibid, pp 13–14.
293 ibid.
294 ibid, p 13.
295 ibid.

has become very clear'.[296] The concern expressed within the SGNR was that the non-competitiveness of rail in the Kwinana South zone would see 'a very large proportion of grain … transfer to the road network'.[297] To ameliorate the effect of this transfer, the SGNR recommended investment into the road network in the zone to ensure that 'affected road routes are fit for purpose'.[298] Furthermore, '[t]o avoid grain from this area being trucked to Kwinana directly', the SGNR recommended the implementation of 'a joint government/industry project … aimed at maximising the efficiency of the rail loading site at Brookton'.[299]

4.22 The Brookton Strategy was to consist of three elements of investment:

- elevated bin capacity at Brookton;
- extended siding lengths at Brookton and Kellerberrin; and
- 'some road works', in the Kwinana South zone, to ensure road freight routes to Brookton and Kellerberrin were adequate.[300]

4.23 According to the SGNR, implementation of the Brookton Strategy would result in the Brookton site becoming 'a viable transfer point for over 500,000 tonnes each year'.[301] The view expressed within the SGNR was that rail lines in the area would cease to operate regardless of whether or not they were formally closed and, as a consequence, 'the risk is that up to 600,000 tonnes could be lost from the rail network and would reach port by road'.[302]

4.24 It must be noted that although the Brookton Strategy was 'agreed in principle' by members of the SGNR Committee, its implementation was contingent upon an investment of public money into three specific areas. The SGNR called upon the Western Australian Government to:

- provide capital for upgrading the Brookton loading site;
- commit approximately $88.1 million to upgrade roads in the Kwinana South zone for the routes connecting bins no longer served by rail to Brookton/Kellerberrin; and

296 ibid.
297 ibid.
298 ibid.
299 ibid.
300 ibid, p 14.
301 ibid, p 13.
302 ibid.

- subsidise rail access charges for lines connecting Brookton to port, at a total cost of $14.4 million between 2011 and 2016.[303]

4.25 Industry would support the Brookton Strategy by committing to long-term, fixed price rail access from the Brookton site to port. In advocating the Brookton Strategy, the SGNR acknowledged that the proposal would 'demand a new level of co-ordinated involvement by industry and government agencies responsible for the rail and road systems, [as well as] some operational funding support'.[304] This funding would be offset, however, by an associated avoidance of 'more expensive road upgrades in the outer metropolitan area'.[305] As the Brookton Strategy would involve the closure of Tier 3 lines in the South Kwinana zone, facilitating the desired outcomes of the strategy would require 'State Government agencies … to take a leadership role'.[306]

4.26 Unfortunately no such initiative was taken by any state government agency, and the Brookton Strategy was never progressed.

4.27 The Brookton Strategy was contingent on investment from the state government (into road and rail sidings in and around Kellerberrin and Brookton) and from CBH Group (into rapid loading facilities at the Kellerberrin and Brookton terminals).

4.28 In answer to a question as to why the Brookton Strategy had not been triggered, Ms McCarrey stated:

> *the Brookton strategy was set up based on the closure of the tier 3 lines, and the intent was that CBH was to introduce rapid-loading facilities at Brookton and Kellerberrin … CBH have not upgraded those rapid-loading facilities […]*
>
> *Because the tier 3 lines have not closed, and the rapid-loading facilities have not been upgraded, therefore the actual strategy had not been implemented […]*
>
> *Should that upgrade occur, then you [government] could extend the rail sidings to assist in that upgraded rapid loading facility. CBH tells us that without updating to rapid loading facilities, it is achieving good loading. The rail sidings at this stage have not been extended.*[307]

4.29 The incentive for each party to fulfil its particular commitment under the Brookton Strategy is clearly linked to the performance of the other party's commitment. In other

303 ibid, p 14.
304 ibid.
305 ibid.
306 ibid.
307 Ms Susan McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, pp 14–15.

words, absent a collaborative approach, the Brookton Strategy will never be implemented. It is imperative that PTA and CBH Group work together to achieve the intended outcome.

CBH Group's entry into above-rail operations

4.30 The decision by CBH Group in 2010–2011 to invest $175 million in new rolling stock and to move into above rail freight operations fundamentally changed WA's grain freight landscape. As this decision occurred subsequent to the production of the SGNR, its policy implications are significant.

4.31 The findings and recommendations within the SGNR were modelled on data drawn from the rolling stock that was in use in 2009, but which is no longer in use for the grain freight task. In a submission, CBH Group provided an overview of the locomotives and wagons that had been purchased, highlighting the extent to which this new rolling stock undermined the modelling that had been done by the SGNR.

4.32 The new locomotives purchased by CBH Group for the grain freight task 'deliver higher horsepower, with more efficient tractive effort than the old … grain locomotive fleet', which had an average operational age of over 35 years.[308] Being new, these locomotives 'provide considerable improvements in reliability, fuel savings, higher grain hauling capabilities and modern technologies that can greatly reduce train operating costs'.[309] Furthermore, CBH Group's locomotives are 'built to US Tier 2 emission standards', and as such offer reduced carbon emissions and in comparison to both the old locomotive fleet and competing road transport alternatives.[310]

4.33 The purchase of 'state of the art' wagons was another component of the $175 million investment made by CBH Group. Where the previous wagon fleet consisted of converted coal wagons which had a wheat payload of 38 tonnes per wagon, the newly-procured narrow gauge wagons, which are fabricated largely out of aluminium, can carry a wheat payload of 47 tonnes on the same axle loading rating (and could carry even higher payloads if line capacity permitted).[311] In addition, these new wagons are shorter in length, which permits a greater number of wagons to be loaded at many locations where track siding lengths are restricted. According to CBH Group, the fact that more wagons—each with their greater capacities—can be loaded results in 'significantly more tonnes per trip and at a reduced cost'.[312] Furthermore, '[t]esting of the wagons has shown significantly reduced track wear through improved design,

308 Submission No. 20 from CBH Group, 17 April 2014, p 8.
309 ibid.
310 ibid, p 9.
311 ibid.
312 ibid.

therefore enhancing the rail network and reducing the need and costs for maintenance'.[313]

4.34 The view expressed by CBH Group is that, 'with the introduction of such a considerable innovation in above rail operations, it is considered that the conclusions of the SGNR are no longer valid as they are based on out of date assumptions'.[314]

The contemporary relevance of the SGNR

4.35 Almost four years after the publication of the SGNR, a Matter of Public Interest was moved by the Leader of the Opposition in the Legislative Assembly, Hon Mark McGowan, MLA, regarding the impending closure of those parts of the rail network classified as Tier 3. In speaking to the motion, the then Minister for Transport, Hon Troy Buswell, MLA, cited the SGNR and referred to the Brookton Strategy in explaining the reasons why those lines were to be closed.[315]

4.36 The Committee broadly agrees with the assessment by the Minister that the SGNR is 'a very good document'.[316] However, the Committee heard considerable evidence that challenged some of the assumptions informing the SGNR.

4.37 Mr Ian Lane, a grain grower from Merredin, explained that increasing farm productivity would likely increase the magnitude of the freight task over time. According to Mr Lane, forecasts of a decline in wheat yield were misguided because Western Australian farmers 'are so far ahead of the game that [they] are literally breaking all the rules'.[317] Mr Lane explained that:

> *in 1994, if you grew 20 kilos of grain per millimetre of rainfall, you were considered an exceptional producer. The state average in 1994 was 25 kilos per millimetre of rainfall. In 1997, it was 28 kilos per millimetre of rainfall … With our ability to use stored summer moisture, feed it off, get it through the frost period and harvest it, as proven last year, and will be proven this year and next year, we are the most efficient dryland farmers in the world and we will continue to be that because we have to to survive.*[318]

4.38 This evidence echoed evidence given by Cr Rodney Forsyth of the Shire of Kellerberrin, who explained that:

313 ibid.
314 ibid.
315 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 October 2013, pp 4824c–4835a.
316 Hon Troy Buswell, MLA, Minister for Transport, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 October 2013, p 6 of pp 4824c–4835a.
317 Mr Ian Lane, Farmer, *Transcript of Evidence*, 27 May 2014, p 5.
318 ibid.

> *farming is evolving that fast … [and] farmers are ahead of the game. Unfortunately, the rail has been left behind … There has been a slip-up somewhere for sure, and it has not been recognised that farmers are so quick on increasing production.*[319]

4.39 It was also asserted by Mrs Lindsay Tuckwell, a grain grower from Kondinin, that the SGNR was based upon 'flawed information' and did not accurately forecast the cost of road transport, primarily because '[t]he [full future] cost of maintaining the roads are not fully extrapolated in [the] report'.[320] Speaking about the Miling line—which was classified in the SGNR as a Tier 2 line—Cr Ken Seymour of the Moora Shire Council explained that the current difference in freight rates from Miling quite clearly indicate that rail is much more cost efficient than road transport. Cr Seymour explained that:

> *the Miling freight rate in last year's harvest was $20.55. I rang a local contractor two hours ago and asked him how much the rate would be from Miling to Kwinana and he said $26.50, so it is $6 dearer to cart the grain down to Kwinana*.[321]

4.40 Further emphasising what he saw as a clear advantage in rail freight, Cr Seymour added that—the cost advantage of rail notwithstanding—if farmers did for some reason want to convey their grain to port via road it would be 'basically impossible for most farmers to do that because there are just not enough trucks'.[322]

4.41 Criticism that in 2014 the SGNR is obsolete was summarised by the President of the Western Australian Farmers Federation, Mr Dale Park, who explained why the move by CBH Group into above rail operations had so fundamentally shifted the dynamics of WA's grain freight industry. Mr Park explained that in the time since the report was prepared:

> *CBH have actually invested $175 million into rail. You would think that buying new rail would actually make their costs higher rather than lower. They have actually lowered the cost. As I say, Narembeen is the one that sticks in my mind; I think they have taken it from, I think, $35 down to $23 a tonne, [a price that includes] the train drivers, has the fuel, has the new rolling stock in this case and pays the interest on it, and still they have dropped the price. So the whole situation changed quite significantly as far as rail went… Nothing stays the same. I think the circumstances have changed quite drastically for both road and*

319 Cr Rodney Forsyth, Delegate, Great Eastern Country Zone, *Transcript of Evidence*, 27 May 2014, p 6.
320 Mrs Lindsay Tuckwell, Grain Grower, *Transcript of Evidence*, 27 May 2014, p 3.
321 Cr Ken Seymour, Moora Shire, *Transcript of Evidence*, 27 May 2014, p 5.
322 ibid, p 5.

> *rail. You have to recognise that things have moved on and it is about time Brookfield actually realised.*[323]

4.42 Mayor Troy Pickard, President of the Western Australian Local Government Association (WALGA), also expressed concern in relation to what he described as 'a significant deficiency of [the SGNR]'.[324] According to Mayor Pickard, 'there was very shallow understanding of the true costs of carting the grain on the local, and indeed the state, road network'.[325] Mayor Pickard has been:

> *encouraging successive transport ministers that a starting point to understand the cost implications would be to do a cost–benefit analysis of road versus rail, if that was the desirable outcome, and that they would need to review that report to not only update the inputs that have changed—there are many—but also, importantly, actually have a solid understanding of the costs of the road network. We have seen, through the allocation of the $114 million to widen, and in some instances completely resurface, the road that that was insufficient to the extent where it was spread too thinly and now we are ultimately going to pay the consequence.*[326]

4.43 The Committee considers the comments by growers and members of local governments to be compelling evidence that the SGNR should no longer form the basis of government policy in WA. Two further important factors underscore this view. First, there have been significant changes within the grain freight market in WA in the time that has elapsed since the SGNR was published. A particularly important factor was the 2008 deregulation of export grain marketing arrangements, which 'allowed CBH to manage the entire export supply chain on behalf of traders using its facilities', and paved the way for CBH's investment in above rail assets.[327]

4.44 Again, the SGNR appears to have overestimated the immediate impact of the deregulation of the export grain market.

---

323 Mr Dale Park, President, Western Australian Farmers Federation, *Transcript of Evidence*, 13 June 2014, p 4.

324 Mayor Troy Pickard, President, Western Australian Local Government Association, *Transcript of Evidence*, 13 June 2014, p 8.

325 ibid.

326 ibid.

327 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, p 7. Australia's single desk wheat marketing arrangements were abolished on 1 July 2008 under the *Wheat Export Marketing Act 2008* (Cth). Under that Act, exporters of bulk wheat must be accredited under the Wheat Export Accreditation Scheme, administered by Wheat Exports Australia and primarily funded from the Wheat Export Charge. Wheat Export Marketing Amendment Bill 2012. Explanatory Memoranda.

4.45 Second, the Western Australian Government has failed to properly or fully implement the SGNR's recommendations.

4.46 The dormancy of the Brookton Strategy provides a good example of the failure by the government to properly implement the recommendations of the SGNR. While the SGNR recommended the closure of those parts of the rail network in the Kwinana South zone, this recommendation was made in concert with the recommendation that the Brookton Strategy be fully implemented. By failing to invest the money required to upgrade rail loading sites at Brookton and Kellerberrin, the situation that has arisen is exactly the situation that the SGNR warned against.

4.47 The Committee's view is that the SGNR was not a document from which government should have selectively implemented recommendations; rather, it was a document in which each of the recommendations were interconnected. The selective implementation of these recommendations totally undermines the SGNR as the basis for WA's grain freight policy.

4.48 This was highlighted during a hearing attended by Dr Fred Affleck, who had served as the Chair of the SGNR Committee. Dr Affleck explained that 'some of [the SGNR findings have not been acted upon and if they had been, I think it would have changed the situation in other, perhaps, beneficial ways'.[328] The Committee agrees with this assessment.

4.49 In any event, the SGNR was rendered largely irrelevant with the entry in 2011 by CBH Group into the Western Australian rail freight business as an above rail operator. Dr Affleck was unequivocal in explaining the significance of the decision by CBH Group to procure and run its own trains on the WA freight network. In describing the acquisition by CBH Group of trains and carriages to facilitate their entry into WA's freight market as 'the single most important thing that has changed' in the time since the publication of the SGNR, Dr Affleck acknowledged that this outcome had 'quite fundamentally changed the way in which the business [of grain freight conveyance in WA] is conducted'.[329]

4.50 Indeed, CBH Group evidence, based upon their experience as an above rail operator, challenged the primary conclusion of the SGNR that Tier 3 rail lines are uneconomic. According to Mr Andrew Mencshelyi, CBH Group's Acting General Manager of Operations, the view of CBH Group on the question as to whether or not Tier 3 lines are

328 Dr Fred Affleck, *Transcript of Evidence*, 18 June 2014, p 2.
329 ibid.

viable is '[t]hat absolutely they are viable'.[330] In support of this view, Mr Mencshelyi explained that CBH Group:

> *are moving record tonnes per a day on that part of the network. We are bringing greater efficiencies to that network even at the performance standards that they are at today. Since 2009 the performance standards have been lowered. Under the SGNR there would be no maintenance done on them. They have been propped up and kept going for a few years; the performance standard has been lowered from a safety perspective. Even at that lower performance standard we are still moving record tonnes on those long sections—cheaper than road transport to port.*[331]

4.51 The Committee accepts this evidence, albeit with a note of caution. There is no question that most if not all Tier 3 lines—the vast majority of which have not been the subject of maintenance or upgrade at any point since the lease was entered into in 2000—are in dire need of maintenance in the form of re-sleepering at the very least. Furthermore, the cost of access to Tier 3 lines has never reflected the true cost of maintaining those lines because the re-sleepering cost has always been borne by government. Yet while it is true that the rail freight cost does not reflect, and has never reflected, the full rail maintenance cost, the fact that rail freight costs to grain growers are presently lower than equivalent road freight costs is in stark contrast to many of the findings in the SGNR. It is therefore clear that many of the recommendations contained within the SGNR are—in 2014—out-dated.

4.52 A further—somewhat more peripheral, but no less important—aspect of the SGNR must also be examined in considering the contemporary relevance of the SGNR as the basis of the state government's freight rail infrastructure policy: that of road funding in regional areas affected by the closure of Tier 3 lines. Though explaining that its main focus was on establishing 'the definition of a sustainable rail network' in WA, the SGNR is emphatic in describing the importance of maintaining the road network, stating that:

> *the maintenance of a safe and effective road network is also critical to the industry and community.*[332]

4.53 Furthermore, the SGNR notes a shift toward increased use of road for the grain freight task in the time since the rail network was privatised, and states that:

330 Mr Andrew Mencshelyi, Acting General Manager, Operations, CBH Group, *Transcript of Evidence*, 11 June 2014, p 3.

331 ibid, pp 3–4.

332 Freight and Logistics Council of Western Australia, *Strategic Grain Network Report*, December 2009, p 66.

> *the use of wheatbelt roads has increased since the end of the orderly and comprehensive use of rail for export grain since 1999. The deregulatory moves which have offered increased supply chain flexibility have also made the use of the road network more common and less predictable. The trend can only increase the pressure on road networks.*[333]

4.54 The SGNR then breaks down the road network into three categories on the basis of required investment. That is, unlike the categorisation of the rail network into Tiers 1, 2 and 3 based upon economic viability, the road network as a whole was considered in dire need of investment across all levels, with the specific reason for that required investment being the method of classification.

4.55 Roads that were considered as being in 'Category A' were deemed as requiring investment on the basis that these roads would see an increase in use owing to the closure of Tier 3 rail lines. 'Category B' roads were in need of investment because they were 'important grain haul roads' that were 'already in a degraded condition'. Finally, 'Category C' roads were those in need of investment as a result of already 'experiencing significant extra freight activity' prior to the closure of Tier 3 lines.[334]

4.56 In aggregate $320 million of road investment was recommended: $96 million for 'Category A' roads, a further $176 million for 'Category B' roads, and a final $48 million for those roads in 'Category C'.[335]

4.57 The state government, claiming to have adopted the SGNR as its official policy, allocated just $118 million to the Grain Freight Network Package program.[336] That is, road investment is another area in which the government failed to fully implement the recommendations of the SGNR. As a result of this under-investment in the road network, the SGNR proposition that, in certain areas, road is a viable alternative to rail for the grain freight task is not sound.

4.58 Despite the failure by government to properly implement critical aspects of the SGNR, the Minister for Transport, Hon Dean Nalder, MLA, has advised the Committee that:

> *the 2009 SGNR remains relevant as a long term, ten year view of the grain transport network. The SGNR assessment was based on long-term averages, so significant short term digression from its assumptions can be expected during lean harvests, bumper harvests, when the location of grain volumes fluctuate or when the commercial*

333 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, p 66.
334 ibid, p 67.
335 ibid, p 71.
336 Submission No. 41 from Main Roads Western Australia, 24 September 2014, p 7.

> *decisions of transport operators, grain traders or farmers fluctuate. Two of the last three grain harvests have been unusually large for Western Australia and this is likely to skew recent data.*[337]

4.59 This statement is of great concern to the Committee, particularly in view of the evidence it has received in relation to improved agricultural techniques resulting in greater sustainable crop yields.

4.60 The Minister has further advised that:

> *the Government will wait until the GFIP [Grain Freight Improvement Program] investments have been completed, the ERA process concludes, negotiations between CBH and Brookfield Rail have finalised to provide further clarity about the future access arrangements and system requirements.*[338]

4.61 The Committee does not consider this to be an appropriate response to what is an urgent situation, particularly given the recommendations of the SGNR have not been implemented.

A long-term solution?

4.62 Though many aspects of the SGNR are now out-dated, its final recommendation remains particularly important, primarily because it is highly likely that the WA freight task will continue to grow at least in line with state population. That recommendation pertained both to congestion on the existing rail corridor via Northam to Kwinana, as well as the need for better transport infrastructure through the Kwinana South zone generally.

4.63 In 2009 the SGNR recommended that the Commonwealth and state governments 'undertake a joint pre-feasibility study of a new rail corridor from Kwinana via Brookton to Merredin, to determine strategic, economic and operating benefits and to identify potential corridor alignments and related technical requirements'.[339] The SGNR estimated the cost of such a pre-feasibility study to be 'between $300,000 and $500,000'.[340]

337 Submission No. 38 from Hon Dean Nalder, MLA, Minister for Transport, 8 August 2014, pp 3–4.
338 ibid, p 4.
339 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, p 9 and pp 18–19.
340 ibid, p 9 and pp 18–19.

4.64 The Department of Transport advised that the recommended feasibility study for the Brookton to Kwinana line had been completed.[341] The May 2013 West–East Rail Feasibility Study concludes that 'there are no compelling economic arguments to support the development of any of the nominated alternative rail corridors, due to the inherent disadvantages of each corridor relative to the existing corridor'.[342]

4.65 The study further concluded that while there would be some economic benefits from the significant volume of grain that would use a new Brookton–Kwinana corridor, the benefits would not 'outweigh the very significant capital costs associated with the construction of a new route down the escarpment'.[343]

4.66 The review suggests that if further analysis is to be undertaken 'additional sets of criteria be considered, so that any additional potentially cost-effective routes could be brought within the specification'.[344] It notes that it would most likely be bulk mineral export freight that would warrant the building of a new rail corridor. Furthermore, this corridor would not need to cater for return freight haulage. This means that rather than needing to accommodate the full range of freight currently handled on the freight rail network, such a new corridor need only meet the 'operational needs of this subset [export minerals] of freight volume'.[345]

4.67 The Committee received this document on 3 October 2014 and has not had sufficient time or resources to critically analyse the data it contains.

Finding 7

Failure to fully implement the Brookton Strategy has significantly reduced the effectiveness of the grain freight strategy outlined in the *Strategic Grain Network Report*.

Finding 8

CBH Group's entry into the above rail operations market has fundamentally altered Western Australia's grain freight landscape.

Finding 9

The *Strategic Grain Network Report* is no longer an appropriate document on which to base Western Australia's grain freight policy.

341 Ms Susan McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 15; Mr Reece Waldock, Director General, Department of Transport, Letter, dated 3 October 2014.
342 Department of Transport, *West–East Rail Feasibility Study*, report prepared by URS Australia, Department of Transport, Perth, 27 May 2013, p 109.
343 ibid.
344 ibid.
345 ibid.

Recommendation 3

The Western Australian Government re-examine its grain freight strategy and develop associated policies to ensure the state's freight infrastructure will meet future requirements.

Chapter 5

Regulation of Western Australia's freight rail network

Western Australia's 'Railway Access Regime'

5.1 Access to Western Australia's (WA's) freight rail network is governed by the 'Railways Access Regime' (the Regime), which commenced in 2001. The Regime is comprised of the *Railways (Access) Act 1998* (WA) (the Act) and the *Railways (Access) Code 2000* (WA) (the Code). The Act establishes the Regime by providing for the creation of (and amendment to) the Code, and conferring Code oversight and regulatory functions upon the Economic Regulation Authority (the ERA). The Regime 'was established as a framework to ensure fair and transparent competition on Western Australia's railway network'.[346]

5.2 The Regime aims to facilitate negotiations between operators of above rail infrastructure (rolling stock) and the operator of the below rail network (the track and most associated infrastructure).[347] In the case of WA's freight rail network, Brookfield Rail is the current operator of the entire below rail network, with the exception of the Tilley to Karara Railway, which is operated (and, at present, used exclusively) by Karara Mining.[348] According to the ERA, negotiations under the Regime are 'based on regulated policies and practices established under the legislation'.[349] The purpose of the Regime is to encourage 'the efficient use of railways and investment in railways by facilitating a contestable market for access to railway lines'.[350]

5.3 The ERA describes its role in regulating the market for access to the WA freight rail network as 'a "light handed" approach to infrastructure regulation', because the Code establishes a negotiate–arbitrate model.[351] This means that the Code does not, beyond

346 Economic Regulation Authority, *Rail Access*, 7 March 2014. Available at: http://www.erawa.com.au/infrastructure-access/rail-access. Accessed on 30 June 2014.
347 ibid.
348 The line connecting the Karara Iron Ore Project to the Morawa to Mullewa line was authorised for construction by the *Railway (Tilley to Karara) Act 2010* (WA). This line is 'owned by the State and administered through a 49 year lease agreement with the Public Transport Authority (PTA)'. Submission No. 14 from Karara Mining Ltd, 17 April, 2014, p 2.
349 Economic Regulation Authority, *Rail Access*, 7 March 2014. Available at: http://www.erawa.com.au/infrastructure-access/rail-access. Accessed on 30 June 2014.
350 Section 2A *Railways (Access) Code 2000* (WA).
351 Submission No. 24 from the Economic Regulation Authority, 7 May 2014, p 1.

broad aspirational phrasing and guidelines, prescribe how negotiations are to be conducted, or identify terms or conditions that might be included in an access agreement.[352] Instead, as the ERA's submission explains, potential access seekers are 'free to negotiate terms, including price, outside the Code' with Brookfield Rail.[353]

5.4 This freedom was further clarified by the ERA's Chairman, Mr Lyndon Rowe, during a hearing. According to Mr Rowe:

> *the code was actually changed in 2009 to exclude conditions of the code from agreements signed outside of the code. So, if somebody does a commercial agreement outside of the code, then the conditions in the code do not apply to that agreement.*[354]

5.5 Mr Rowe acknowledged that this 2009 amendment meant that safety requirements, train management and train path policy were all 'now negotiable'.[355] Indeed, s 4A of the Code makes this clear:

> ***4A. Parties have option to negotiate agreements outside this Code***
>
> *(1) To avoid doubt it is declared to be the case that —*
>
> *(a) the parties concerned may choose whether negotiations for an agreement for access are carried on under this Code or otherwise; and*
>
> *(b) if the parties choose to negotiate an agreement for access otherwise than under this Code, nothing in this Code applies to or in relation to the negotiations or any resulting agreement.*[356]

5.6 In a practical sense, however, the notion that safety, train management and train path policy is open to negotiation is somewhat misleading. Policies in relation to these matters apply to the network as a whole and, as such, are effectively non-negotiable. Nonetheless, the fact that that Code represents an optional method of regulation is significant.

---

352 The Committee notes that the High Court of Australia has never examined the question as to whether the common law implies a duty to negotiate in good faith. As such, the imposition, under s 13 of the Code, of a duty to negotiate in good faith is arguably the only strict prescription of how negotiations between an access seeker and Brookfield Rail are to proceed.

353 Submission No. 24 from the Economic Regulation Authority, 7 May 2014, p 1.

354 Mr Lyndon Rowe, Chairman, Economic Regulation Authority, *Transcript of Evidence*, 18 June 2014, p 1.

355 ibid.

356 Section 4A *Railways (Access) Code 2000* (WA).

5.7 In clarifying the implications of allowing negotiations to occur outside of the provisions of the Code, Mr Rowe explained that:

> *in all regulation—it does not matter whether it is rail or electricity or gas—it is a last resort, if you like; the parties are free to commercially negotiate outside the regulatory arrangements. In the event they cannot, then that regulatory arrangement—there is a backstop. Currently, what happens is if parties decide to negotiate outside of the code, then the provisions in the code do not apply to them; they are free to do whatever they like.*[357]

5.8 At least superficially, the notion that parties 'are free to do whatever they like', may be difficult to reconcile with the notion that the market for access to WA's freight rail network is regulated. On the question of regulation, Mr Rowe explained that:

> *[t]he reason for regulation of monopoly infrastructure is that there is market power and there is an opportunity for that market power to be exploited because it is a monopoly. The aim of economic regulation is to address that market power issue … [but] that does not stop people doing commercial deals [and] commercial deals are done. They are voluntary and, therefore, both parties are presumably happy with those commercial deals. But in the event that they cannot reach a commercial deal and they feel that that power is being exercised, then regulation is there to address that issue.*[358]

5.9 The Regime, then, is not a mechanism by which the Western Australian Government specifies the parameters for access to the freight rail network. Rather, as Mr Rowe described it, the Regime theoretically acts as a 'backstop' against Brookfield abusing its position as monopoly operator of the network. The preference of government is for rail access agreements to be determined through negotiations between access seekers and Brookfield Rail, informed by market forces.

5.10 The ERA argues that this preference is validated by the way that the market for rail network access has thus far operated. As Mr Rowe explained, the situation in July 2014—almost 15 years since the Regime was implemented—is that 'there are no access arrangements under the code', and only three proposals have ever been made pursuant to the Code.[359] Considered relative to the fact that the 71 million tonnes conveyed over the freight rail network in 2013 represented a 113 per cent increase

357 Mr Lyndon Rowe, Chairman, Economic Regulation Authority, *Transcript of Evidence*, 18 June 2014, p 2.
358 ibid.
359 Submission No. 24 from the Economic Regulation Authority, 7 May 2014, p 4.

since the network was privatised, it is easy to appreciate the State's preference for commercial, rather than regulated, negotiations.[360]

5.11 Equally, however, the fact that parties to access agreements have not utilised the Code does not necessarily indicate the existence of a robust, contestable market for access to the WA freight rail network. Indeed, one of the reasons the Committee began this Inquiry was the disquiet among current above rail operators and potential access seekers alike. As such, in order to properly evaluate the utility of the Regime, and to be able to assess whether it does indeed function 'to ensure fair and transparent competition on Western Australia's railway network', it is useful to begin with an understanding of the specific way in which the Regime functions when it is called upon.

Finding 10

The fact that parties to access agreements have not utilised the *Railways (Access) Code 2000* (WA) does not necessarily indicate the existence of a robust, contestable market for access to Western Australia's freight rail network.

Background information

5.12 Irrespective of any access proposal Brookfield Rail may receive, Part 2A of the Code requires the operator to make some information relating to the performance standards of the freight rail network readily available. Specifically, Brookfield Rail is required to provide potential access seekers with:

- maps showing the geographical location and configuration of tracks on each network route;
- information on each line segment regarding the type, length, curves, gradients, operating gauge, formation and characteristics of the track, as well as available communications systems;
- the location and length of passing loops;
- the running times, maximum axle loads, maximum speeds and maximum lengths of existing trains;
- the existence of any speed restrictions and rolling stock dimension limits;
- the total gross tonnage, and total tonnage of freight carried on all trains operated during the most recent three calendar years; and
- the available capacity of each route section.[361]

360 Submission No. 22 from Brookfield Rail, 17 April 2014, p 3.

5.13 All of this information is available via the Brookfield Rail website, delineated by route section.[362] As such, although the Code envisages a situation in which Brookfield Rail would furnish this information upon potential access seekers at their request, no such formal request is necessary.

A negotiate–arbitrate model

5.14 When access to WA's freight rail network is sought under the Code, the process begins with Brookfield Rail's duty, as stipulated in Part 2, to provide information regarding network capacity and access fees,[363] and the steps that an interested party should take to begin the process of seeking access to the network.[364] Part 2 of the Code also stipulates:

- the process that must be undertaken by Brookfield Rail when it receives an access proposal;[365]
- the requirement to provide particular information to the ERA;[366] and
- the requirement to obtain ERA approval when access is sought that may result in the capacity of the network being exceeded.[367]

5.15 Once the requirements under Part 2 of the Code are satisfied and a proposal for access is lodged, Part 3 of the Code—which outlines parameters for negotiations between an access seeker and Brookfield Rail—is activated. When this occurs, Brookfield Rail is required to provide the access seeker with 'the floor and ceiling price for the proposed access'.[368] The Code requires these floor and ceiling costs to be delineated by route section, and Brookfield Rail is also required to provide the access seeker with a copy of the 'costing principles' by which these costs were calculated.[369] Even under the provisions of this regulation the Code envisages negotiations between the access seeker and Brookfield Rail to result in the determination of a mutually agreeable access fee that is somewhere between these floor and ceiling prices. Where negotiations on

361 Schedule 2 *Railways (Access) Code 2000* (WA).
362 The information is available at the 'Track Inventory Data' page of the Brookfield Rail website, which is located at: http://www.brookfieldrail.com/about-us/our-network/network-specifications/network-data.html.
363 Section 7 *Railways (Access) Code 2000* (WA).
364 Section 8 *Railways (Access) Code 2000* (WA).
365 Section 9 *Railways (Access) Code 2000* (WA).
366 Section 8(4A) *Railways (Access) Code 2000* (WA).
367 Section 10 *Railways (Access) Code 2000* (WA).
368 Section 9 *Railways (Access) Code 2000* (WA).
369 The 'costing principles' is a statement of principles that, under s 46 of the Code, must be provided by the operator to, and subsequently approved by, the ERA. These principles are then used in the process of determining floor and ceiling costs. The costing principles that are presently in use were approved by the ERA in April 2011. A copy of the costing principles is available at: http://www.erawa.com.au/cproot/9496/2/20110413%20WestNet%20Rail%20-%20Costing%20Principles%20-%20Approved%20April%202011.PDF.

access fees are undertaken and agreed (whether under the Code or otherwise), the ERA is effectively left with no regulatory role to play.

5.16 If these negotiations fail, however, the ERA's regulatory role commences. In a broad sense, this confirms Mr Rowe's explanation that the ERA's regulation of the market for access to the WA freight rail network only occurs when initial access negotiations fail.

5.17 When negotiations fail, Brookfield Rail is first required to provide its determination of floor and ceiling costs relating to the access proposal to the ERA. The ERA must then consider these costs, with reference to the approved costing principles. Following this consideration, the ERA either approves Brookfield Rail's determination of floor and ceiling costs or determines the relevant costs itself. In this process, the ERA is permitted to seek public consultation on the determination of floor and ceiling costs for the access proposal. The Code envisages this process will take up to 30 days in total.[370]

5.18 It should be noted that even if the ERA assesses the floor and ceiling cost determination provided by Brookfield Rail as unsatisfactory and elects to determine the relevant costs, the actual access price remains subject to negotiation between the access seeker and Brookfield Rail, albeit within a band determined by the ERA. In a submission to this Inquiry, the ERA was careful to point out that it 'does not have a role in establishing specific access prices, except where requested to provide an opinion of the fairness of prices, as described in Section 21 of the Code'.[371] The Committee considers s 21 of the Code to be an empty provision insofar as s 21(4) stipulates that '[a]n opinion given under this section is for the information of the applicant and does not have any effect for the purposes of the Act or this Code'.[372] Plainly, the s 21 opinion provision is irrelevant, which effectively means that the ERA has no role in establishing specific access prices.

Finding 11

The Western Australian Railways Access Regime does not allow the Economic Regulation Authority to have a role in establishing specific access prices. That is, the Economic Regulation Authority does not set prices for rail access in Western Australia.

5.19 If, after the ERA has either approved or determined floor and ceiling costs in relation to an access proposal, an access agreement is still unable to be negotiated, the access seeker can have the dispute referred to an arbitrator.[373] The arbitrator will be drawn from a panel established by the ERA, though the ERA is itself precluded from engaging

370 Section 7 *Railways (Access) Code 2000* (WA).
371 Submission No. 24 from the Economic Regulation Authority, 7 May 2014, p 2.
372 Section 21 *Railways (Access) Code 2000* (WA).
373 Section 26 *Railways (Access) Code 2000* (WA).

in the arbitration process.[374] Though the process of arbitration is clearly intended to resolve any dispute over access fees, the fact that no access proposal has ever previously proceeded to arbitration means that the usefulness of the arbitration process cannot presently be evaluated.

Finding 12

It is not possible to evaluate the usefulness of the Western Australian Railways Access Regime in resolving a dispute between an access seeker and the lessee as the arbitration process has never been completed for any access proposal.

5.20 In describing its regulation of the WA's freight rail network as involving a 'light handed' approach, the ERA acknowledged that its responsibilities in regulating access to the electricity and gas markets are more specific and onerous. In its submission, the ERA explained that its 'role in gas and electricity access regulation involves establishing a set of terms and conditions, including tariffs for a benchmark or reference service'.[375]

5.21 Mr Rowe expanded upon this explanation during a hearing, informing the Committee that the ERA:

> *would contrast [its regulation of the access to the freight rail network] with the type of regulation we do in either electricity or gas. In electricity or gas when we regulate, for example, Western Power's electricity networks or when we regulate the Dampier to Bunbury gas pipeline, the goldfields gas pipeline or ATCO's distribution system, we actually determine prices or, to be more technically correct in the case of Western Power, we determine the regulated revenue they are entitled to earn and then we approve prices consistent with some price guidelines that make sure that that is the only remedy they achieve … under gas and electricity, we are actually far more involved in determining tariffs.*[376]

5.22 This contrasts markedly with the ERA's role in simply either approving or determining floor and ceiling costs for access to the freight rail network as the way that these figures are calculated means that they bear no resemblance to the actual price for access.

Finding 13

The Economic Regulation Authority's regulation of the freight rail network differs significantly from its regulation of the state's electricity and gas networks.

374 Section 24 *Railways (Access) Code 2000* (WA).
375 Submission No. 24 from the Economic Regulation Authority, 7 May 2014, p 2.
376 Mr Lyndon Rowe, Chairman, Economic Regulation Authority, *Transcript of Evidence*, 18 June 2014, pp 2–3.

Floor and ceiling costs

5.23 The purpose of the floor and ceiling cost model is to 'constrain the price which is offered by the railway owner in negotiations with the [access seeking] proponent'.[377] The ERA explained that the 'establishment of a regulated revenue band allows for price discrimination between access seekers'.[378] That is, in theory, the use of a floor and ceiling cost mechanism to regulate access to the Western Australian freight rail network creates economic efficiency within the market for a service that is provided by a monopoly. This implies that the floor and ceiling price mechanism allows Brookfield Rail to impose access fees in a way that incentivises economically efficient network patronage. In being able to charge different prices to reflect the different demand profiles of the various above rail operators, Brookfield Rail can minimise the economic inefficiencies that would arise if some users were locked out of the market as a consequence of inflexible pricing.

5.24 The ERA explained that the floor and ceiling costs 'represent the minimum and maximum recoverable revenue in respect of the relevant route sections'.[379] When an access seeker requests the ERA to either approve or determine floor and ceiling costs for network access, the Code requires the ERA to take into account the following specific factors:

- the 'legitimate business interests' of Brookfield Rail, and their investment in railway infrastructure;
- the cost to Brookfield Rail of providing access, including the cost of extending or expanding the network (but not the costs associated with increased competition in upstream or downstream markets);
- the economic value to Brookfield Rail of any additional investment that an access seeker has agreed to undertake;
- the interests of other parties holding contracts for access to railway infrastructure;
- firm and binding contractual obligations between Brookfield Rail and other parties who have access to railway infrastructure;
- the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure;
- the economically efficient use of the railway infrastructure; and

377 Submission No. 24 from the Economic Regulation Authority, 7 May 2014, p 2.
378 ibid, 2.
379 ibid, p 3.

- the benefit to the public from having competitive markets.[380]

5.25 As an overarching guideline, the ERA must also consider the Regime objective of encouraging the efficient use of, and investment in, WA's rail freight network by facilitating a contestable market for operations on that network.[381]

5.26 Floor costs are determined in accordance with the Code concept of 'incremental costs'. These are defined as Brookfield Rail's operating costs, capital costs and overheads incurred that the company would be able to avoid in the 12 months following the proposed commencement of access if that access were denied.

5.27 Ceiling costs are derived from the 'total costs attributable to the section of a route and use of that infrastructure'.[382] The Code defines 'total costs' as being 'the total of all operating costs, capital costs and overheads attributable to the performance of Brookfield Rail's access-related functions'.[383] In calculating both the floor and ceiling costs, capital costs are based on the hypothetical Gross Replacement Value (GRV) of the railway infrastructure in question, where the GRV is the lowest current costs of replacing existing assets with modern equivalent assets.[384]

5.28 In essence, this means that the floor cost is the calculated additional cost that would be incurred by Brookfield Rail in allowing an entity to access a particular line for a period of 12 months, while the ceiling cost is the calculated price of replacing the line in question with a newly constructed line that meets the expected level of service. As a consequence, the accuracy of floor and ceiling costs relies upon there being access to existing and relevant information pertaining to the capital and operational costs of the line in question. Furthermore, potential exists for there to be a large gulf between floor and ceiling costs.

Finding 14

Under the *Railways (Access) Code 2000* (WA), the floor cost is calculated as the additional cost incurred by the operator in allowing access to a particular line for 12 months, while the ceiling cost is the cost of replacing that line with a newly constructed line that meets the expected level of service.

Historic use of the *Railways (Access) Code 2000* (WA)

5.29 The Code has been dormant for the majority of its 14-year existence. Only three proposals for access have ever been made under the Code. Of these, only two sought access to the freight rail network, one of which (made by Portland Cement in 2001) was

380 ibid, pp 2–3.
381 ibid, p 2.
382 ibid, p 3.
383 Schedule 4 *Railways (Access) Code 2000* (WA).
384 ibid.

overtaken by commercial negotiations outside the Code.[385] As a consequence, the access proposal made under the Code by CBH Group in December 2013—which in June 2014 proceeded to Code-specified arbitration—is the only access proposal pertaining to the freight rail network that has triggered the formal involvement of the ERA in considering the floor and ceiling prices proposed by Brookfield Rail.

5.30 It is clear that the formal involvement of the ERA in the December 2013 access proposal lodged by CBH Group is a watershed moment in the history of the Code, and the Committee has followed this particular proposal with active interest. Furthermore, the Committee has heard evidence that the Code was quickly assessed as being of scant use when Karara Mining sought access to the freight rail network in 2011. Given this, these two episodes are outlined and considered in detail at Chapter 6.

Reviewing the *Railways (Access) Code 2000*

5.31 In light of the dormancy of the Code, the role of the ERA in regulating the market for access to WA's freight rail network in the time since it was privatised can best be described as minimal. Indeed, the main task that has been undertaken by the ERA since the Regime was established has been the discharge of its statutory obligation to review the Code every five years, which is required by s 12 of the Act.

5.32 Two such reviews have been conducted: first in 2004, and more recently in 2010.[386] Reports arising out of the first two reviews are published on the ERA's website and, in both instances, were provided to the Treasurer for consideration. Recommendations contained within the 2004 review report gave rise to a Code amendment in 2009.[387] As yet, no action has been taken in response to the 2010 review report, though the ERA has advised the Committee that it 'does not consider that any of the eight recommendations contained within the 2010 Code Review report reflect any significant issues with the application of the Code to the Brookfield Rail-owned infrastructure.[388] A third review is due to occur in 2015, and the ERA plans to begin work on that review 'starting at the end of this year'.[389]

5.33 During his appearance before the Committee, Mr Rowe explained that one of the problems that the ERA had experienced in discharging its responsibility of reviewing the Code related to its dormancy. When questioned as to whether or not the ERA might, in the course of a Code review, see fit to recommend a more active form of market regulation, Mr Rowe explained that:

385 Submission No. 24 from the Economic Regulation Authority, 7 May 2014, p 4.
386 ibid.
387 ibid.
388 ibid.
389 Mr Lyndon Rowe, Chairman, Economic Regulation Authority, *Transcript of Evidence*, 18 June 2014, p 6.

> *one of the difficulties we have had in the reviews up to now [is that] we have had no attempts to access [the freight rail network made] under the Code.*[390]

5.34 As to whether the ERA could have addressed the perceived issues with the Code earlier, and in particular whether the ERA might recommend compulsory negotiations under the provisions of the Code in the future, Mr Rowe expressed reluctance—both with the specific suggestion and with the inference that the Code's dormancy might have been cause for an earlier review:

> *It may well be that we come to some conclusions that are current—are based on experience with both Brockman Mining and with CBH, and that becomes the conclusion that the code is not working as well as it should—no doubt that may well be a conclusion we come to as part of the review. And it may well be as part of that review we then recommend some changes to the code, and if one of those options that we might look at might be similar to what happens in gas or electricity, so either a revenue cap or price cap, I think it is unlikely that we would recommend that all negotiations have to be under the code. Now that is not the case in electricity; it is not the case in gas. As I said right at the start, with regulation there is—you would hope that organisations as large as the ones we are talking about can reach a commercial agreement. In the event that somebody is being unreasonable or exercising market power unreasonably, then the code is there as a backstop. But I would not—I think it is unlikely that the ERA would recommend that negotiations compulsorily be under the code.*[391]

5.35 When asked again as to 'how regulation of the network might be made more efficient and more effective', Mr Rowe expressed a preference for basing his view on experience, indicating that it would be better to 'ask… after [the ERA] have done the review'.[392] To put this comment into context, Mr Rowe explained:

> *I say that in all seriousness because to make an informed comment on that we would want to go through that process and we would want to go through the public consultation on that process. So we will have a view on that, as we are required to every five years to do a review of that, but it would [at present] be inappropriate for me to comment.*[393]

390 ibid.
391 ibid, p 7.
392 ibid, p 10.
393 ibid.

5.36 The Committee accepts that there is clear merit in the view that Code reviews are best based upon evidence, rather than opinion, and that the dormancy of the Code has thus far rendered any such evidence-based review impossible. The Committee also takes the view, however, that the historic dormancy of the Code ought at the very least to have provided evidence of some problem inherent to it. Insofar as it is clear that the Code was intended to function as a fundamental component of the Rail Access Regime, its historic non-use should have triggered an earlier review as to its inherent merit.

Finding 15

The *Railways (Access) Code 2000* (WA) was clearly intended to be a fundamental part of the Rail Access Regime. Its dormancy should have been cause for an earlier review of its usefulness.

Recommendation 4

The Economic Regulation Authority's 2015 review of the *Railways (Access) Code 2000* (WA) include a critical evaluation of why so few access seekers have sought to use the Code.

Chapter 6

Access Agreements

Introduction

6.1 The *Railways (Access) Code 2000* (the Code) commenced operation on 1 September 2001.[394] In the almost 13 years since, only two applications for access to the Western Australian freight rail network have been made under the Code, one of which was abandoned.[395] If it results in an access agreement, the application made under the Code by CBH Group in December 2013—which, in June 2014, had proceeded to Code-specified arbitration—will be the first and only access proposal resolved under the provisions of the Code.

6.2 This stands in stark contrast to the fact that, in the same period, a total of 20 access agreements have been successfully negotiated between Brookfield Rail and various above rail operators outside the Code since 2006. Twelve of these are new access agreements and eight are renewals or extensions of agreements entered into prior to the 2006 separation of the above and below rail businesses.[396]

6.3 In one sense this is appropriate: according to the Economic Regulation Authority (the ERA), regulation of the market for access to the freight rail network in Western Australia (WA) is intended to only act as a 'backstop' when commercial negotiations fail.[397] There is, however, a significant difference between the Code being unnecessary, and the Code being unhelpful. It appears that the Code's dormancy owes a great deal more to its impotence than its redundancy.

6.4 This is best illustrated by the circumstances surrounding two recent and significant access proposals, namely the current proposal that has been lodged by CBH Group and the access proposal made—and subsequently agreed outside of the Code—by Karara Mining in 2011. These proposals are presented in the following two case studies.

394 Section 2 *Railways (Access) Code 2000* (WA).
395 Submission No. 24 from the Economic Regulation Authority, 7 May 2014, p 4.
396 Ms Royah Dehbonei, Legal Counsel, Brookfield Rail Pty Ltd, Electronic mail, 3 September 2014.
397 Mr Lyndon Rowe, Chairman, Economic Regulation Authority, *Transcript of Evidence*, 18 June 2014, p 2, p 5 and p 7.

Case study 1: The CBH Group access proposal

6.5 On 10 December 2013 Brookfield Rail received a formal proposal from CHB Group, made under s 8 of the Code, for access to various sections of the freight rail network.[398] In response, Brookfield Rail provided its determination of floor and ceiling costs for this access to CBH Group and the ERA by 17 December 2013, satisfying the requirements of s 9 and Schedule 4 of the Code.[399] In providing this determination, Brookfield invoked the confidentiality clause in s 50(3) of the Code, preventing disclosure by the ERA of the information provided.[400]

6.6 The ERA then began the process of determining whether to approve the floor and ceiling costs provided by Brookfield Rail or else determine and specify the relevant costs itself.[401] Ordinarily the ERA would have been required to complete this process within 30 days of receiving Brookfield Rail's determination, but, with the permission of CBH Group (as proponent of the access proposal), this deadline was extended to enable the ERA to undertake public consultations in aid of the cost determination process. Accordingly, on 6 January 2014 the ERA issued an invitation for public submissions, 'on matters relevant to the determination of costs for the routes on BR's [Brookfield Rail's] network which may be of interest to CBH',[402] with submissions to be made by 3 February 2014 to enable the ERA to meet the determination deadline of 7 March 2014. On 3 February the deadline was further extended to 7 April 2014, with the ERA undertaking to approve or determine costs by 28 April 2014. On 16 April 2014, the ERA further extended this deadline to 30 June 2014.[403] Though the specific reasons for these extensions are not known, each of the extensions was made with the agreement of CBH Group.[404]

398 Economic Regulation Authority, *2013 Access proposal by Co-operative Bulk Handling Ltd*, Available at: http://www.erawa.com.au/rail/rail-access/freight-network/2013-access-proposal-by-co-operative-bulk-handling-ltd. Accessed on 13 August 2014.

399 Section 9(1) of the Code requires Brookfield Rail to provide a determination of the floor and ceiling costs relating to an access proposal 'within 7 days'.

400 Economic Regulation Authority, *Brookfield Rail—2013 Access proposal made by Co-operative Bulk Handling Ltd.* Available at: http://goo.gl/FSnqnB. Accessed on 3 July 2014.

401 In a procedural sense there is little practical difference between approving or determining floor and ceiling costs as any such decision can only be made after a thorough market inquiry is conducted by the ERA.

402 Economic Regulation Authority, *Brookfield Rail—2013 Access Proposal made by Co-operative Bulk Handling Ltd*, 'Invitation for Public Submissions'. Available at: http://goo.gl/B2kdm8. Accessed on 2 May 2014.

403 ibid.

404 Mr Greg Watkinson, Chief Executive Officer, Economic Regulation Authority, *Transcript of Evidence*, 18 June 2014, p 6.

6.7 Eleven submissions were received by the ERA prior to the first extension, seven of which were subsequently published on the ERA's website on 21 February 2014.[405] None of the submissions made by either CBH Group or Brookfield Rail—including submissions that were received after the deadlines were extended—were published.

6.8 While each of the seven published submissions articulated a strong and clear preference—for various reasons—in seeing grain freight conveyed via rail instead of road, none related to the question of how floor and ceiling costs should be calculated. In various ways, however, all seven submissions made the important point that the process of calling for public submissions on a floor and ceiling costs determination is somewhat absurd where the terms of the lease and terms of access sought are not similarly made public. Indeed, while the Committee understands the value of community consultation, it is difficult to see how public submissions would in any way aid in the Code-stipulated process of determining floor and ceiling costs for a rail access proposal.

6.9 The Committee acknowledges that Brookfield Rail has a right to protect its commercial interests by invoking the confidentiality clause in s 50(3) of the Code when providing information to the ERA. Equally, however, the Committee believes that the market for access to rail infrastructure in WA would very much benefit from enhanced transparency. In a submission to the Inquiry, above rail operator Asciano was critical of the s 50(3) confidentiality clause, stating that permitting Brookfield Rail to invoke the clause:

> *makes it impossible for interested parties (such as end users) to make genuinely informed comment on the appropriateness of the access provider's costs, and so makes any public consultation on such costings problematic.*[406]

6.10 The Committee agrees with this assessment. Indeed, the Committee cannot see how public submissions might aid the process of determining floor and ceiling prices for rail access when information required to calculate those prices is confidential.

Finding 16

The value in seeking public submissions in the process of determining appropriate floor and ceiling costs for access to the freight rail network in Western Australia is questionable, particularly in light of the confidentiality provisions of the *Railways (Access) Code 2000* (WA).

405 Economic Regulation Authority, *2013 Access Proposal by Co-operative Bulk Handling Ltd*, Available at: http://www.erawa.com.au/rail/rail-access/freight-network/2013-access-proposal-by-co-operative-bulk-handling-ltd. Accessed on 13 August 2014.

406 Submission No. 15 from Asciano, 17 April 2014, p 1.

6.11 On 30 June 2014 the ERA issued a media release in the following terms:

> *The Authority has today made a determination of costs for certain routes on the Brookfield Rail network which are relevant to the access proposal made by Co-operative Bulk Handling in December 2013.*
>
> *The Authority will provide a copy of this determination to Brookfield Rail and Co-operative Bulk Handling.*[407]

6.12 In the ordinary sequence of events, the provision of the ERA's costs determination would enable the parties to commence negotiations to agree an access price somewhere within the floor and ceiling cost boundaries. Prior to the commencement of any such negotiations, s 20 of the Code requires that the parties jointly fix a 'termination day' by which the negotiations must conclude. The initial termination day must be within 90 days of the commencement of negotiations, but can be extended by mutual agreement between the two parties. If negotiations have not succeeded by the time of the termination day, the parties are considered to be in dispute and the Code's arbitration provisions are triggered. When this occurs, an ERA-appointed arbitrator will resolve the dispute in accordance with Code and the provisions of the *Commercial Arbitration Act 2012* (WA).

6.13 In the case of CBH Group's December 2013 access proposal, however, CBH Group declared itself to be in dispute with Brookfield Rail on 12 June 2014—almost three weeks before formal negotiations under the Code were due to begin. Furthermore, an arbitrator was appointed under the Code on 27 June 2014—again, prior to the ERA's cost determination process concluding. As such, the declaration of dispute made by CBH Group can only have been made under s 18(3) of the Code, which stipulates that an access seeker can declare a dispute in the event of a disagreement over the terms of the access proposal. Though it is impossible to say with certainty what the dispute in question may have related to, it is highly likely to be a dispute regarding whether or not the operations proposed by CBH Group were within the capacity of the route sections of the rail network to which it was seeking access.

6.14 Arbitration of a dispute declared under s 18(3) of the Code is limited to the specific application matter that is in dispute. That is, the process of arbitration between CBH Group and Brookfield Rail that began on 27 June 2014 will make no inquiry into network access fees, but will instead simply determine whether or not specific sections within the freight rail network have the capacity to accommodate CBH Group's access proposal. Once that dispute is resolved, price negotiations between CBH Group and Brookfield Rail can begin (again, subject to the determination of costs made by the ERA

407 Threlfall, Jeremy, *Brookfield Rail. Determination of costs relevant to Co-operative Bulk Handling's access proposal of December 2013*, Media Statement, Economic Regulation Authority, 30 June 2014.

on 30 June 2014). If they do occur, any such negotiations may also ultimately proceed to arbitration. It is thus apparent that negotiating an access agreement under the provisions of the Code can easily involve a lengthy process.

6.15 As well as announcing that a determination of floor and ceiling costs in respect of the CBH Group access proposal had been made, the ERA's media release of 30 June 2014 also stated that the ERA was 'currently working with Brookfield Rail and [CBH Group] to enable an appropriately redacted version of the determination to be published'.[408] In light of the fact that the ERA had elected to itself determine the floor and ceiling costs, and also because the ERA's determination was the first such document ever produced, the Committee wrote to the ERA on 4 July 2014 seeking a complete and unredacted copy of the determination. In addition to enhancing its understanding of the Code process, the Committee was keen to learn why the ERA was dissatisfied with the cost determination originally made by Brookfield Rail. The fact that the ERA had seen fit to determine floor and ceiling costs also appeared to demonstrate the need for regulation of the market for access to WA's freight rail network.

6.16 The Committee's initial request for a copy of the determination was denied, with ERA Chairman Lyndon Rowe advising that '[t]he determination contains information which Brookfield Rail … has indicated is commercially confidential' and that the provision of the determination to Brookfield Rail and CBH Group had been made 'subject to a detailed confidentiality regime.[409] In response, and under ss 4 and 5 of the *Parliamentary Privileges Act 1891* (WA), the Committee Chairman authorised the Clerk of the Legislative Assembly to issue a summons to Mr Rowe ordering the production of the determination. The Committee duly received a full copy of the determination on 14 July 2014.

6.17 It is clear that in making the determination, the ERA—aided by the services of an independent consultant—conducted a painstaking and thorough inquiry into rail access costs. This has resulted in the production of a document of significant value to any subsequent rail access seekers. Furthermore, notwithstanding the s 50(3) confidentiality provision invoked by Brookfield Rail, s 50 of the Code makes it clear that its intent is to make this information public precisely for the purpose of enhancing transparency within the rail access marketplace.

6.18 On this point, the Committee agrees with the sentiments expressed by the President of the WA Farmers Federation, Mr Dale Park, who explained that grain growers in WA were frustrated by the lack of both competition and transparency in WA's freight rail network operations. As Mr Park put it:

408 ibid.

409 Mr Lyndon Rowe, Chairman, Economic Regulation Authority, Letter, 7 July 2014.

> *when we are looking for efficiencies in an industry, we either have transparency … or you have competition. One of the problems is that with the grain on rail freight, we have neither.*[410]

6.19 The freight rail network in WA is a natural monopoly: in operating the network, Brookfield Rail has no direct or prospective competitors. In such a situation, the Committee agrees that there is a need for transparency regarding how access fees are calculated, if for no other reason than to assuage concerns that the network operator may in some way be abusing its monopoly power. For this reason, the Committee decided to publish that part of the ERA's determination of floor and ceiling costs produced with the assistance of the ERA's independent consultant. However, as Chapter 1 explains, the Committee's decision was superseded by the ERA's publication of a redacted version of its determination.

6.20 On balance, the Committee believes that there is more merit in increasing transparency within the market for access to WA's freight rail network by publishing the bulk of the ERA's determination.

6.21 It is important to recall that the access application made by CBH Group in December 2013 was just the second application ever made for access to the freight rail network under the terms of the Code and the first to proceed any significant way through the Code process. In light of what has transpired in the time that has elapsed since, the historic dormancy of the Code is perhaps unsurprising.

6.22 Furthermore, it must be highlighted that CBH Group has previously engaged in successful negotiations for freight rail network access outside the Code. As such, their decision to lodge a formal access proposal pursuant to the Code on 10 December 2013 was the product of changing contemporary circumstances. During a hearing, CBH Group CEO, Dr Andrew Crane, gave some context into the decision to initiate Code-driven negotiations:

> *The Western Australian grain freight rail freight network has issues such as axle weight limits, speed restrictions and heat restrictions ... [yet] Brookfield has recently proposed a significant increase of fees to us, to growers, despite plans to close 800 kilometres of track, and the rail network standards are decreasing while fees are increasing.*[411]

6.23 Access to the Tier 3 grain freight rail network is one of the elements of the current dispute between CBH Group and Brookfield Rail. This dispute relates to whether the lines can be used in their current condition. There may also be an ensuing dispute over

410 Mr Dale Park, President, Western Australian Farmers Federation, *Transcript of Evidence*, 13 June 2014, p 2.

411 Dr Andrew Crane, CEO, CBH Group, *Transcript of Evidence*, 11 June 2014, p 2.

access pricing. In essence, while it is widely acknowledged that those sections are in need of some amount of capital investment, opinions vary in terms of what amount of capital investment is required. According to CBH Group's Acting General Manager of Operations, Mr Andrew Mencshelyi, the amount may not necessarily be large.

6.24 Whatever amount of capital investment is required, the present state of the lines means that access cannot be granted without capital investment. That an operator can receive access fees and either not make an adequate ongoing investment into the network or else not set aside sufficient capital for a cyclical upgrade is a failing of the lease. An inadequate portion of fees paid since 2001 for access to certain line segments has been reinvested into those lines. If this is symptomatic of the way the network is maintained, and in the absence of any positive obligation on the lessee to set aside capital or continually invest in lines, there is a real danger of this situation being repeated.

6.25 When questioned as to the present viability of those lines classified as Tier 3 lines (which were closed on 30 June 2014), Mr Mencshelyi explained that the view of CBH Group is '[t]hat absolutely they are viable'. In support of this view, Mr Mencshelyi explained that CBH Group is:

> *moving record tonnes per a day on that part of the network. We are bringing greater efficiencies to that network even at the performance standards that they are at today. Since 2009 the performance standards have been lowered… They have been propped up and kept going for a few years; the performance standard has been lowered from a safety perspective. Even at that lower performance standard we are still moving record tonnes on those long sections—cheaper than road transport to port.*[412]

6.26 Mr Mencshelyi also explained that it was representatives of Watco, the operator of CBH Group's above rail assets, who had originally asserted that these lines could be viably operated:

> *When we engage with WATCO from the US, they are the ones who really said, 'The tier 3 lines, we think they are viable. We run on lines like this in the US and we maintain them and we run economically.' They were the catalyst to actually look at this differently; they brought some other consultants over from the US that do track maintenance*

412 Mr Andrew Mencshelyi, Acting General Manager of Operations, CBH Group, *Transcript of Evidence*, 11 June 2014, p 3.

> *and maintain those, what they call, short-line railways, in the US, which have low volume and relatively short sections of track.*[413]

6.27 Critically, however, Mr Mencshelyi also conceded that the network operations model effectively required a vertical integration of below and above rail operations. The Watco model, Mr Mencshelyi explained:

> *is about an annualised maintenance regime. It is about replacing assets that are end of life and really running assets down to end of life and investing the revenues that are derived from the track back into that track and not taking any profit out of it.*[414]

6.28 In an earlier hearing attended by representatives of Brookfield Rail CEO Mr Paul Larsen gave context to the commercial viability of such a proposition in the context of WA, explaining that 'there needs to be a return of, and a return on, capital invested to a level that is satisfactory to support both debt and equity being raised to facilitate that investment'.[415] Explaining this comment, Mr Larsen noted that there were numerous 'situations where [Brookfield Rail] customers have invested their capital alongside us', and that Brookfield Rail had clearly expressed to CBH Group its 'willingness to negotiate with any party for access, including the opportunity for others to invest capital alongside our capital to find a solution to tier 3'.[416]

6.29 According to Mr Mencshelyi, however, the capital investment that would be required under such a proposal would likely be prohibitive. The current status of the Miling line—a line classified as Tier 2—was cited as being symptomatic of this problem. Mr Mencshelyi explained that:

> *the Miling line [is] up for [maintenance] review in 2015. The feedback we have been given is that it is not a sleeper problem; it is an actual rail problem. The rail is snapping on a considerably high occurrence.*[417]

6.30 In providing context for the capital investment that might be required, Mr Mencshelyi explained that:

> *[t]he number that is being proposed is around the $40 million mark to replace the steel to bring that line back to full train length, normal line speed and still 16 tonne per axle, which, if you look at the tonnes on that one particular line section, it is probably about 400 000 tonnes—*

413 ibid, pp 8–9.
414 ibid, p 9.
415 Mr Paul Larsen, CEO, Brookfield Rail, *Transcript of Evidence*, 11 June 2014, p 10.
416 ibid, p 12.
417 Mr Andrew Mencshelyi, Acting General Manager of Operations, CBH Group, *Transcript of Evidence*, 11 June 2014, p 5.

> *$40 million over 400 000 tonnes per annum, it is a case of a big pay back; a long time to pay that back.*[418]

6.31 The Committee notes that this reluctance to invest in a line that CBH Group acknowledges as needing investment directly contrasts with the argument that these lines could be operated without investment. It is, however, clear that this reluctance is a function of a lack of transparency over how access fees that have been paid by CBH Group have been spent in the past. On this point, Dr Crane explained that:

> *as the customer of Brookfield paying the access fee, we do not know what we are paying for in relation to what is the minimum standard performance speed, weight, that we should get for the money. It is not dictated in anything that we can see within the lease … when we are negotiating with Brookfield, we do not know whether they are offering us terms that they are below the minimum standards in the lease or not and/or has the lease got standards in there that are unworkable? There is no way of us being able to sort of have that discussion and let alone when it is particularly an asset that is a sole asset—there is no secondary rail line next-door that we can move to.*[419]

6.32 Uncertainty over how access fees were expended, in combination with the gradual deterioration in performance standards across some route sections, had made CBH Group reluctant to commit to joint capital expenditure with Brookfield Rail. According to Mr Mencshelyi:

> *[w]e do not have any transparency about where our fees go and what part is capital and what part is variable cost, operational cost. Through the ERA process we should get some transparency on those things, but in terms of our current commercial agreement, we do not have any transparency on that at all. In terms of how much is getting invested in the track, we have seen just through the SGNR process that the track has been deteriorating since it has been privatised in the grain network and it has taken government to come in and invest capital to bring it back to a standard. Through that process you would assume the amount of capital being put in outside of that is minimal.*[420]

6.33 There can be no doubt that stipulated performance standards are so important in the context of negotiations for freight rail network access, and indeed part of the dispute between CBH Group and Brookfield Rail relates to the fact that the performance standards of routes used to convey grain freight have declined over time. The view

418 ibid.
419 ibid, p 4.
420 ibid, p 10.

expressed by CBH Group is that, rather than being open to negotiation, performance standards should be set by government. To emphasise this point, Mr Mencshelyi explained that:

> *[w]hen we are negotiating for standards, it is for a performance standard … On a 10-year agreement do we know that there is an absolute minimum service obligation in terms of axle load and rail speed for that whole 10 years? Is that what they are obligated to provide or is that just what they are willing to provide?*[421]

6.34 A final point made by Mr Mencshelyi was that the floor and ceiling cost determinations would not provide any assistance to CBH Group, specifically because the method of calculating the ceiling cost would always return an unrealistic figure. Mr Mencshelyi explained that:

> *one of the key [concerns] is the pricing methodology that is under the rail access code in terms of determining what the floor and ceiling price is and also what the actual final price will be determined. It is based on a modern equivalent asset and a gross replacement value, which is fine when it is a brand new railway operating as a modern equivalent asset, such as the standard gauge that is heading east–west. As you have seen, many of the grain lines are over 100 years old, narrow gauge, pioneer railways, so just that price methodology of using a modern equivalent asset to determine what the price should be to run on that asset is flawed, in our view.*[422]

6.35 As Mr Mencshelyi had earlier made clear, the present day cost of building new rail line in some areas that are already served by existing—albeit aging—infrastructure would likely not be justified by the freight task in those areas. Rather, the desire of CBH Group is to make use of existing infrastructure. Whether such an outcome will be facilitated by the Code remains to be seen.

6.36 Whatever outcome is reached as a result of the access proposal lodged by CBH Group, it is clear that there exists significant room for improvement within the process. First and foremost, the time already taken to discharge the Code process must be regarded as one obvious reason for the Code's historic dormancy, particularly as there is no clear end in sight to the CBH Group proposal some ten months into the process. Furthermore, the Committee regards the confidentiality surrounding the process of determining floor and ceiling costs as unhelpful. Plainly, and particularly as the ERA undertook independent cost calculations in the process of assessing the costs

421 ibid, p 5.
422 ibid, p 6.

submitted by Brookfield Rail, there is no good reason for the floor and ceiling costing process to take place under a shroud of secrecy.

6.37 While the Committee appreciates the theory informing the use of floor and ceiling costs to guide negotiations for network access, this is similarly an element of concern within the Code process. Plainly, the fact that the Code permits such a vast gulf between nominated floor and ceiling costs limits the usefulness of these parameters in any negotiation.

6.38 Certainly it is true that the length of any access agreement will be the most significant determinant as to whether the fee for access is closer to the floor or ceiling costs. It must be recognised that the floor cost is effectively the minimum cost for access to the route sections in question for a period of one year, whereas the ceiling cost represents an amount that would facilitate an access agreement lasting for ten (or indeed, more) years. Nonetheless, inflexibility within the floor and ceiling cost regime leaves a potential access seeker in a difficult position if the performance standards associated with the ceiling cost are significantly in excess of what is required. That is, because the Code stipulates ceiling cost to be a function of the cost to replace existing line with modern equivalent assets, this cost may well pertain to infrastructure that exceeds the requirements of the freight task in question. As a result, the ceiling cost may be an unrealistic parameter for access agreement negotiations.

6.39 In any event, the Committee notes that the ERA's experience in fully discharging its duties under the Code for the first time will very likely lead to useful amendment to the Code. As noted in Chapter 5, one of the ERA's key responsibilities under the Code is to review the operation of, and recommend amendments to, the Code every five years. When questioned on the historic discharge of this responsibility, Mr Rowe indicated that the experience in processing the application for access made by CBH Group would be invaluable by explaining that:

> *[w]e have got the opportunity to review the code [but] one of the difficulties we have had in the reviews up to now [has been the fact that] we have had no attempts to access under the code. We will be doing a new five-year review starting at the end of this year, and we will [now] have … experience to draw on.*[423]

6.40 The Committee can appreciate that the ERA's role of reviewing the Code has been made difficult as a result of the Code's historic dormancy, and as such Mr Rowe's evidence that the next Code review will be markedly enhanced by the experience of having processed the formal access application made by CBH Group is understandable. Equally, however, the Committee believes that the historic absence of formal access

423 Mr Lyndon Rowe, Chairman, Economic Regulation Authority, *Transcript of Evidence*, 18 June 2014, p 6.

applications under the Code should have been cause for an earlier thorough review of its operation and utility. Plainly, the experience of CBH Group thus far demonstrates that the Code does little to actually facilitate or aid access agreement negotiations. Indeed, it is not unlikely that the only reason why CBH Group sought access pursuant to the Code was because, with many of the lines in question scheduled to close in any event, CBH Group had nothing to lose by seeking to engage the Code.

6.41 Ideally the Code should function to lend certainty to the negotiations process through greater transparency. It must be remembered that, with no direct competitors, Brookfield Rail enjoys the benefit of perfect information as to the cost of rail network access and, as such, is always able to negotiate with potential access seekers from a position of significant strength. It should not have taken the processing of CBH Group's access application for the ERA to realise that the Code is effectively broken, particularly as the floor and ceiling price mechanism lends only minimal transparency to the market for network access. Furthermore, negotiations under the Code can only begin at the conclusion of what is a lengthy process and, as such, it seems obvious why access seekers have generally seen no point in turning to its provisions.

6.42 Indeed, this much was made abundantly clear when the Committee heard evidence regarding an attempt to seek access under the provisions of the Code that was made by Karara Mining in 2011. With a project for which the freight rail network was a critical component, but having no prior experience in its access, Karara Mining began the access process by turning to the Code. This approach was quickly abandoned. As such, as the following demonstrates, the experience of Karara Mining in accessing the freight rail network further illuminates many of the significant problems that are inherent to the Rail Access Regime.

Case study 2: The Karara Railway

6.43 The most significant investment into WA's freight rail network in the time since privatisation was the 2010–2011 upgrade of the line between Tilley Siding and Geraldton, which occurred in conjunction with the construction of the Karara Railway. The upgrade came about as a result of an access agreement negotiated between Karara Mining and Brookfield Rail. The ability to convey magnetite from the site of the Karara iron ore project to port at Geraldton is a fundamental component of a project that has already made, and will for some time make, a major contribution to the economic development of Western Australia.

6.44 The Karara iron ore project—a Joint Venture between Gindalbie Metals and Chinese steel producer AnSteel—is located approximately 220 kilometres east south east of Geraldton.[424] Officially opened in April 2013, the project is presently able to produce

424 *Karara Mining Ltd*. Available at: http://www.kararamining.com.au/. Accessed on 2 September 2014.

about 10 million tonnes of magnetite concentrate per year. It is believed that the project has the potential to produce in excess of 30 million tonnes of magnetite concentrate annually for more than 30 years.

6.45 As a component of the project's first stage, Karara funded and constructed a 90-kilometre, 26.5-tonne axle load narrow gauge (albeit with dual-gauge sleepers) railway from the mine site to Tilley Junction at Morawa. Owned by the State and administered via a 49-year lease arrangement between Karara Mining and the Public Transport Authority (the PTA), the Karara Railway connects to the existing state railway network at Tilley Siding. From here, magnetite from the Karara project mine site is conveyed a further 200 kilometres to port at Geraldton over WA's freight rail network. Giving the Committee an overview of this infrastructure strategy, Karara Mining CEO, Mr Dale Harris, explained that:

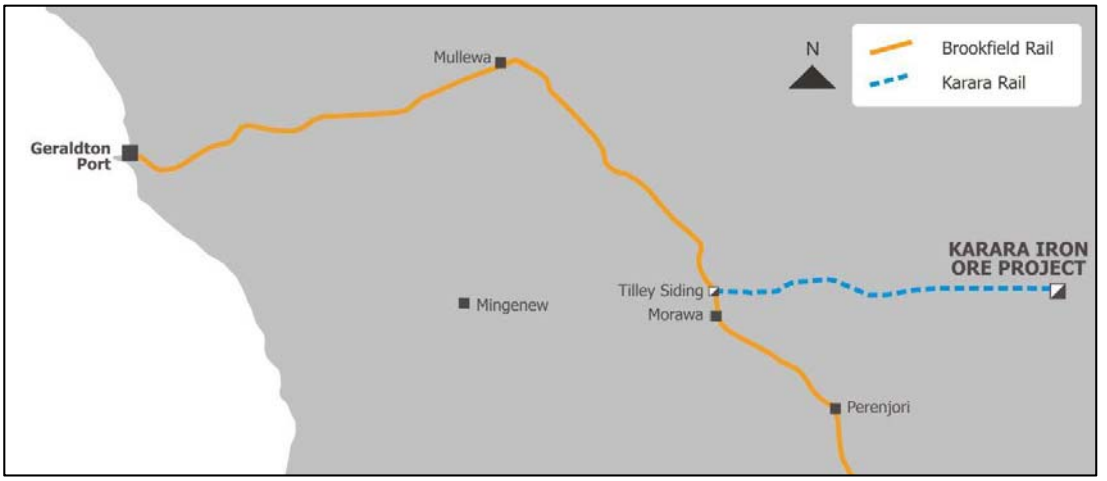
> *[t]he nature of the midwest is that the resources are not of the size that you see in the Pilbara. In the Pilbara, the economics of building dedicated railways are okay, but in the midwest that is not the case and you need to do the best deal that you can with the existing infrastructure provided.*[425]

6.46 In 2009, however, the 'existing infrastructure provided' between Tilley Siding and Geraldton—approximately half of which consisted of rail dating back to 1910—was nowhere near the standard required for servicing Karara Mining's needs. As such, Karara Mining's use of this 'existing infrastructure' was contingent upon a significant capital upgrade to the network section in question, as well as an access agreement between Karara Mining and Brookfield Rail. Ultimately a 15-year agreement, which resulted in a $450 million upgrade to the line, was struck in August 2011. The agreement was the product of direct negotiations between Karara Mining and Brookfield Rail, which were unassisted by any of the provisions in the Code.

6.47 The Karara Railway was opened in August 2012 and since this time approximately four train services have run each day between the mine site and Geraldton Port, each carrying a payload of some 6,800 tonnes.

425 Mr Dale Harris, Chief Executive Officer, Karara Mining, *Transcript of Evidence*, 13 June 2014, p 2.

Figure 6.1: Map of freight rail network between Geraldton Port and Karara mine site



6.48 In providing the Committee with an overview of Karara Mining's rail operations, Mr Harris expressed satisfaction with the arrangement, noting that '[o]perationally, and from a maintenance perspective, the service is working well'.[426] Indeed, both the newly-constructed Karara railway line and the upgraded line between Tilley Siding and Geraldton Port are state-of-the-art components of WA's freight rail network. Reflecting upon the process that led to this outcome, however, Mr Harris was somewhat less complementary.

6.49 The 'key issue' for Mr Harris pertained to the negotiations between Karara Mining and Brookfield Rail in pursuit of the access agreement. Though Karara Mining had originally looked to the Code for support in procuring access to the WA freight rail network, it quickly became apparent that the Code was not able to offer any such useful support, with Mr Harris explaining that:

> *in terms of the original negotiations and structuring of the agreements to allow the Karara project to proceed and for access to rail to be had, when those discussions and negotiations were occurring, it became clear fairly early that the regulatory framework that was in place did not really provide any real support for a company in Karara's position.*[427]

6.50 Karara Mining began the process of seeking access to the Tilley Siding–Geraldton section of the WA freight rail network by turning to the provisions of the Code. After seeking the advice of the ERA and obtaining independent legal advice, however, the futility of the Code quickly became apparent, with the required capital upgrade to the network section in question especially problematic. Because the Code imposes no

426 Mr Dale Harris, Chief Executive Officer, Karara Mining, *Transcript of Evidence*, 13 June 2014, p 9.
427 ibid, pp 1–2.

obligation upon Brookfield Rail to perform any upgrade, extension or expansion to any route, Karara Mining formed the view that the regulatory framework could not provide sufficient certainty for achieving its desired outcome within an acceptable timeframe. As such, Karara Mining elected to simply negotiate directly with Brookfield Rail for access. In essence, having considered its provisions and mode of operation, Karara Mining concluded that engaging the Code would be a waste of time.

6.51 Also serving to undermine the Code was the lack of existing access pricing information. Describing the floor and ceiling price mechanism as 'ineffective', Mr Harris explained that:

> *because there was no real mechanism to get a floor and ceiling price and there was no information on existing floor and ceiling prices [the Code] was completely ineffective and of no use.*[428]

6.52 By contrast, greater transparency in the Queensland market was suggested as functioning to facilitate better negotiations:

> *If you look at the Queensland situation, at least there is a register of previous deals, if you like, and transparency on what has gone before it in terms of access. There were no registered agreements that were in place that would enable us to have any insights into what it would be costing to access a particular section of the track, so it was opaque, would be a way to describe it. It just makes the negotiation difficult.*[429]

6.53 Mr Harris also contrasted the lack of transparency in the WA rail access market with transparency within the mining industry generally, informing the Committee that:

> *[t]here is quite a bit of transparency in the [mining] industry about what mining rates are, because there is a suite of providers you can go to to provide those services. In many instances, you get access to the cost model that those contract miners use at times… so there are opportunities in terms of how you have that engagement and that commercial discussion to get quite detailed information about the cost structures and the profit margins et cetera … Effectively in this case [however], there is only one realistic provider of the service and getting real insights into what their true costs are is much more difficult.*[430]

6.54 Questioned as to what information Karara Mining would have liked to have known in advance of beginning negotiations with Brookfield Rail, Mr Harris indicated that 'an understanding of [network] capacity', was fundamental, and stated that:

428 ibid, p 7.
429 ibid, p 2.
430 ibid, p 3.

> *[t]he ultimate thing is what is the existing network and those particular sections of track truly capable of. What is the true incremental cost of additional capacity?*[431]

6.55 Mr Harris summarised the frustrations of Karara Mining by informing the Committee that 'there is just not enough transparency on all those inputs into how a tariff would be calculated'.[432]

6.56 Uninformed as to prevailing market rates and left to negotiate directly with Brookfield Rail, Karara Mining found itself in the difficult position of negotiating with the monopoly provider in an unregulated market. Summarising this situation, Mr Harris explained that:

> *[y]ou essentially have a monopolistic provider of those services [which] puts the balance of the negotiation power too much on one side and not enough on the company that is trying to get access to that infrastructure.*[433]

6.57 Though ultimately a deal was reached between Karara Mining and Brookfield Rail, not only was this deal not aided by the regulatory framework—the lack of regulation arguably jeopardised the deal. In making this point, Mr Harris indicated that negotiations between Karara Mining and Brookfield Rail were somewhat one-sided:

> *[u]ltimately, we got a deal done with Brookfield, but it was on what we considered was a very tough negotiation where the balance of the risk–reward trade-off—we took on a lot of the risk in terms of bank guarantees required, parent company guarantees and so forth. It was a tough negotiation in the context of dealing with a monopoly supplier, effectively.*[434]

6.58 To put the unilateral nature of this negotiation into context, an August 2011 securities exchange announcement explained that Karara Mining had provided $300 million in security for the $450 million upgrade to the Tilley Junction–Geraldton route. Questioned on the detail of this arrangement, Mr Harris explained that:

> *as part of that deal there is a bank guarantee that that Brookfield could call on if we could not fulfil our obligations to utilise the rail… If, for some reason, we were not fulfilling that, then Brookfield has a bank guarantee, and so on demand they could call on that $300 million.*

431 Ibid, p 3.
432 ibid, p 3.
433 ibid, p 2.
434 ibid, p 2.

> *That bank guarantee is obviously part of the overall financing solution, and the banks have security against the assets of Karara.*[435]

6.59 Mr Harris also informed the Committee that the access agreement placed a significant 'take or pay' contractual burden on Karara Mining. While variable costs in this agreement were described as 'quite low', Mr Harris indicated that Karara Mining is subjected to 'a very high fixed cost arrangement', requiring them to pay access fees irrespective of their actual level of network access.[436] Mr Harris also revealed that over the 15 years of the agreement, Karara Mining would pay Brookfield Rail about $100 million per year in access fees—for a total of approximately $1.5 billion.[437]

6.60 In effect, the Rail Access Regime in WA permitted Brookfield Rail to largely avoid carrying risk in upgrading the Tilley Siding–Geraldton route. In acknowledging that Karara Mining 'are carrying the full risk of the Karara project', Mr Harris provided some context for why such a situation is extremely undesirable from the perspective of state development:

> *when you are looking at putting together an overall project, you have got to have port, rail. It is one package so, again, if you contrast that to a Rio [Tinto] who is doing the whole thing, they can manage that risk, as one package, whereas when you have separated it, you can push the risk one way or the other.*[438]

6.61 On this point, Mr Harris again acknowledged that 'a deal was done between Karara and Brookfield', but made the point that 'there could have been a better deal … if there was a stronger regulatory framework'. To emphasise the target of his criticism, Mr Harris explained that:

> *I would not want to be sitting here criticising Brookfield. I think the relationship we have got is a good one. We have talked to them about this and I think they are listening and willing to engage [but] I think the system here can be improved and I think it is going to require all the stakeholders to work together to get that improvement, and I am sure that Brookfield, from what I have seen, are willing to engage in that… they are looking for a return on the investment they have got. That is fine, I think that is just the commercial reality of business.*[439]

6.62 A final matter of concern to the Committee was the revelation by Mr Harris that not only was the agreement between Brookfield Rail and Karara struck outside the Code (as

435 ibid, p 4.
436 ibid, p 5.
437 ibid, p 5.
438 ibid, p 10.
439 ibid, p 9.

permitted under s 4A), but that the Code is expressly excluded from operating between Brookfield Rail and Karara Mining under the 15-year duration of the agreement. According to Mr Harris:

> *[a]s part of the commercial negotiation … Karara agreed that it would not revert back to any code in future.*
>
> *[…]*
>
> *[T]he agreement … came at the express exclusion of any future right to be treated under the code for the duration of the 15-year agreement… [which was about] carving out any potential protection that that code might afford.*[440]

6.63 It may well be the case that this term of the agreement between Karara Mining and Brookfield Rail is inconsequential, especially in light of the fact that the provisions of the Code are highly unlikely to be enlivened in respect of what is state-of-the-art infrastructure during a 15-year window covered by an access agreement.

6.64 Subsequent to Mr Harris' appearance before the Committee, the Chairman of the ERA, Mr Lyndon Rowe, was asked to comment on the concerns raised by Mr Harris. Though prefacing his response by acknowledging that it was made 'solely on the basis of what [he had] seen in *The West Australian*', regarding Mr Harris' evidence, Mr Rowe explained that, from his perspective, criticism of the ERA's role was unfair in light of the fact that Karara Mining had elected not to formally engage the processes of the Code when it had sought access to the freight rail network. Stating that he was 'very surprised by the report' of Mr Harris' evidence, Mr Rowe said that:

> *to the best of my knowledge, Karara have never sought to seek access under the code. To the best of my knowledge, Karara have never made a submission to any reviews of the code. And to the best of my knowledge—and I am now hesitating, because you are implying that I might be wrong in this—they have not approached us about access under the code. My understanding is Karara have entered into a commercial agreement. Presumably they are now unhappy with that commercial agreement, but presumably at the time they entered into it, they decided that was in their interests rather than seeking access under the code, because the option of seeking access under the code was there at the time they did that commercial agreement, and no approach was made.*[441]

440 ibid, p 10.

441 Mr Lyndon Rowe, Chairman, Economic Regulation Authority, *Transcript of Evidence*, 18 June 2014, p 4.

6.65 Subsequent to Mr Rowe's appearance, the Committee wrote to Mr Harris seeking further comment, particularly in relation to the view expressed that the decision to enter into a commercial agreement, rather than seek access under the Code, must have been guided by the commercial interests of Karara Mining. In a response dated 7 July 2014, Mr Harris emphasised that representatives of Karara Mining had met with ERA representatives, and had been advised that '[u]nder the Code there is no obligation to perform any upgrade, extension or expansion of the route'.[442] This advice was subsequently affirmed by Karara Mining's independent legal advice. Mr Harris thus explained that:

> *[o]n the basis of that advice, and as the line required significant capital upgrade, [Karara Mining] elected to negotiate directly with Brookfield in relation to rail access. That decision was a commercial one and based on the view that [the] regulatory framework did not provide sufficient certainty in regard to achieving an acceptable outcome in the timeframe required.*[443]

6.66 Mr Rowe also provided further evidence in relation to Mr Harris' comments subsequent to his appearance. By a letter dated 7 July 2014, Mr Rowe confirmed 'that members of the ERA Secretariat held discussions with Karara in 2009 in relation to the process for access under the Code'.[444] Mr Rowe further provided context to those discussions, explaining that the specific requirements of Karara Mining in relation to the proposed access would have made it difficult to engage the Code. According to Mr Rowe:

> *the access required by Karara [required] expanding the capacity of the existing infrastructure. The railway route in question was not technically capable of the freight task required to transport Karara's ore and the capacity of the route was required to be expanded. The Code does not allow for costs to be determined for infrastructure which has not yet been built and the ERA does not have a role in relation to negotiations for extensions and expansions.*[445]

6.67 Of specific concern to the Committee, Mr Rowe's letter then further clarified that upgrades to the freight rail network are effectively determined solely on the basis of Brookfield Rail's discretion:

> *Any access proposal involving an extension or expansion must proceed first from a determination of costs for the pre-existing route, with costs*

442 Mr Dale Harris, Chief Executive Officer, Karara Mining, Letter, 7 July 2014.
443 ibid.
444 Submission No. 35 from Economic Regulation Authority, 7 July 2014, p 1.
445 ibid.

associated with any required expansion or extension being negotiated separately, and not subject to the ERA's determination.[446]

6.68 While the upgrade to the freight rail network that resulted from the access agreement negotiated by Karara Mining is one of the most significant upgrades that have been performed in the time that the Code has operated, it seems highly likely that other significant upgrades will be necessary in the future. It is therefore unfortunate that the Code is so flawed as to offer no assistance whatsoever in the process of negotiating a network upgrade. Plainly, the state of WA benefits as a whole when upgrades to the freight rail network are performed, and as such facilitating network upgrades should be one of the clear aims of regulating the market for access to the network. The view of the Committee is that the Code is inherently flawed insofar as it does not lend sufficient certainty to rail network access negotiations. That it does not apply at all where a network upgrade is to be negotiated calls into question the worth of having the Code at all, especially considering that rail technology is unlikely to regress over the remainder of the term of the lease. As such, at the next Code review, this significant flaw must be addressed.

Finding 17

The *Railways (Access) Code 2000* (WA) is not an adequate regulatory mechanism for access proposals requiring an upgrade to the network.

Recommendation 5

The *Railways (Access) Code 2000* (WA) review of June 2015 needs to include a review of its effectiveness in third party access requiring capital upgrades.

Recommendation 6

Part 4A of the *Railways (Access) Code 2000* (WA) be amended to make it clear that while parties are free to negotiate outside the Code, they are not able to expressly prohibit the future operation of the Code under an access agreement.

446 ibid, p 2.

Chapter 7

Management of the Freight Rail Network by the Public Transport Authority

Regulation of the freight rail network is essential

7.1 Western Australia's (WA's) freight rail network is a natural monopoly: as a result of both economic and legislative impediment, Brookfield Rail has no current or prospective competitor in maintaining and facilitating access to the freight rail network.[447] The freight task in WA overwhelmingly involves conveying freight from inland areas to port, with rail and road being the only available transit options. Absent government regulation, Brookfield Rail's rail access fees would simply be a direct function of what the freight market in WA could bear. This absence of competition means that there is nothing functioning to either constrain or reduce rail access fees, other than the cost of equivalent road transport.

7.2 Though the economic efficiency of the rail network is obvious for some freight tasks (such as mineral resources), it is less obvious for others, including grain freight. Apart from the economic viability of the freight rail network, it must also be recognised that the network, as a public good, is a vital piece of state infrastructure that can deliver both economic and social dividends. Because competition cannot be relied upon to ensure the efficiency of operation of the freight rail network, as noted in Chapter 3, government regulation is essential if these dividends are to be maximised.

7.3 Regulation of the freight rail network takes two primary forms. First, there is regulation of the market for access to the network. As discussed in Chapter 4, the market for access to the freight rail network is, where necessary, regulated by the Economic Regulation Authority (ERA), in line with the provisions of the *Railways (Access) Code 2000*. In essence, it is the role of the ERA to ensure that the price charged by Brookfield Rail for access to the freight rail network does not exceed certain thresholds.

7.4 Second, the actual operation of the freight rail network (which, in a broad sense, means its ongoing availability and maintenance) is formally regulated by the provisions

447 Aside from the economies of scale associated with being the exclusive operator of an existing freight rail network, s 51(xxxiv) of the Commonwealth Constitution means that the construction of any new rail line requires the consent of the relevant state legislature.

of the lease instruments and their administration. This regulation aims to maximise the efficient and equitable use of the freight rail network.

7.5 Because the freight rail network is a public asset, the lease instruments effectively seek to regulate the operation of the freight rail network to balance economic viability with equitable provision in meeting the state's freight task. It is therefore hardly surprising that the lease instruments for both the standard and narrow gauge sections of the freight rail network are complex and lengthy documents. The lease contains detailed descriptions of the rights, interests, obligations and responsibilities conferred upon the network operator over the course its 49-year duration. The lease also understandably contains comprehensive contingency provisions for dealing with unforeseen circumstances.

Finding 18

The Western Australian freight rail network, which is subject to a 49-year lease, is a natural monopoly.

The role of the Public Transport Authority

7.6 The Public Transport Authority (PTA) is designated as the 'Authority' in s 2 of the *Government Railways Act 1904* (WA) that, through s 13 of that Act, 'shall have the management, maintenance and control of every government railway'.[448] Every part of the freight rail network is a government railway.

7.7 The PTA is one of WA's three key transport agencies, with the 'Transport Portfolio' comprised of the PTA, the Department of Transport and Main Roads Western Australia (Main Roads WA). In the course of this Inquiry it has become apparent that, in relation to the role of managing, maintaining and controlling government railways, the Department of Transport and the PTA are more integrated than delineated: the PTA's specified role notwithstanding, submissions made to the Committee were signed by Mr Reece Waldock as the Chief Executive Officer of the PTA, with Mr Waldock appearing as Director General of the Department of Transport along with the Deputy Director General of the Department of Transport, Ms Sue McCarrey, at Inquiry hearings with the PTA on 25 June 2014.[449] Furthermore, as the Inquiry progressed the Committee was advised to direct all enquiries to Mr Waldock in the first instance, instead of to previously nominated liaison officer within the PTA.

7.8 The Committee has formed the view that the responsibilities of the PTA as specified in the *Government Railways Act 1904* (WA) are effectively shared between the PTA and the Department of Transport, and there is little practical difference between these two

448 Section 2 *Government Railways Act 1904* (WA).

449 Mr Waldock is currently Director General of the Department of Transport, Chief Executive Officer of the Public Transport Authority, and Commissioner for Main Roads.

entities within the 'Transport Portfolio'. As such, the Committee uses the PTA acronym as an interchangeable descriptor for both the Public Transport Authority and the Department of Transport throughout this chapter.

7.9 It should be noted that the PTA was not formed until 2003. This is clearly after the commencement of the *Rail Freight System Act 2000* (WA) on 8 June 2000 and the signing of the lease agreement on 17 December 2000. Prior to the *Rail Freight System Act 2000* (WA), the public authority responsible for the operation of WA's freight rail network was Western Australian Government Railways, trading as Westrail. Westrail's responsibility for the operation of the freight rail network ceased when the lease was entered into. Subsequent to the lease, the Western Australian Government Railways Commission was formed to assume responsibility for the non-freight duties previously performed by Westrail.

7.10 Notwithstanding these name changes, it must also be recognised that the entry into the lease in 2000 did not alter the Western Australian Government's responsibilities under the *Government Railways Act 1904* (WA). Rather, through the Act, the Western Australian Government permitted the assignment of Westrail's freight rail network duties to a private operator by way of leasehold interest.

7.11 The December 2000 lease represented a delegation of the performance of these duties by Westrail to a private entity. The PTA was established through the *Public Transport Authority Act 2003* (WA) and assumed responsibility for the oversight of the operator's performance of its freight rail network duties. In 2014 these duties are performed by Brookfield Rail, effectively on behalf of the PTA. The agreement underpinning this arrangement is scheduled to run until at least 2050.

7.12 The PTA is tasked with overseeing the lessee's adherence to the regulatory provisions of the lease. The role of the PTA under the present arrangement, then, is to ensure that its 'management, maintenance and control' responsibilities are being adequately discharged by Brookfield Rail on its behalf.[450]

7.13 That is, in 2014 the PTA is effectively the landlord of the leased freight rail network, with Brookfield Rail the lessee. The PTA's task, therefore, is to manage the lease to ensure both that the lessee's obligations are performed and, given the provisions of the lease, that the provisions of the lease instrument remain appropriate as circumstances change.

7.14 PTA's role in relation to the freight rail network is therefore fundamental. Indeed, the PTA describes 'protection of the long-term functionality of the rail corridor and railway infrastructure' as one of its two 'targeted outcomes' in honouring 'the Government's

450 Section 13 *Government Railways Act 1904* (WA).

vision for Western Australia'.[451] According to the PTA, its success in this task 'results from quality management of the railway corridor and residual issues of the rail freight network'.[452]

7.15 The balance of this chapter is concerned with the PTA's execution of its lease-management task.

The Public Transport Authority's view of its performance

7.16 The PTA submits that its management of the freight rail network 'is best judged by the current status of the rail freight network [in 2014] that in all aspects, except Tier 3 which have succumbed to market forces and commercial realities, is in a far better state than when it was leased in 2000'.[453] Brookfield Rail's submission confirms that the rail network has, indeed, transported increased tonnages:

> *[t]onnages transported on our rail network have increased by around 113% since privatisation, with net tonnages in 2013 reaching over 71 million.*[454]

7.17 It is clear that freight tonnages carried on the freight rail network have increased markedly over the 14 years in which the network has been privately operated. Note, though, that as Figure 1.1 in Chapter 1 demonstrates, the increase from approximately 50 million tonnes in 2011 to over 71 million tonnes in 2013 is largely due to the rail freight of iron ore from Karara Mining's Mid West mine. While the Committee agrees that increased freight tonnage is an important and substantial outcome, it should not be the sole metric by which the PTA's management of the network lease is assessed.[455] Indeed, though this measure is important, the long-term functionality of the freight rail network *in its entirety* is arguably a more fundamental measure of lease management success because the ongoing availability of the network will be critical as the freight task evolves over time.

7.18 For this reason, the lease imposes strict obligations upon the lessee regarding the maintenance of the rail network. In particular, clause 15.2 of the lease is unequivocal:

> *Throughout the Term, the Network Lessee will maintain, replace and repair and upgrade all Leased Railway Infrastructure so that it is Fit for Purpose.*

---

451 Public Transport Authority, *Annual Report*, 10 September 2013, p 4. Available at: http://www.pta.wa.gov.au/portals/0/annualreports/2013/docs/pta-annual-report.pdf. Accessed on 4 September 2014.

452 ibid.

453 Submission No. 10 from the Public Transport Authority, 16 April 2014, p 6.

454 Submission No. 22 from Brookfield Rail, 17 April 2014, p 3.

455 As noted in Chapter 1, a significant proportion of this growth is related to the growth in iron ore freight.

7.19 The term 'Fit for Purpose' is defined at clause 1.2 of the lease and basically requires that the freight rail network be maintained so that its performance is not less than the standard of the network at the time of the lease was signed. This requirement imposes a very specific obligation on the network lessee and, as such, represents an effort by government to regulate the monopoly rail network operator. As manager of the lease, the PTA—acting on behalf of the Minister for Transport as lessor—is required to enforce this obligation.

7.20 While some parts of the network have been upgraded since private operation began so they are able to perform to a higher standard than before the lease, maintenance to the fit for purpose standard has not occurred across the entire network. That is, while some parts of the freight rail network have been the subject of extensive upgrades in the time that the lease has operated, other parts of the network—particularly those parts of the network for which the sole freight task is grain freight—appear to have received nothing more than cursory routine maintenance.

7.21 The Committee saw this first hand when it travelled to Bruce Rock to convene a series of hearings in June 2014. Travelling through the Wheatbelt, the Committee inspected parts of the then-open (and now closed) Merredin–Kondinin and Merredin–Corrigin lines, as well as the then-closed York–Quairading lines. It was clear that the rail infrastructure along each of these lines was in a state of disrepair as a result of gradual degradation. The Committee is aware that the state of these three lines is fairly typical of many if not all Tier 3 lines, all of which were placed into 'care and maintenance' on 30 June 2014. As a consequence, it is presently the case that some parts of the rail network cannot be used and will not be able to be used without comprehensive maintenance. This will include re-sleepering and, in some instances, line and ballast replacement. That is, notwithstanding the express requirements of the lease, some parts of the rail network have not been maintained so that they are fit for purpose.

7.22 In effect, this is exactly the outcome that is at risk when public infrastructure is privatised without adequate regulation. While some sections of the freight rail network can be profitably operated by Brookfield Rail, other sections cannot, and have consequently been designated as 'non-operational'. In other words, these lines have been closed. It must therefore be observed that the Western Australian Government, in leasing the freight rail network in 2000, converted the network from a public into a private good by inadequately regulating how the network should be operated. Furthermore, as will be demonstrated, this problem has been compounded by the manner in which the PTA has discharged its responsibilities as lessor.

Finding 19

The freight rail network is a natural monopoly and the lease instrument places the operation of that natural monopoly into private hands. The Public Transport Authority's approach to managing the lease does not recognise that more effective regulation is necessary to avoid abuse of market power by the lessee.

A light touch

7.23 The existence of the lease itself is testimony to the fact that the government intended some level of oversight by the relevant government authority, which, since 2003, has been the PTA.

7.24 The PTA's submission outlined the way in which it discharges its duty to manage the freight rail network lease:

> *As to the ongoing management of the leased railway infrastructure by the PTA, in addition to the day to the scheduled and day* [sic] *activities related to the management of the Lease, the PTA holds quarterly meetings with executives from Brookfield Rail and the Department of Transport to ensure that the requirements of the Lease and the strategic requirements of the State in relation to the leased rail freight infrastructure are being met.*
>
> *Additionally, where the State funds a project on the leased rail freight infrastructure, such as the resleepering of the Eastern Goldfields Railway in 2007 and the recent Grain Line Resleepering Project, a Project Control Group is formed and monthly meetings are held with the Lessee to go through a detailed monthly report on the status of the project and feedback from monthly inspections of the works by the PTA, to ensure the best outcome for the State.*[456]

7.25 When questioned as to what specific activities are undertaken in managing the lease, the PTA again indicated that they 'have regular formal meetings as laid down under the lease', and that these meetings include 'monthly meetings … and quarterly strategic issues meetings'.[457]

7.26 These duties were contextualised by the Department of Transport's Deputy Director General, Ms Sue McCarrey, who informed the Committee that 'the lease was set up to

456 Submission No. 10 from Public Transport Authority, 17 April 2014, p 5. See also: Submission No. 42 from the Public Transport Authority, which provides copies of some of these documents.

457 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 25 June 2014, p 17.

be a fairly light management by government in a sense', and that '[t]he intent was to hand it to the private sector to actually operate the network'.[458]

7.27 This evidence was consistent with the description by the Auditor General that '[t]he lease anticipated a relatively 'light touch' role for government in managing the lease',[459] and is consistent with the legal formulation of the covenant for quiet use and enjoyment of leased property.

7.28 It is, however, important to recognise that the Auditor General qualified his description of the anticipated 'light touch' role for government by explaining that the light touch approach was envisaged 'where the interests of the State and the lessee are well-aligned through the lease'.[460] Importantly, the Auditor General also made it clear a light touch approach to lease management would not always be appropriate by explaining that 'where the interests of the lessee and the State may diverge, a *risk-sensitive and proactive approach* was anticipated.[461]

7.29 Evidence to this Inquiry, however, strongly suggests that the level of lessor oversight, irrespective of whether the interests of the state are aligned or in conflict with the interests of the lessee, is minimal.

7.30 In discussing its meetings with Brookfield, the PTA advised that it has 'a very close working relationship to make sure that it does work for the state and the lessee', while 'keeping in mind… that [Brookfield Rail] have the right to the quiet enjoyment and use of the leased rail infrastructure'.[462]

7.31 The Director General of the Department of Transport, Mr Reece Waldock, explained this position as follows:

> *We believe [that] we are following the intent of the lease. We talk about quiet enjoyment. We actually have a number of things we do. We do abide by the lease in terms of what exemptions are laid down, what they have to provide. It has been suggested we should be far more micro in how we manage the lessee. I must say that has never been our interpretation … we believe, and still do believe, that these*

458 Ms Sue McCarrey, Deputy Director General, Department of Transport, *Transcript of Briefing*, 10 February 2014, p 2.

459 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 9.

460 ibid.

461 ibid, p 7. Emphasis added.

462 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 25 June 2014, p 17.

> *people, this lessee, should not be bothered and pestered by us on day-to-day issues.*[463]

7.32 While the Committee accepts that the lessee should not be 'bothered and pestered' by PTA on a day-to-day basis, it does not accept that PTA should not actively engage with Brookfield Rail. Indeed, the view of the Committee is that on some lease management issues, particularly in relation to whole of network maintenance, the PTA should—as explained by the Auditor General—take a proactive approach.

Quiet use and enjoyment

7.33 Mr Waldock's reference to 'quiet enjoyment' is of particular interest. The lease contains, at clause 4.9, an express covenant[464] for quiet use and enjoyment of the network by the lessee. This covenant is an often misunderstood legal term described in *Australian Real Property Law* as imposing:

> *an obligation on the landlord to put the tenant into possession and allow the tenant to remain peacefully in possession during the term of the lease free from interruption.*[465]

7.34 The covenant 'amounts to an obligation on the landlord not to do anything after the date of the grant which *substantially interferes* with the tenant's occupation'.[466] Certainly the covenant of quiet use and enjoyment is an important component of the common law. Critically, however, the covenant does not alter the fact that the instrument by which the rail network is leased contains a number of express terms which impose specific obligations upon the lessee.[467] In becoming a party to the lease the lessee would be aware of those obligations and would expect a reasonable level of management by the lessor. Ensuring that those obligations are discharged is, plainly, the direct responsibility of the PTA.

7.35 The Committee is unsure as to how the PTA has interpreted the effect of the covenant for quiet use and enjoyment, though evidence given by the PTA suggests that it has been misinterpreted through literal construction. In a submission, the PTA cited clause 4.9 of the lease, putting particular emphasis on the specific wording of the covenant:

> *Regardless of whether any Railway Infrastructure is affixed to land, all Leased Railway Infrastructure is leased to the Network Lessee, who*

463 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 17.

464 The covenant for quiet enjoyment is implied into all leases in the absence of any such express covenant in any event. *Hawkesbury Nominees Pty Ltd v Battik Pty Ltd* [2000] FCA 185.

465 Bradbrook, Adrian J et al., *Australian Real Property Law 5th Edition*, Thomson Reuters, Pyrmont, 2011, p 672.

466 ibid. Emphasis added.

467 ibid, p 664.

> *obtains a right of quiet use and enjoyment of the Leased Railway Infrastructure as lessee…*[468]

7.36 The wording of clause 4.9 is unremarkable in that the lessee 'obtain[ing] a right of quiet use and enjoyment' in a leased property is a standard term of any lease, whether expressed or implied.

7.37 During a hearing on 17 September 2014, the Committee sought a more detailed explanation as to the PTA's interpretation of the covenant for quiet use and enjoyment. Mr Waldock confirmed that the covenant contained at clause 4.9 of the lease was unremarkable, informing the Committee that:

> *we do many, many lease agreements and they all have that clause about quiet enjoyment for leaseholders, so it is no different to any other.*[469]

7.38 As to what this meant for the management of the lease, Mr Waldock further explained that:

> *our job is not to look over their shoulder on a day-by-day basis. We set clear milestones for reporting, which was locked into the agreement because we got it, and we managed it to the best of our ability.*[470]

7.39 The Committee cannot help but contrast this interpretation of the lease with evidence also given during the hearing by Mr Browne that, 14 years into the lease:

> *we are putting that contract management plan and, indeed, all of the documents that we have been utilising over the last 14 years into a consolidated [Geographic Information Systems]-based system [which will utilise satellite imagery] so that we have far more visibility of the decisions that are being made, the status of the Brookfield network and the strategic plans for the state. Those things are moving along very well.*[471]

7.40 The view of the Committee is that steps in 2014 to implement satellite-based visibility of the physical state of the freight rail network is very much akin to looking over the lessee's shoulder on a day-to-day basis. While it is true that moves of this nature are a product of enhanced technological capability, the view of the Committee is that the PTA's 2014 implementation of a more proactive method of lease management

468 Submission No. 27 from Public Transport Authority, 26 May 2014, p 3. Emphasis in original.
469 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 10.
470 ibid.
471 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 12.

amounts to a recognition that the earlier lease management methods were deficient. Nonetheless, the Committee believes that the PTA should be commended for taking these steps.

7.41 Regardless of how the PTA has interpreted the covenant for quiet use and enjoyment, its interpretation has historically limited the organisation's administration of the lease. This is problematic for two main reasons. First, the lease is a complex and detailed instrument that calls for attentive administration; and second, the details of the lease have not previously been made publicly available. Put simply, ensuring that the lessee discharges its obligations and responsibilities under the lease is the role of the PTA—a role that is important, given that the freight rail network is an important state asset.

Managing standards

7.42 The lessee is required, by clause 15.21, to 'commission an independent and appropriately qualified expert to review [their] compliance… with [maintaining] performance standards'. This must be done every five years. Clause 15.21 also specifies that the lessee is required to meet the cost of these reviews and that the chosen 'expert' must be approved by the Minister for Transport prior to any review being undertaken. Two such reviews have thus far been undertaken: the first in 2005 and the second in 2010.[472] It is on the basis of these reviews that the fulfilment by Brookfield Rail of its maintenance obligations is assessed. Indeed, clause 15.7 of the lease similarly requires Brookfield Rail to, every five years:

> *submit to the Minister [for Transport] a Maintenance Plan showing the works, repairs, replacements, maintenance, additions and other things that is [sic] reasonably expected to be necessary to be undertaken by the Network Lessee … in order to keep the Leased Railway Infrastructure Fit for Purpose.*

7.43 While the 2005 review was tabled in Parliament in 2007, the 2010 review has never been made publicly available. Apparently, the question as to whether the information contained within the reviews ought to be publicly available has not been raised previously. It is clearly in the public interest that information regarding the assessed standard of the freight rail network—information that has been gathered independently—be published as this lends transparency to the duties undertaken by Brookfield Rail in managing, maintaining and controlling the network. While Brookfield Rail makes detailed information regarding the status of all possible routes on the freight rail network available via its website, the Committee's view is that each five-year review document ought to be tabled in Parliament as soon as is practicable after it is received by the Minister for Transport. Making the independent assessment of the

472 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 25 June 2014, p 14.

state of the railway network available for public scrutiny would enhance the PTA's oversight of Brookfield Rail's network maintenance duties.

7.44 On this point, the Committee notes the commentary within the Auditor General's report regarding the possible public release of the independent reviews and, indeed, the lease instruments themselves. According to the Auditor General:

> *Transport and PTA are aware that the Minister may table the lease in Parliament, or provide it to individual Members of Parliament, but maintain the view that Transport and PTA are bound by the confidentiality provisions of the lease. In 2011 PTA opposed a request for lease information and the five-yearly track condition reports from a third party, on the grounds that the lease was confidential. PTA's view was upheld by the Information Commissioner.*[473]

7.45 It is important to note that the Information Commissioner's decision was based entirely upon the confidentiality clause within the lease, as the Information Commissioner is bound by any such clause. In any event, the Auditor General also explained that:

> *while maintaining this wide view of the lease's confidentiality, PTA has advised its Minister on two occasions that it sees no obstruction to the Minister tabling the lease in Parliament. The lease contains a widely-drafted confidentiality clause that asserts that the entire lease and all related documents should be treated as commercially confidential, while also authorising the tabling of the lease in Parliament, or the provision of the lease to Members of Parliament on request.*[474]

7.46 Given that the 2005 review was tabled in Parliament, the Committee sees no reason why other subsequent reviews should not also be similarly published.

Finding 20

The lessee of the freight rail network is required to commission a review of its operational performance every five years—a process that requires a detailed assessment of the capacity and performance of the network.

Finding 21

Since 2000, two reviews of the capacity and performance of the freight rail network have been undertaken as required in the lease. Though the 2005 review was tabled in Parliament in 2007, the 2010 review has never been publicly available. There is no basis for this information not to be made public.

473 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 25.

474 ibid.

Recommendation 7

Freight rail network capacity and performance reviews be tabled by the Minister for Transport as soon as practicable after their production.

7.47 More pointedly, however, the Committee notes the recent comments by the Minister for Transport, Hon Dean Nalder, MLA, regarding the present state of the freight rail network. After meeting with relevant stakeholders in regional areas in July 2014, the Minister announced that the PTA would perform a 'safety check' on the lines that were put into care and maintenance on 30 June 2014. The *Narrogin Observer* reported the Minister as saying that he had:

> *asked the Public Transport Authority to conduct a safety check on the lines so that we actually have a proper understanding as to the health of those lines and really understand what work will need to be done.*[475]

7.48 It is difficult to reconcile the Minister's statement with the requirements of clauses 15.7 and 15.21 of the lease. That the State has found itself in a position where the PTA itself needs to undertake a 'safety check' on the freight rail network calls into question their role in managing the lease, and indeed the lease instrument generally. Plainly, a situation where the public lessor of a fundamental piece of state infrastructure is unaware of the condition of that infrastructure reflects poorly upon the Western Australian Government.

7.49 The Committee requested a copy of the safety review report from the Department of Transport. The Committee's request was declined on the basis that the audit report was a cabinet document.

Recommendation 8

The Minister for Transport table the safety review report on Tier 3 rail lines in the Legislative Assembly.

7.50 The Committee is concerned that the commitment to 'light handed' management has been interpreted so as to excuse government from its regulatory role. On this point, evidence given by PTA representatives suggests a strong commitment to market-based outcomes. On the question of upgrading the performance standards along the Kwinana-Kalgoorlie line, the PTA's Managing Director, Mr Mark Burgess, said that:

> *there is a very different level of investment, level of enthusiasm, on those train lines that have a lot of traffic and are providing good*

475 O'Connor, Kendal and van Straalen, Pia, 'Tier 3 not closed', *Narrogin Observer*, 7 August 2014, p 3.

> *business for them [compared to those lines that do not]. I think we could look positively towards those improvements.*[476]

7.51 As to whether problems with the wording within the *Rail Freight System Act 2000* (WA) had hampered the PTA's ability to manage the network, Ms McCarrey said:

> *no, because…. Regardless of what the act actually says, the standards were reached out of agreements between above and below ground operators.*[477]

7.52 Finally, on the question of how upgrades to the network have been financed, Mr Browne explained that upgrades were dependent upon:

> *commercial negotiations, and that is the model that has been followed through the upgrade of the midwest. There has been some $550 million of investment between Morawa, Mullewa and Geraldton as a result of the iron ore operations out there, and they were the result of commercial negotiations between the miners and Brookfield. They would then go to the customers and say, 'What do you need? We can provide whatever you need, but it's going to cost.' That's basically economics 101, I think.*[478]

7.53 The Committee acknowledges that in these cases the approach taken by the PTA has merit because the interests of the state and the lessee are, broadly speaking, in line: both want to see as much freight conveyed over these lines as possible. The interests of the state, however, are not always so aligned with the interests of the lessee. In particular, it may not be in the state's interests to see a freight task that could be handled by rail be taken over road. In some instances, that is, the PTA's approach of leaving the market to decide is not appropriate—especially because the 'market' for rail freight services in WA can hardly be considered 'free'.

7.54 It is important to note that while privatisation can deliver efficiencies in the provision of public goods and services, competition is a critical element of any such outcome. In the absence of competition, regulation becomes critical. That is, government oversight should not be regarded as an anathema to efficiency, but rather a fundamental component of it. This point was made by the former Chairman of the Australian Competition and Consumer Commission (ACCC), Mr Graeme Samuel. In speaking about why debate on the form of regulatory oversight often tended to miss the point,

476 Mr Mark Burgess, Managing Director, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 6.

477 Ms Sue McCarry, Deputy Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 7.

478 Mr David Browne, Executive Director, Safety and Strategic Planning, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 8.

Mr Samuel noted that 'regulatory mechanisms need to address the market problem in the most efficient way possible'.[479] The ACCC Chairman observed that 'to debate whether any particular approach is 'light handed' or 'heavy handed' risks missing the point: is it effective?'[480]

7.55 Mr Samuel further explained that:

> *the ACCC endorses absolutely the objective of always using means that are as light-handed as possible to achieve the desired outcomes. If an objective can be achieved with less rather than more intervention this should be the approach adopted.*
>
> *I would however urge us all to focus on regulation that is effective and efficient (that is, positive for the community as a whole), rather than getting caught up in endless debates about whether regulation generally is 'good or bad' for business.*[481]

7.56 On the strength of the evidence received for this Inquiry, the Committee believes that the PTA's 'light handed' approach to lease management should be reviewed. It would be to the benefit of all parties for the PTA to formulate and articulate a clear and specific set of lease management criteria, which would permit:

- appropriate quiet use and enjoyment by the lessee where the interests of the state and the lessee are well aligned; and
- more proactive lease management where those interests diverge.

7.57 Such a revised strategy would appear to be especially prudent when considered relative to some of the problems that have been encountered thus far in the term of the lease.

What can happen when a private company is engaged to provide a public good?

7.58 A consideration of the basic maintenance requirements of below rail infrastructure illustrates some of the problems inherent to the PTA's 'light touch' management of the lease. Broadly speaking, timber railway sleepers have a finite useful service life. Following a series of recommendations made to government in 1995, an extensive re-sleepering program for 3,000 kilometres of narrow gauge rail freight lines was initiated

479 Australian Competition and Consumer Commission, *Regulation in the infrastructure sector—A national approach*, 22 August 2006. Available at: https://www.accc.gov.au/system/files/Regulation%20in%20the%20infrastructure%20sector%20-%20a%20national%20approach.pdf. Accessed on 7 August 2014.

480 ibid.

481 ibid.

in 1996. The program, for which $81.6 million was initially budgeted, involved in excess of one million sleeper insertions, the adoption of a '1 in 4 steel sleeper strategy' as a minimal standard, and general track strengthening works. In August 1998 the scope of the program was expanded, and the value of the works increased to $125.951 million over five years. By October 2000 the first 'five year program' was completed and was hailed as a success. Some work on grain freight lines remained outstanding and was included in the lease at clause 15.17 as work to be completed by the lessee by 30 June 2004.[482]

7.59 The Committee notes that not all of this work was completed.[483] Given the limited service life of timber sleepers, the need to again re-sleeper narrow gauge lines by around 2010 should have been expected.

7.60 Re-sleepering can be performed either as required (as a component of ongoing track maintenance) or in cycles whereby an entire route section is re-sleepered all at once. Both methods have merit: while re-sleepering as a component of ongoing maintenance is more costly, line performance standards are more steadily maintained. In the alternative, cyclic re-sleepering brings cost advantages through economies of scale, but track performance declines as sleepers age. There is a risk that, over time, insufficient funds can be brought to bear to perform this cyclical task.

7.61 It is in this context that a chain of correspondence from 2009 between Mr Paul Larsen, who was then the General Manager of the freight rail network lessee, WestNet Rail (and is now the Chief Executive Officer of Brookfield Rail) and the then Minister for Transport, Hon Simon O'Brien, MLC, demonstrates the fundamental problem associated with the PTA's 'light touch' approach to lease management.

7.62 This correspondence relates to the maintenance requirements of the narrow gauge sections of the freight rail network. Initiated with a letter from Mr Larsen dated 6 May 2009 outlining the need for significant capital upgrades to the rail network, the correspondence chain[484] demonstrates that the PTA's 'light-handed' management of the lease allowed the operator to dictate to government what maintenance obligations it would fulfil and how the network would be maintained, notwithstanding the 'fit for purpose' requirement in the lease.

7.63 As context for this correspondence, the lessee of the freight rail network in 2009 was known as WestNet Rail. In 2011, WestNet Rail was rebranded as Brookfield Rail.

7.64 Mr Larsen's 9 May 2009 letter began by stating that the 'narrow gauge branch lines … that service the grain industry, are in need of a cyclic re–sleepering cycle over the next

482 Lease Annexure A *Grain Line Strengthening Plan, Narrow Gauge Grain Lines.*
483 See Chapter 3.
484 Submission No. 42 from the Public Transport Authority, 24 September 2014.

four years', and that '[i]t is important for the State that this upgrading occurs'.[485] The letter then went on to indicate that:

- $238 million would be required for this upgrade;
- the last re–sleepering program occurred in the late 1990s; and
- without the upgrade, 'grain lines will be required to have their speed reduced to a level where rail will not be operationally competitive with road transport', which would see 'an extra 300,000 trucks per annum being on the roads of the south-west [of] WA'.[486]

7.65 In his letter, Mr Larsen then argued that the provisions of the lease 'cannot be used by government to force WestNet Rail to invest [the required] $238 million into the grain lines' because 'the lease documentation provides that the buyer will not be responsible for the $238m re–sleepering cycle'.[487] Mr Larsen further asserted that '[t]o have done otherwise [by a provision in the lease] would have obviously resulted in a sale price for the State Government that was $238 million lower'.[488]

7.66 Mr Larsen's letter also stated that funding for the re–sleepering cycle 'could be obtained through higher access charges to the grain industry', but that, at the prospect of any such increase in network access charges, 'the very clear feedback from the [grain] industry is that they would simply move to road transport'.[489] On this point, it is claimed that if such an outcome were to occur, 'attracting [grain freight] back to rail [in the future] will be very difficult'.[490]

7.67 With respect to the lease requirement that the rail network operator maintain the network so that it is fit for purpose, Mr Larsen stated that 'suggestions [that the government] could effectively force WestNet Rail to undertake the $238 million upgrade using provisions in the lease relating to audit and the lease maintenance [are] against the spirit of the contractual arrangements in the Lease'.[491]In support of this assertion, Mr Larsen claimed that 'WestNet Rail has very strong legal advice that any such action by the State Government is not legally supportable'.[492]

7.68 To underscore this point, Mr Larsen indicated that 'WestNet Rail had the opportunity to commence the surrender process in relation to a number of uneconomic lines two

485 Mr Paul Larsen, General Manager, WestNet Rail, Letter, 9 May 2009, in Submission No. 42 from the Public Transport Authority, 24 September 2014.
486 ibid.
487 ibid.
488 ibid.
489 ibid.
490 ibid.
491 ibid.
492 ibid.

years ago', but 'chose not to then, nor since, because it preferred to work with government and industry to find a solution and it is committed to the philosophy that grain should be transported by rail'.[493] Mr Larsen concluded his letter by warning that if public money were not provided to effect the re-sleepering cycle, WestNet Rail would surrender these lines to government, and this would result in 'industry moving their grain from rail to road, effective January 1, 2010'.[494]

7.69 In an initial response dated 11 June 2009, Minister O'Brien explained that 'all proposals for public investment in the grain transport chain [were being considered by] the Grain Freight Advisory Council, a sub-group of the Freight and Logistics Council'.[495] This was intended to 'ensure that any further public investment in the rail network and wider grain logistics chain is not wasted by being spent in areas that will not produce the expected results'.[496] Minister O'Brien also indicated that port capacity was being evaluated so as to ensure any investment made would appropriately enhance capacity and efficiency within the overall freight transport chain.

7.70 In addressing the specifics of the WestNet Rail proposal, Minister O'Brien rejected the assertion that public money would be required to fund a re-sleepering cycle, and explained to Mr Larsen that:

> *re–sleepering required to maintain lines at their set performance standards that make the lines fit for purpose is your obligation under the lease. It is Westnet's decision as to whether you undertake such work on an annual or cyclical basis but either way it is your obligation as part of your need to maintain line standards.*[497]

7.71 As to the necessity of a re–sleepering cycle, Minister O'Brien noted that '[i]t may be the case that the current line standards are sufficient for the task and Westnet simply has to maintain the lines at those standards as per the lease obligations'.[498] Minister O'Brien expressed his belief in the importance of maintaining the network as a whole with similar clarity:

> *I have said repeatedly that it is my intention to keep the whole network open even if some lines are not currently being used by CBH as I intend to keep options open for future use of those lines. Those lines would be kept open in a minimal care and maintenance basis for*

493 ibid.
494 ibid.
495 Hon Simon O'Brien, MLC, Minister for Transport, Letter, 11 June 2009, in Submission No. 42 from the Public Transport Authority, 24 September 2014.
496 ibid.
497 ibid.
498 ibid.

> *the time being whether that was done by Westnet or the government if those lines are surrendered.*[499]

7.72 The Minister concluded his letter by again emphasising his expectations of WestNet Rail to perform their lease obligations:

> *I must again emphasise the critical point that the rail infrastructure lease agreement requires Westnet to maintain all lines at the performance standards that define them as being fit for purpose for a period of 49 years. The network is to be handed back at the end of the period with lines capable of the same performance as [at the] time of [the] lease. That requires Westnet to do everything that is needed to keep lines operational and at least at the minimum standards as set out in the lease agreement.*[500]

7.73 In a response dated 18 June 2009, Mr Larsen acknowledged that, under the terms of the lease, re–sleepering and other activities required to maintain the rail network in a fit for purpose state was the responsibility of the lessee. Balancing this requirement, however, was the right of the lessee to surrender back to government any lines that were deemed, under lease provisions, to be uneconomic. Mr Larsen's letter was quite direct:

> *Under the lease we have the express and clear right to surrender lines in certain circumstance, and once we surrendered them, that obligation to maintain the lines ends.*[501]

7.74 Mr Larsen then couples this statement with one which indicates a clear intent to surrender lines without government investment:

> *Under the course of action we are currently (reluctantly) pursuing, these lines will meet the required tests to be surrendered at 30 June 2010, [and] they will cease to be subject to the lease by 1 July 2011, and we will no longer have any obligation in relation to them.*[502]

7.75 As discussed in Chapter 3, the Committee has been advised that at no time were formal steps taken to initiate the process of surrendering uneconomic lines, despite this process being very clearly laid out in the lease. Though Mr Larsen's letter intimated that this process could and potentially would be pursued by the lessee, ultimately it was not.

---

499 Ibid.

500 ibid.

501 Mr Paul Larsen, General Manager, WestNet Rail, Letter, 18 June 2009, in Submission No. 42 from the Public Transport Authority, 24 September 2014.

502 ibid.

7.76 Further asserting that the government was in no position to negotiate with the lessee on this matter, Mr Larsen's letter stated that the lease provisions relating to uneconomic lines had already absolved the lessee of any responsibility it may have had in relation to maintaining these sections of the network. Explaining that the lessee has 'had the clear right' to surrender the lines in question 'since 2006', Mr Larsen also stated that any surrender of the lines would occur by July 2010, and this would require 'the cessation of train operations on these lines by December 2009'.[503] Such an outcome would have adversely affected the grain freight task at a time when efficiency of supply chain logistics is critical for taking advantage of the seasonal availability of grain grown in WA, which is able to command a premium price if it can be brought to market in the early part of the year.[504]

7.77 Mr Larsen's assertion of the lessee's 'clear right' to surrender lines that may have been uneconomic was an exaggeration. Clause 16 of the lease outlines a process by which lines can be surrendered, with the provisions requiring adherence to a detailed, formal process.

7.78 As discussed in Chapter 3, the Auditor General's 2013 report notes a 2007 approach by the lessee 'seeking to surrender certain lines'. As Chapter 3 also notes, the Committee raised this matter with the PTA and received assurance that no formal request to surrender lines had been made. As the PTA's response did not help explain the apparent discrepancy between the date (2007) in the Auditor General's report and the notion that Brookfield Rail first raised the issue of the need for re-sleepering lines in 2009.

7.79 During a hearing with the PTA, the Committee raised the issue of the statement in the Auditor General's report, and asked whether the Department had documents recording this approach and advising the Minister accordingly. The PTA were not able to advise during the hearing, but undertook 'to go back and do some more checking out'.[505]

7.80 The Committee made its own inquiries and these confirm that the information in the Auditor General's report is accurate.

7.81 Subsequent to the hearing, the PTA provided copies of meeting papers from 2006, 2007 and 2008. Of particular interest is an agenda item from the Corridor Clearing Meeting of 13 February 2006. Agenda item 2 is 'Surrender of Grain Lines status'.

---

503 ibid.

504 In Australia, grain is typically harvested between October and December each year. As a result, from November through until the end of March, fresh Australian grain—particularly wheat, canola and barley—is available for sale at a time when most of the world's other grain producing nations are in the depths of winter. At this time, the only other grain that is available fresh is from Argentina; as a result, Australian grain is able to command a price premium during the November–March window.

505 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 19.

Meeting records for 26 June 2007 show that WestNet Rail asked PTA for its 'view on the Grain Line Surrender test' and who in PTA Mr Larsen should speak with. While these suggest that the potential to surrender grain lines was certainly being discussed, Mr Waldock again advised that:

> *The formal surrender of lines was never requested, and that the items within the agenda and minutes relate to general advice on the leases clauses and a request for an officer to discuss the specifics of lease clauses. … there was never any submission under section 16 of the lease received by the Government to terminate the lease in relation to any lines.*[506]

7.82 This situation is cause for serious concern as it suggests that the PTA was aware of the potential for an approach by the lessee to surrender lines as early as 2006, some three years before the chain of correspondence between Mr Larsen and the Minister. The Minister's responses to Mr Larsen—particularly his initial strong response that re-sleepering was the lessee's responsibility and no further public money would be provided—suggest that he may not have been aware of the 2007 discussions.

7.83 In relation to Mr Larsen's claims about maintenance obligations, the Committee has trouble reconciling Mr Larsen's position with the requirement, at clause 15.7 of the lease, that the lessee is to submit a maintenance plan outlining all work that will need to be undertaken to keep the network in a 'fit for purpose' state every five years (specifically, at or slightly after the completion of each five-year track performance audit). When the Committee sought clarification as to how some sections of the freight rail network had been permitted to deteriorate to a state where they now cannot be used, PTA's Mr David Browne explained that the '2005 the five-yearly audits that were done by WorleyParsons said at that time that the lines were meeting the initial performance standards', which meant that the PTA's lease management function had been properly discharged.[507] What is not explained by this evidence is what work was proposed by the lessee at the completion of the 2005 track performance audit, as required by clause 15.7, so that the same lines would also pass the 2010 audit. Plainly, if clause 15.7 had been properly satisfied, it is difficult to see how Mr Larsen could possibly have indicated a sudden need for government subsidy to the freight rail network in 2009.

7.84 After apparently threatening the immediate surrender of these lines, Mr Larsen then proposed that that the Minister provide the lessee with written assurance that it would not seek to enforce the lease provisions requiring the network be maintained in a fit for purpose state, and gave an undertaking that, upon receipt of such an assurance:

506 Submission No. 42 from Department of Transport, 9 October 2014, p 2.
507 ibid, p 13.

> *WestNet will ensure that train operations continue on the entire grain rail network … for the 2009/10 financial year.*[508]

7.85 Minister O'Brien's response again reiterated that the lessee, under the terms of the lease, 'has a responsibility to maintain the Lines to these Initial Performance Standards', before going on to clearly outline his view as to a possible course of future action:

> *If WestNet is not maintaining the Lines to the Initial Performance Standards at the time of audit due for completion on 19 June 2010 it is within my rights [as Minister] under the Lease Agreement to ask WestNet to bring those back to the Initial Performance Standards.*[509]

7.86 On the question of surrendering uneconomic lines, the Minister's letter acknowledged:

> *the existence of Clause 16 [of the lease] and the ability for WestNet to approach Government in relation to Lines that have seen a Significant Reduction in Use and would be Uneconomic for WestNet to maintain.*[510]

7.87 Explaining that this clause 'provides WestNet with the opportunity to approach Government', the Minister indicated that the government would seek to negotiate with the lessee as to 'the best option in relation to these Lines, including potential surrender, closure or agreed financial support from Government'.[511] The Minister then explained that 'for [an agreement] to be negotiated in terms of those Lines, WestNet must provide the appropriate information to Government'.[512]

7.88 As noted in Chapter 3, from 16 June 2009 to 25 June 2009, the Trayning to Merredin, York to Quairading, Katanning to Nyabing and Tambellup to Gnowangerup lines were withdrawn from service. It was also noted that WestNet's suspending of these lines from service is not covered in the lease and may be a breach of the lease.

7.89 When questioned as to whether this was, in fact, a breach of the lease and, if so, what action was taken, Ms McCarrey replied:

> *At the time they [WestNet] were very careful with their wording, in the sense that they did not withdraw them from service in the way that it would be worded in the lease. Their access arrangement with the*

508 Mr Paul Larsen, General Manager, WestNet Rail, Letter, 18 June 2009, in Submission No. 42 from the Public Transport Authority, 24 September 2014.
509 Hon Simon O'Brien, MLC, Minister for Transport, Letter, 26 June 2009, in Submission No. 42 from the Public Transport Authority, 24 September 2014.
510 ibid.
511 ibid.
512 ibid.

> *above-ground operator was coming to an end. They were renegotiating their access agreements. The wording they used was around the idea that they were not going to renew an access agreement for those lines at that time. In a sense, that is what brought the government to the table to actually sit down with them and negotiate. They were being frustrated by the fact that no government decision had been taken out of the GIG process. But from memory, we actually checked that they were very careful about the wording that they actually used to ensure that they were not in breach of the lease. […] Brookfield were very careful about how they worded it.*[513]

7.90 Mr Brown stated that the Minister was 'not happy about the decision, but it was perhaps the precursor to some of the subsequent discussions and correspondence between the minister and Brookfield Rail in relation to that matter'.[514] Mr Browne further advised that his 'recollection is that those lines were reopened. They had traffic on them within a very short space of time afterwards'.[515] Ms McCarrey clarified that this did not include the Gnowangerup–Nyabing line, which had not been in use for some time.

7.91 Notwithstanding WestNet Rail's careful wording, the PTA's response relates to the negotiations underway between the Minister and WestNet. The Committee remains concerned that the PTA was aware of the withdrawal of service of these lines and did not initiate proceedings for a breach of the lease. It is not clear whether Parliament was advised of this breach.

Finding 22

The lessee's decision to not renew any access agreement for the Trayning to Merredin, York to Quairading, Katanning to Nyabing and Tambellup to Gnowangerup lines in June 2009 was, in effect, a withdrawal of those lines from service.

Finding 23

The lessee's withdrawal of the Trayning to Merredin, York to Quairading, Katanning to Nyabing and Tambellup to Gnowangerup was not undertaken pursuant to any specific provision of the lease.

Finding 24

The lessee's ability to suspend lines in June 2009 without consequence is an example of the inadequacy of the lease instrument to protect the state's interests.

---

513 Ms Susan McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 24.

514 Mr David Browne, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 24.

515 ibid.

Recommendation 9

The Western Australian Government revises the lease instrument to ensure that lines are not able to be suspended from use without consequence.

7.92 Ultimately any such negotiations were overtaken by the Strategic Grain Network Committee review, and the associated investment of public funds into various parts of the network. No surrender of lines was made by the lessee.

The surrender of uneconomic lines?

7.93 Mr Larsen's various claims as to the 'uneconomic' nature of some of the lines in the freight rail network were essentially confirmed in the course of the review process, with the ensuing Strategic Grain Network Report (SGNR) recommending that several grain freight lines be closed. Unfortunately, however, in acting upon this recommendation the Western Australian Government chose not to require the surrender of these lines by Brookfield Rail, instead electing to leave these lines in the possession of the lessee.

7.94 The surrender of lines back to government is covered by clause 16 of the lease which, as noted, details a specific procedure by which the operator can surrender unprofitable lines and thereby avoid ongoing maintenance costs associated with their continued upkeep. Two important aspects of clause 16 are made clear at clause 16.1: that the surrender provisions could not be invoked within the first six years of lease operations, and that line surrender would function to benefit the lessee:

> *At any time after six years from the Commencement Date, the Network Lessee may request the Minister to terminate this agreement in respect of a particular Line.*

7.95 In effect clause 16 obligated the lessee to operate and maintain the entire freight rail network in a 'fit for purpose' state for at least the first six years of the 49-year lease, irrespective of whether access fees for particular route sections were able to cover the associated maintenance costs. The Auditor-General described the situation in the following terms:

> *At the time of drafting the lease, the State recognised that some narrow gauge grain lines would be unlikely to operate profitably for the lessee, particularly in low-harvest years. From December 2006 the lease allowed the lessee to surrender certain lines or request state funding where a line is carrying low traffic and is expected to make a loss over the next three years. In these cases, the government may*

resume the line or make arrangements to prevent the lessee making an ongoing loss.[516]

7.96 Were it not scheduled to expire after just six years, clause 16 would be exactly the type of regulation that might be expected in an agreement to privatise the provision of a public good: effectively the government imposed an unprofitable duty upon the lessee. This duty must have depressed the total rent paid. Indeed, the Committee notes that the government received $292.5 million in pre-paid rent from the original lessee (Australian Railroad Group) in 2000. Almost six years later, in June 2006 (that is, immediately prior to the expiration of the obligation), the lease was sold by the original lessee to a consortium of Babcock & Brown Infrastructure and Queensland Rail for $835.5 million.[517]

7.97 The stipulated six-year obligation was inadequate from the outset. Almost immediately prior to the lease of the network the government had undertaken a significant campaign of capital investment into the network, including a full re-sleepering program. Re-sleepering is generally expected to last for 15 years. This means that none of the grain freight lines would have required cyclical re-sleepering within that initial six-year period and, as such, low-volume grain freight lines were always going to become uneconomic as soon as the first re-sleepering cycle was required. Though the six-year obligation ensured that the network did not significantly deteriorate almost immediately following the lease of the network, the decision by government in 2000 to specify just six years of obligated maintenance was at best an oversight.

7.98 Now that the six-year obligation period has lapsed, clause 16 provides a mechanism by which the lessee can avoid satisfying the clause 15 requirement of ongoing maintenance expenditure on unprofitable lines. To invoke that mechanism in respect of a particular line, clause 16.2 provides that Brookfield Rail must approach the Minister for Transport and provide evidence that, over the course of a financial year:

- there has been a significant reduction in use of the line in question;[518] and
- continued maintenance of the line would be uneconomic.[519]

516 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 7.

517 ibid, p 15-16.

518 The phrase 'significant reduction in use' is defined at clause 1.2, which provides that a line has experienced such a reduction in use if the amount of freight carried over the line drops below 200,000 tonnes in the course of a financial year, or else if the freight tonnes carried over the line in a financial year is an amount that is less than 50 per cent of the average amount carried over that line during each of the previous three financial years.

519 The term 'uneconomic' is defined at clause 1.9, which explains that line maintenance is uneconomic if that line cannot be run profitably. Clause 16.2 also requires Brookfield Rail to demonstrate that they are otherwise able to perform their lease obligations.

7.99 On the receipt of such evidence, the Minister can either agree to terminate the lease agreement in respect of the line in question (that is, permit the lessee to avoid its ongoing maintenance obligation by surrendering the line) or else elect to subsidise the maintenance of the line with sufficient public money to ensure the maintenance task is not uneconomic.

7.100 With respect to the 'uneconomic' requirement, the Deputy Director General of the Department of Transport, Ms Sue McCarrey, argued that the maintenance obligation was compromised when the above and below rail businesses were disaggregated following the assignment of the lease in June 2006. As Ms McCarrey explained:

> *if… Brookfield Rail was… to come to government and say that a line [is] uneconomic, the lease [says] they [have] to take into account any revenue that was being earned by a related entity who was an above-ground operator.*[520]

7.101 Earlier, Ms McCarrey explained the implications of the disaggregation of rail freight network operations. When the rail freight network was originally privatised in 2000, the Australian Railroad Group (ARG) had effectively purchased the above rail assets and the below rail infrastructure as a single business. As Ms McCarrey explained:

> *they bought all the freight business, the rolling stock and the actual business associated with moving freight aboveground. Because they were covered by the same parent company, they [were] considered related entities under corporations law and in the lease agreement it said when you are determining if the lines are economic or not, you have to take into account any revenue earned by your related entity sitting over here. Now, of course, you remember just prior to that that is when we had Brookfield come in and purchase both the above-ground and below-ground and they on sold the above-ground business to what was Queensland Rail at the time. Therefore, there was no aboveground revenue to be taken account anymore when you were looking at whether or not a line was uneconomic. That had had quite an impact at the time because it was no longer a related entity.*[521]

7.102 The 2009 correspondence between Mr Larsen of Brookfield Rail and Minister O'Brien arguably initiated an effort to invoke the provisions of clause 16, albeit in a manner that was inconsistent with the formal requirements of the lease. The decision to invest

520 Ms Sue McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 9.

521 Ms Sue McCarrey, Deputy Director General, Department of Transport, *Transcript of Briefing*, 10 February 2014, p 3.

public money into lines characterised in the SGNR as 'Tier 1' and 'Tier 2' was, in effect, a decision by the Minister to subsidise the maintenance task, as provided for in clause 16.4(b)—though again, this process was undertaken independent of the lease.[522]

7.103 Ultimately the decision to subsidise track maintenance was taken on the back of analysis provided by professional services firm KPMG as to how unsubsidised maintenance costs would affect access rates for the freight rail network. According to Ms McCarrey, the PTA engaged the services of KPMG to 'test' the claims conveyed in Mr Larsen's correspondence that line maintenance had become uneconomic in some instances. Explaining this situation, Ms McCarrey informed the Committee that:

> *KPMG … had a look at the books of WestNet at the time, and came back and confirmed that the great majority of the grain lines—not ones that carry a great deal of other product—would actually be uneconomic. As Mr Waldock has mentioned, at the time then it was the case of, 'Well, does the government go through a process and take all the rail lines back?' At that stage there was no interest in another party taking it on. I understand that has now changed—a part of it—but at the time there was no interest, so then the government was in a position of, 'Do we rely totally on the terms of the lease or is this one of those times where you do intervene on the market because you want as much grain as possible to stay on rail?' As I said, of the grain that was on there we are keeping around 93, 94 per cent of the grain on rail because of the intervention into the tier 1 and tier 2 lines. Certainly, I do not think the lease envisaged, the way it was drafted, what actually then happened. So government either then sits back and says, 'We will rely totally on the lease or do we actually make a policy decision for the better outcome of keeping as much grain on rail as we possibly can?'*[523]

7.104 Later in that same hearing, however, Mr Browne painted the PTA's adherence to the lease in respect of the maintenance requirement in a somewhat different light:

> *KPMG … had open access to all the Brookfield's financial data and they made an assessment based on the data and based on the cost of resleepering that an investment that we have just put in through the tier 1 and 2 lines was required, so that those lines would not be*

522 The Committee notes, however, that this investment into the line was not done strictly in accordance with the formal provisions of clause 16.4(b).

523 Ms Sue McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 9.

> *uneconomic in accordance with the definition within the lease and that is what we are bound by.*[524]

7.105 What neither of these statements refers to, though, is the commentary provided in the final draft of the KPMG August 2009 report. While broadly agreeing with the methodology used by WestNet, and stating that, under the model reviewed, if the lessee 'was required to fund the re-sleepering programme the majority of grain lines (23 out of 27) will be, by definition contained within the Lease Agreement, uneconomic', the KPMG report noted:

> *there could be a number of different assumptions which might arguably be valid, but which differ to those adopted by WNR [WestNet Rail].*[525]

7.106 The KPMG report also drew 'attention to the fact that the supporting historical financial information in relation to the individual grain lines is limited to the ten month period ending 30 April 2009 which management say is all that is available to that level of detail'.[526] According to KPMG:

> *this represents a very limited data set (albeit the most current) with which to compare the model outputs to actual performance, to support the assumptions and reasonably conclude on the model's suitability for forecasting the future performance of the business.*[527]

7.107 Furthermore:

> *WNR management prepared a Financial Model that was **built specifically to support their claim** that certain grain lines operated under the rail track Lease Agreement will be, by definition contained within that agreement, uneconomic. The model primarily considers the three years FY11–FY13 and calculates expected EBITDA [earnings before interest, tax, depreciation and amortisation] by line segment before subtracting re-sleepering capital expenditure in the year in which it is expected to be undertaken.*[528]

7.108 The KPMG report made further comments on the grain volume, the costs included in uneconomic claim calculation, opex, capex, interpretation of capex definition in the lease agreement, and inflation modelling. Following KPMG's challenging of several

524 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 25 June 2014, p 10.

525 Public Transport Authority, *Assistance with respect to WestNet Rail. Final Draft*, report prepared by KPMG, Western Australia, 7 August 2009, p 7.

526 ibid.

527 ibid.

528 ibid. Emphasis added.

areas of 'the methodology, basis and support for certain input assumptions', WestNet Rail 'updated and issued a new version of the Financial Model'.[529] These adjustments increased the EBITDA loss over three years from $2.4 million to $3.2 million and the EBITDA loss after capex over three years from $209.6 million to $210.3 million.[530]

7.109 Nevertheless, KPMG still notes:

> *that there are several other areas, that whilst not adjusted by WNR management in the model, could potentially change the model outputs if these adjustments were to be processed. The estimated impact of such adjustments … is $14.1 million ($0.8 million opex adjustment and $13.3 million capex adjustment), which would result in an EBITDA loss of $2.3 million and an EBITDA loss after capex of $196.2 million.*[531]

7.110 This paints a very different picture from that of Ms McCarrey who stated that 'we were not necessarily just going to take their [WestNet Rail's] assumptions [on their costs] as fact'.[532] According to Ms McCarrey:

> *that was the assumption we had KPMG audit because we did not want to take that just as a given. We said to KPMG that we needed them to have a look at their books and at those assumptions and what it would cost them to do that work. If they built that into their access charges, would that actually drive the charges up? And, yes, that was on a line-by-line basis. That is what KPMG went in to audit. They came back and confirmed that those assumptions were right.*[533]

7.111 In August 2009, the PTA advised the Minister of the outcomes of the KPMG and Willox audits which confirmed WestNet's claim that most grain lines currently operate at a loss and would be uneconomic should WestNet be required to fund the re-sleepering. Furthermore, the PTA advised the Minister that KPMG had been engaged to undertake the audit because :

> *the PTA is a customer of WestNet rail and as such there is a potential conflict of interest in the PTA reviewing WestNet Rail's access revenue and charging methodology.*[534]

7.112 This is a confusing statement. If the PTA has a conflict of interest that prevents them from undertaking an audit to determine whether certain lines were uneconomic, the

529 ibid, p 10.
530 ibid.
531 ibid.
532 Ms Susan McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 21.
533 ibid.
534 Submission No. 39 from Department of Transport, 29 August 2014. Closed evidence.

same conflict of interest raises questions as to the appropriateness of having the PTA as the manager of the lease—a task that requires them to oversight a supplier. Questioned on this dilemma, Mr Waldock explained that the PTA 'pay[s] an access fee' to Brookfield for access to the lines used by the *Australind* Perth to Bunbury passenger train service.[535] Mr Waldock also explained that Brookfield Rail 'pay[s] an access fee [to the PTA], too, for small parts, so we are both a client and a supplier'.[536] As to whether this created any problems for the PTA in the discharge of its lessor duties, Mr Waldock was dismissive, explaining that:

> *[i]n terms of our business, that would be minimal. The access fees we pay to Brookfield would infinitesimal[ly] small [… and that KPMG had done the work] because they were our auditors at the time. They were our PTA auditors, our acknowledged internal auditors.*[537]

7.113 Ms McCarrey further explained that:

> *at the time of that KPMG work, we did not actually get KPMG because we felt conflicted because Transwa paid access charges […] We got KPMG more because the strategic grain network review was a whole range of bodies sitting around the table, and we thought it important for the government of the day that we actually bring in somebody who was independent to have a look at it. We wanted independence as well, just to get an external view of what was happening.*[538]

7.114 This information, though, does not explain the conflict of interest noted in the Ministerial Briefing Note. The Committee sought clarification from the Department and was advised:

> *both answers appear to apply. The important issue was the need for the Government to receive independent advice with the appropriate expertise, which KPMG could provide. Independence was important because a part of PTA is a customer of Brookfield and so that the Strategic Grain Network Review Committee and Government were receiving independent advice with the expertise required.*[539]

7.115 Of greater concern to the Committee is the fact that the PTA's approach to managing the requirements of the lease appears to be somewhat contradictory: while it seems

535 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 11.
536 ibid.
537 ibid.
538 Ms Susan McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, pp 11–12.
539 Mr Reece Waldock, Director General, Department of Transport, Letter, 3 October 2014, p 2.

that the lease can be varied to accommodate amendments that benefit Brookfield Rail, it is simultaneously the case that the lease strictly binds the PTA as lessor. This one-sided approach to lease management is best demonstrated by the arguments put by the PTA as to why the decision to subsidise the maintenance task was taken. According to Ms McCarrey:

> *in looking at the comparison between rail and road, if Brookfield Rail had had to pay for that re-sleepering, in order to get that money back from their customers over a set period of time would have meant that the access charges drove it up and the imbalance between road and rail would not have just been on tier 3, there would have been a pretty major imbalance, certainly across pretty much all of the tier 2 and potentially some of those tier 1s.*[540]

7.116 Similarly, a PTA briefing note to the Minister in August 2009 recommends that:

> *the Government give in principle support to entering into a new agreement with WestNet Rail for the period until the next cyclic re-sleepering is due in approximately 15 years, where WestNet Rail can profit from grain lines in return for accepting the risk of and liability for future losses on the grain lines*.[541]

7.117 While the Committee appreciates the logic underpinning such statements, it provides an example of the PTA, on the basis of an assumption, intentionally or otherwise not applying or relying on the provisions of the lease to achieve an outcome that would benefit the lessee. In light of the present circumstances—circumstances that demonstrate that not every assumption proves true—a future approach to lease management in which some of the PTA's assumptions are actually tested prior to action being taken may prove prudent. By way of example, though the PTA has argued that the subsidy to lines characterised as Tier 1 and Tier 2 was necessary to prevent the grain freight task shifting from rail to road, any such situation would likely have given Brookfield Rail significant financial incentive to drive down line maintenance costs so that the freight rail network could remain competitive with road.

7.118 This was underscored by Mr Larsen of Brookfield Rail who, when questioned as to whether Brookfield Rail was indifferent to whether or not grain freight lines would be put to future use, explained that:

---

540 Ms Sue McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, pp 6–7.

541 Submission No. 39 from Department of Transport, 29 August 2014. Closed evidence.

> *we are railway people. We would love to find a way to keep the railway lines open.*[542]

7.119 At the very least, such an approach would permit the market to be the ultimate determinant, and a decision based on desired social objectives could then have been taken on the basis of actual, rather than assumed, evidence.

7.120 In line with the recommendations of the SGNR, the first re-sleepering campaign during the term of the lease began in 2010. At that time a variation to the lease was made, and public money was invested into parts of the freight rail network for which there was (apparently) a 'good business case'.[543]

7.121 The variation, entitled *Project Agreement for Capital Works* (Project Agreement), was an agreement by government to fund upgrades to Tier 1 and Tier 2 lines at an estimated cost of $258 million. In funding these upgrades, the government also varied the lease to keep the price of access to these lines capped (rising only in line with inflation) through until the end of 2016, and to provide a return on the government's investment in the event that these lines became profitable.

7.122 Accordingly, the Project Agreement contains, at clause 10, provisions for capping the price of access to parts of the freight rail network that are dedicated to the task of grain freight until 'December 2016.' Clause 10.1, 'Special Conditions Relating to Dedicated Grain Lines,' specifically stipulates that:

> *for each of the Dedicated Narrow Gauge Grain Lines for which the Works are completed, WestNet's Gross Tonne Kilometre access rates for grain must, for the period Until December 2016, be no greater than the rates, as at 1 July 2009, escalated at the annual CPI rate in accordance with the escalation formula.*

7.123 This clause is comprised of four specific elements:

- **Dedicated Narrow Gauge Grain Lines** are those lines within the freight rail network that are only used for carrying grain freight. These lines may be Tier 1, Tier 2 or Tier 3, and are listed in a schedule to the Project Agreement.

- **Works** refers to the re-sleepering campaign that was facilitated by the agreement.

542 Mr Paul Larsen, Chief Executive Officer, Brookfield Rail, *Transcript of Evidence*, 11 June 2014, p 4.

543 Freight and Logistics Council of Western Australia, *Strategic Grain Network Report*, December 2009, p 8.

- **WestNet's Gross Tonne Kilometre access rates** are the prices for line access, which are a function of the mass of the freight in question, and the distance over which it is conveyed.

- **Escalation formula** is the formula used to revise access prices each year within the 2010–2016 window. The formula is specified at Clause 10.1, and sees the price for access amended annually in line with variations in the Consumer Price Index (All Groups, Perth) data published by the Australian Bureau of Statistics.

7.124 Clause 10 also contains a profit-sharing provision, whereby 15 per cent of any profit that is made by the lessee (over a three-year period) on the lines in question between 2015 and 2023 will be paid to the PTA.

7.125 Because the re-sleepering of Tier 1 and Tier 2 lines was paid for with public money, both the capped access prices and the profit sharing provision represent measures by which the government sought to earn a public return on this investment. In effect, access rates were capped to encourage the continued use of these grain lines subsequent to their re-sleepering and, thus, to ensure that rail remained a fundamental component of the grain freight task. This would deliver a social dividend in the form of preventing an increase in road usage to meet the grain freight task. If it is triggered, the profit sharing arrangement will deliver a financial dividend to government. The Committee notes that compliance with the profit sharing provisions will first be examined after 30 June 2017.

7.126 To ensure compliance with the provisions of Clause 10, the PTA may, by Clause 10.2, 'appoint an independent third party to review and confirm that WestNet has complied with its obligation as stated in clause 10.1'. With this in mind, the Committee asked the PTA to provide information regarding:

- action that had been taken to date to ensure that the lessee has complied with its Clause 10 obligations; and

- the process that is in place to ensure continued compliance with clause 10 into the future.

7.127 The Clause 10 provisions are especially important as the Committee understands that CBH Group's access arrangements with Brookfield Rail for Tier 1 and Tier 2 lines expires on 31 October 2014. The Committee also understands that CBH and Brookfield Rail are currently engaged in access negotiations through the Economic Regulation Authority and that CBH has flagged substantial increases in access charges.

7.128 In response to the query about past compliance, the PTA advised the Committee that it 'has discussed the requirement to comply with clause 10 with Brookfield Rail and is

satisfied with [Brookfield Rail's] response,' and that '[t]he matter will be reviewed once the current access negotiations between Brookfield Rail and CBH are finalised.'[544]

7.129 With respect to the query about future compliance, the PTA explained that:

> *to ensure future compliance PTA reserves the right to appoint an independent third party to review and confirm that Brookfield Rail has complied with its obligations as stated in clause 10.1.*[545]

7.130 The Committee notes that the 'right' that has apparently been reserved by the PTA is expressly contemplated by Clause 10.2. As such, the PTA's answers in relation to Clause 10 compliance reveal that, once again, it is extremely difficult to discern any difference between the PTA's 'light touch' approach to lease management and an approach where there was no lease at all.

7.131 To return to the above-mentioned first re-sleepering campaign during the term of the lease, no investment was made into lines characterised by the SGNR as Tier 3 lines, and some of those lines were effectively closed.[546] Critically, however, government decided not to require Brookfield Rail to surrender those lines, and instead it was agreed they be placed into a state of 'care and maintenance'. As the original lease did not contemplate any such state of rail line maintenance, the lease was formally amended by the *Project Agreement for Capital Works*, in which the phrase 'care and maintenance' was defined to mean:

> *a Line Section which, due to the Initial Performance Standards not being satisfied and where line speeds are such that it is no longer efficient or safe to transport grain on the Line Section, is no longer maintained to an operational standard.*[547]

7.132 Lines that the SGNR characterised as Tier 3 thus remain under the control of Brookfield Rail as lessee, but are not currently in use. At present, these lines cannot be put to use without an access agreement being negotiated between a potential access seeker and Brookfield Rail. The most fundamental component of any such access agreement would be a significant investment of capital into the network, as these lines would at the very least require re-sleepering, if not also re-ballasting and line replacement. Negotiations for such an access agreement were initiated by CBH Group in December 2013 but, as described in Chapter 4, are presently at an impasse over their freight carrying capacity.

544 Mr Reece Waldock, Director General, Department of Transport, Letter, 3 October 2014, p 2.
545 ibid.
546 Technically those lines were put into a 'care and maintenance' schedule, which was provided for in the lease variation.
547 *Project Agreement for Capital Works. Dedicated Narrow Gauge Grain Lines*, Schedule 1: Program of Works, 9 July 2010.

7.133 In response to various questions on this situation, both the former and current Transport Ministers have explained that the government believes that the availability of these route sections is a 'commercial matter between two commercial entities'.[548] This view is in contrast to the view expressed by Minister O'Brien to the lessee in 2009 that it was his 'intention to keep the whole network open even if some lines are not currently being used by CBH as [he] intend[ed] to keep options open for future use of those lines'.[549] In essence, because they have not been surrendered to government the lines in question are neither open nor available for present use. That is, the 'whole network' is most certainly not open.

7.134 It appears that at some point subsequent to the release of the SGNR report government policy regarding the surrender of uneconomic lines was altered to allow the lessee to retain these lines without maintaining them in a manner that would facilitate their ongoing use. In light of evidence by CBH Group that an alternative approach to rail maintenance could facilitate the viable use of Tier 3 lines, the Committee questions the statement that the Western Australian Government is unable to entertain any such proposal.[550] Furthermore, this change of policy runs contrary to the provisions of the lease, and requires some examination.

A frozen asset

7.135 In appearing before the Committee, Mr Waldock, was asked why government decided to close Tier 3 lines, but leave them in the hands of the lessee. Mr Waldock advised that:

> *it was clear to us at the time … that we saw no benefit. You can imagine these tier 3 grain lines that did not seem to have any customers; they were not seen to be the future and road was going to in fact dominate the market in those areas. We saw no value in the Public Transport Authority at that stage picking up, not an asset, but a liability in terms of we would have to then maintain them. Care and maintenance and all the rest was at least a number of million dollars per year to do.*

548 Hon Dean Nalder, MLA, Minister for Transport, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 June 2014, p 4436b. During a Matter of Public Interest debate on 15 October 2013 the then Minister for Transport, Hon Troy Buswell, MLA, explained that for the route sections in question to be made available, 'a commercial arrangement is needed between the operator and the user'. Hon Troy Buswell, MLA, Minister for Transport, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 October 2013, pp 4824c–4835a.

549 Hon Simon O'Brien, MLC, Minister for Transport, Letter, 11 June 2009, in Submission No. 42 from Public Transport Authority, 24 September 2014.

550 Hon Dean Nalder, MLA, Minister for Transport, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 June 2014, pp 4435b–4436a.

7.136 The Committee regards Mr Waldock's evidence on this point—particularly his suggestion that government 'saw no value' in resuming possession of what is a fundamental piece of state infrastructure because it was 'not seen to be the future'—as extraordinary. Mr Waldock's evidence suggests that the government in 2011 may have been sceptical as to the future of WA's grain growing industry.

7.137 This view was given some context in a hearing at which Mr Waldock outlined the timing of the decision. Though again acknowledging that the decision not to pursue the surrender of certain lines was difficult to justify in the face of events that have transpired since that decision was taken (in particular the acquisition by CBH Group of its own rolling stock), Mr Waldock explained that:

> *if we had known when we did that strategic grain network review that whilst we were shaking hands and signing off with industry, at the same time CBH had gone off and had other plans—which they must have had in mind, and they probably even had formalised at the time—clearly, things would have been different … the reason why government would not even consider accepting these uneconomic lines was because there was no opportunity, no interest, no demand, and that is why, clearly, if we were going to put them in care and maintenance, they would stay with Brookfield at the time. But if we had known there was going to be vertical integration, that the dynamics of the market was going to change, the whole cost structure would change, the strategic grain network review fundamental assumptions would change and, therefore, the costing models would change, of course, we would have looked at things differently. We did not know any of that.*[551]

7.138 The Committee regards this as a reasonable point and accepts that any criticism of the PTA needs to be balanced against the positive outcomes that did flow from the SGNR process.

7.139 In explaining the decision by the PTA to allow Tier 3 lines to be put into a regime of care and maintenance and not surrendered, Mr Waldock argued that the liability that would have been incurred by government if the lines had been surrendered was potentially significant. According to Mr Waldock:

> *our assessment … was [that it would cost] $2 million a year for ongoing, I guess, just care and maintenance … in terms of weed control*

551 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 11.

> *and all the rest, but also inspections regularly to see that the rail was not being stolen, they were intact and all the rest.*[552]

7.140 The PTA's Executive Director for Safety and Strategic Development, Mr David Browne, confirmed that lines under 'care and maintenance' were not operational, and put the annual $2 million dollar 'care and maintenance' figure into context:

> *that was for weed spraying, it was for firebreak control, it was for inspections, and it was to ensure that the lines were in care and maintenance, which was that, in the shorter term, they could potentially be brought back into an operational sense but, in the longer term, they were not unsafe for the populations who potentially could stumble across them as well.*[553]

7.141 As noted in Chapter 3, however, the care and maintenance definition, as provided in the *Project Agreement for Capital Works*, does not specify any positive obligations on the lessee. Rather, by defining care and maintenance as 'a Line Section which, due to the Initial performance Standards not being satisfied and where line speeds are such that it is no longer efficient or safe to transport grain on the Line Section, is no longer maintained to an operational standard', the definition specifies only what the lessee does not have to do.

7.142 This definition is seemingly at odds with the evidence provided by PTA: the Project Agreement does not provide that lines in care and maintenance 'could potentially be brought back into an operational sense' or stipulate any actions the lessee needs to take in relation to hazard prevention, such as 'weed spraying … firebreak control [or] inspections'. This leaves the State exposed and needs to be addressed.

Finding 25

The meaning of the term 'care and maintenance' gives no indication as to what is expected of the lessee.

Recommendation 10

The definition of the term 'care and maintenance' should be amended to specify the obligations of the lessee and how lines placed into care and maintenance are to be maintained.

7.143 In December 2008, the PTA outlined for the Minister the possible impacts of the lease's surrender provisions. According to the PTA, 'if the decision was made to have all 1,000kms of line returned to Government and closed for use, the lines would be

552 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 4.

553 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 25 June 2014, p 4.

removed and sold for scrap metal and any sleepers worth using could also be sold off'.[554] To do otherwise 'would only result in theft of the rail and sleepers once it becomes known that the line is no longer used'.[555]

7.144 The PTA noted the need for 'environmental management including weed control and maintenance of structures and fire break control' and estimated this to cost $3 million per annum, not including 'the shift in cost to roads due to current freight moving from rail to road and any resulting social costs'.[556]

7.145 If the government decided to either operate the lines itself or subsidise WestNet to cover its operating costs, PTA estimated the average annual cost to be $38 million 'after revenue, maintenance and capital costs are taken into account in respect to grain lines'.[557] A further option that was also canvassed was for the PTA 'to take back the Lines and seek expression of interest from other parties wishing to manage the Lines'.[558] Though the extent to which this option may have been considered is not known, it should be noted that at this time (December 2008) there was no suggestion of any such interest being expressed from within the market.

7.146 While the Committee accepts that the PTA potentially would have incurred a liability in relation to the surrender of any lines by the lessee, the Committee regards the evidence relating to the specific risk of this liability as unconvincing and does not accept that any such liability would have been so great as to justify the effective freezing of a state asset. The Committee acknowledges that, at the relevant time, the PTA was focussed on negotiating a variation to the lease with the aim of 'keep[ing] 92 per cent of all grain on rail,' and not upon the future status of Tier 3 lines.[559] Nonetheless, it seems remarkable that no condition was included in the lease variation by which the 'care and maintenance' status of particular lines could be revoked by government. If the imposition of such a condition was rejected by the lessee, this would have given insight into the value placed by the lessee on keeping these lines in its possession as a contingent asset. If consideration was not given to the implementation of such a condition within the lease variation, this reflects poorly upon those who negotiated the 2010 lease variation with the lessee.

7.147 The situation is exacerbated by the PTA's apparent unwillingness to find a solution to the problem. When asked as to whether there is some way for the state to extricate the Tier 3 lines from their 'care and maintenance' designation, Mr Waldock replied:

554 Submission No. 39 from Department of Transport, 29 August 2014, Closed Evidence.
555 ibid.
556 ibid.
557 ibid.
558 ibid.
559 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 11.

> *of course not, and we have gone through that. We have looked and looked and looked, and there is no way of getting out of it. That is just weaknesses of the lease that do not allow that. As Sue [McCarrey] said, if we did it again, we would draft it better, but we did not do it and we will not have a chance to draft it again.*[560]

7.148 The Committee regards this as an unsatisfactory response for two reasons. First, the variation that created the 'care and maintenance' designation and allowed Tier 3 lines to be placed under this regime most certainly was drafted by the PTA, under Mr Waldock's leadership. Second, the fact that the original lease has been varied five times in the course of its existence demonstrates that the terms of the lease are always open to further negotiation.

7.149 As it stands, the fact that the PTA 'saw no value' in what is a significant proportion of the freight rail network is of some concern to the Committee. This issue is, of course, exacerbated by the fact that CBH Group presently wishes to make use of these lines for WA's grain freight task but, in the absence of an agreement being struck with the lessee, will shift that freight task onto road. PTA representatives have stated that a different decision might have been made 'with the benefit of hindsight'.[561]

7.150 The situation that has resulted from the decision not to enforce the surrender provisions of the lease is that some lines remain in the possession of Brookfield Rail, and cannot be put to use unless an access proposal satisfying the requirements of Brookfield Rail is lodged. The Committee believes strongly that it is in the best interests of the state to see the freight rail network used to the greatest extent possible. When questioned as to whether government might seek to enforce the surrender provisions and thus enable a new party to access lines that are presently frozen, Mr Waldock was dismissive, stating simply that:

> *I am not going to express my views other than to say when you get into an agreement, an agreement is an agreement is an agreement and it is very clear what that agreement says.*[562]

7.151 Indicating that he understood the Committee's concern, Mr Waldock acknowledged that the present situation is unfortunate:

> *I feel the same as you do in terms of it is hardly in the state's interests, and certainly not the farmers' interests, to see that situation, but none*

560 ibid.

561 Ms Sue McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 3.

562 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 4.

> *of us were involved in that lease, and the lease is the lease is the lease.*[563]

7.152 Notwithstanding Mr Waldock's characterisation of the lease as irremediable, formal deeds to amend the lease have been registered on three occasions since privatisation. The lease, that is, most certainly can be altered. PTA's reluctance to amend the lease except where it is in the interests of the lessee is difficult to understand. It is also worth noting that, as discussed in Chapter 3, the PTA have not themselves always strictly followed the provisions of the lease. Indeed, the present situation has arisen out of a variation to the lease negotiated by the PTA in 2010.

7.153 The role of the PTA is to manage the lease in a way that promotes the interests of the state. The interests of the state are not always the same as the interests of Brookfield Rail: in many instances these interests may be in direct conflict, which is ultimately why many of the formal provisions of the lease exist. It is inevitable that Brookfield Rail would seek to concentrate its services into line sections that are able to generate the greatest profit. While this may be appropriate from the perspective of an operator seeking to maximise return on assets, it takes no account of the vast social dividends that can be generated through the use of public infrastructure.

Legislative Limitations on the disposal of corridor land

Section 12(6) and the Koolyanobbing—Esperance line

7.154 As noted in Chapter 3, s 12(6) of the *Rail Freight System Act 2000* (WA) requires any disposal (lease) of corridor land to include an upgrade of the Koolyanobbing—Esperance line. Section 12(6) states that:

> *a proposal to dispose of standard gauge corridor land between Koolyanobbing and Esperance is to ensure that, if the holder of the land has a contract under which more than 3 million tonnes of freight per year are to be carried on the track between Kalgoorlie and Esperance— … [the track is upgraded to a specified standard and that standard maintained over the term of the lease].*

7.155 PTA found s 12(6) to be unenforceable due to problems with the drafting of the legislation. Under s 12(3)(a) and (b), corridor land can only be disposed of to a company whose main business is to provide and maintain railway operations and 'is not involved in providing train services'.[564] This means that because the lessee is not able to contract

563 ibid, p 7.

564 Western Australian Auditor General, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, 2013, p 24. What it means to be 'involved in providing train services' is defined in s 12(4) of the *Rail Freight System Act 2000* (WA).

to carry freight, this threshold can never be triggered. Also, as the Auditor General noted, the threshold of a single contract for 3 million tonnes of freight per year is unlikely to be reached and, thus, the second condition also would not be triggered.

7.156 The unenforceability of these sections has consequences for the enforcement of s 12(6). Because of the provisions of s 12(3), the lessee (currently Brookfield Rail), who is the holder of the land, cannot be a provider of train services. This means that the lessee will never have a contract to carry any amount of freight, which makes the stipulation of three million tonnes of freight absurd. Therefore, s 12(6) cannot be triggered and Brookfield Rail cannot be compelled to complete the upgrade specified in the Act.

7.157 The Committee sought information from the PTA in relation to this matter. Specifically, the PTA was asked:

1. at what stage the Department of Transport or PTA became aware of this issue;
2. was legal advice sought in relation to this section of the Act once the enforceability issue came to light;
3. if legal advice was sought, what was that advice; and
4. what actions or measures, if any, were taken to try to resolve this issue with the lessee, given the intent of the legislation

7.158 In response, the Director General of the Department of Transport stated that he could:

> *advise that all parties including both sides of Parliament and the PTA became aware of the issue referred to in [… the Committee's request] at the time the Bill was debated in the House. The discussions with the PTA's General Council concluded that no action was required given both sides of Parliament were aware of this at the time the Bill was debated in the House. Due to all parties being aware of the issue at the time the Bill was debated no other measures were considered.*[565]

7.159 The Committee had a number of concerns in relation to this response, not least because the unenforceability of a section of an Act of Parliament is a serious matter. It seemed that the Department of Transport was asking the Committee to accept that both Houses of Parliament debated and adopted an amendment to a Bill that they knew would be unenforceable. As the Hansard records of the debates in the Houses did not appear to support this interpretation of the Department's advice, the Committee sought further information from the Department, as follows:

565 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 24.

- The precise stage in this process at which the Public Transport Authority or the Department of Transport became aware that s 12(6) would be unenforceable due to problems with the drafting of the Bill.
- On becoming aware of this problem, what actions, if any, the Public Transport Authority or the Department of Transport took to advise the Minister.
- What documentary evidence the Public Transport Authority or the Department of Transport could provide in support of the above claim that both sides of Parliament were aware of this issue when the Bill was debated in the House. In particular, documentary evidence was required that demonstrated that both sides of Parliament were aware that the Koolyanobbing-Esperance line upgrade, as required under s 12(6) of the *Rail Freight System Act 2000* (WA), would be unenforceable due to problems with the drafting of the legislation.
- The time at which the Director General and/or other officers of the Public Transport Authority and the Department of Transport discuss this with General Council, and documentary evidence of these conversations or the General Council's advice on this matter.

7.160 The PTA responded to these questions in the course of a hearing. According to Ms McCarrey, the fact that s 12(6) is unenforceable 'first came to the fore … in and around 2005'.[566] Ms McCarrey explained that the PTA became aware of the problem:

> *when Portman Mining was in negotiations with WestNet Rail over the Esperance railway line … [then, the PTA] had a look at the issue to see whether or not we could trigger those sections of the act.*[567]

7.161 Ms McCarrey corrected the advice that had earlier been provided by Mr Waldock, explaining to the Committee that 'it is not true to say that it was unenforceable because we interpreted the fact that both sides of Parliament seemed to feel at the time that it was unenforceable'.[568] Instead, the PTA 'thought it was unenforceable because general counsel internally said because of the wording and the way the actual sections of the legislation had been worded that we could not enforce that section of the act'.[569]

7.162 Ms McCarrey then provided further context to what had occurred, informing the Committee that:

566 Ms Sue McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 6.
567 ibid.
568 ibid.
569 ibid.

> *[t]he way that I work is that if I discover an issue like that, I discuss it with legal counsel internally, discuss it with other people who were working with WA Government Railways [such as] railway engineers … whoever I might need to discuss those issues with … working with legal counsel in those discussions, we actually looked at the way the wording was done in the Rail Freight System Act—I think you have had a look at that yourselves—and it was determined then that we could not enforce that.*[570]

7.163 As part of the 2013 audit of the management of the freight rail network, the Auditor-General revealed that:

> *PTA has not monitored when the level of freight passed three million tonnes, and the lessee has not been required to undertake the works. The lessee nonetheless began upgrade works in 2008 on its own initiative, under an agreement with a private partner. Available evidence indicates that more than three million tonnes of freight was being carried on this line by sometime between 2002 and early 2004, but PTA advise that there has never been a single contract for more than three million tonnes carried on this line, as expressed in the Act.*[571]

7.164 Given the PTA's assessment somewhere around 2005 that the section of the Act was unenforceable, it is reasonable to suggest that they continued not to monitor the level of freight on the line.

7.165 Having taken the view that s 12(6) of the *Rail Freight System Act 2000* (WA) was and is unenforceable, Ms McCarrey explained that the PTA had simplified its view of how track performance standards would be upgraded:

> *What has happened since then … was that negotiations would occur between the track owner and the aboveground operator to upgrade tracks as and when required, as has happened with Karara Mining Ltd into Geraldton … The idea was always negotiation between track owner and aboveground operator to bring a track to the standard that is needed to meet the purpose or the market that is out there at the time. We would expect that if tonnage does continue to increase out [of] Esperance port—certainly if the multi-user iron ore facility does*

570 ibid.

571 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 24.

> *get off the ground, that would actually occur—then more negotiations would need to occur to make sure that the track is at the standard.*[572]

7.166 While the increase in performance standards intended in the Act has been achieved, there is no guarantee that these standards will be maintained in perpetuity as envisaged by the legislation.

Section 12(7) and the Kwinana–Parkeston line

7.167 As noted in Chapter 3, s 12(7) of the *Rail Freight System Act 2000* (WA) relates to the disposal of the standard gauge corridor land between Kwinana and Parkeston. Here, the lessee is to ensure that the track was upgraded to a particular standard and ensure that the standard be maintained over the term of the lease.[573]

7.168 In relation to the s 12(7)(b) requirement for increased standards on the Kwinana–Parkeston line, the Auditor General reported that this upgrade was completed in 2010, but that the performance standards had not been amended to reflect the increased standards.

7.169 The Committee requested further information from the PTA as to whether the performance standards for the Kwinana–Parkeston line had been amended since the Auditor General's report to reflect the 2010 upgrade required under the Act.

7.170 The Department of Transport advised that:

> *the performance standards for the Kwinana–Parkeston line have not been amended. Any changes to the Initial Performance Standards in this regard will be managed in accordance with the process detailed at clause 15.22 of the Lease.*[574]

7.171 Section 15.22 of the lease states:

> *Within six months, but not later than three months, before each Five Year Anniversary either the Minister or the Network Lessee may give notice to the other proposing an amendment or addition to or replacement of a Performance Standard or Performance Standards, if the party considers that:*

572 Ms Sue McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 6.

573 The upgrade was also to ensure that 1,800 m long trains could cross at all crossing loops that existed at the time of the disposal. Section 12(7)(a)(iii) provides that those improvements are carried out in accordance with any program developed by the holder of the land in co-operation with the Australian Rail Track Corporation Limited.

574 Submission No. 39 from Department of Transport, 29 August 2014, p 2.

> *(a) compliance with any or all of those standards will no longer result in any Leased Railway Infrastructure being Fit for Purpose; or*
>
> *(b) the Network Lessee may comply with a lesser standard and still meet its obligations under clause 15.2 [Fit for Purpose].*

7.172 Given the upgrade on the Kwinana–Parkeston line was completed in 2010 it may be reasonable that amending the performance standards would be dealt with in the five-yearly process of reviewing performance standards. However, it is not clear if, and how, the provisions of the lease and the legislative requirements operate together. The legislation, at s 12(7)(b), states that the disposal of the corridor land (the lease) should ensure the improved track and the maintenance of that track 'to at least that standard over that length of track during the term of the disposal'.

7.173 The Committee sought clarification as to the present status of the Kwinana–Parkeston line, and whether the performance standards had been elevated as a result of the upgrade. Confirming that the performance standards had not been increased, Mr Browne explained that the line 'is being maintained in accordance with the performance standards that were done at the time of the lease'.[575] This was despite the fact that, as Mr Browne also explained:

> *there has been a significant amount of work done on the Kwinana–Kalgoorlie line since 2000. Indeed, they have in their maintenance plan a final piece in the jigsaw to have it fully upgraded to the standard up to 25 tonnes. That is expected in the next year or two. We would like to encompass that so that then completes the requirements under the Rail Freight System Act—the original intention. It is currently at 21 tonnes [per axle] at 115 kilometres an hour, but it is going to be just slightly under at 25 [tonnes per axle].*[576]

7.174 Asked whether there is any deadline by which the lessee was required to have the Kwinana–Parkeston line upgraded, Mr Browne confirmed that there is not:

> *No … There was no time frame up to the 25 tonnes; that was effectively an aspirational target that was agreed between the two parties in May 2000. They did agree to upgrade it to 23 tonnes at 80 kilometres an hour, which is now being exceeded by the actual condition on the lines. That has been done and exceeded, but there was no time frame to have it up 25 tonnes a day, albeit, as I said, [the current performance standards are] 21 tonnes [per axle] at 115*

575 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 5.

576 ibid.

> *[kilometres per hour]. It is meeting half of [the heightened] requirement at the moment and it is very, very close to making the [other] one.*[577]

7.175 Though the Committee is encouraged by this evidence, it remains concerning that an upgrade of the specified performance standards will only be triggered if and when the lessee upgrades the line to a point where it actually exceeds the 25 tonnes per axle freight capacity. If the lessee maintains the line just below that standard, the specified performance standards will never be increased. The view of the Committee is that the PTA should actively seek to ensure that the performance standards along what is one of the most critical sections of the freight rail network are upgraded by exerting pressure upon the lessee to complete its announced upgrade plans as soon as possible.

Finding 26

The Public Transport Authority's 'light touch' approach to managing the lease has proven inadequate for ensuring the freight rail network is adequately maintained.

Recommendation 11

The Public Transport Authority takes a more proactive approach to its responsibilities in managing the freight rail network lease.

The Miling Line

7.176 The Committee's concern that the established 'light touch' approach to lease management is inappropriate is further illustrated by the present situation pertaining to the Miling line. This line was characterised as a 'Tier 2' line in the SGNR report but, having been re–sleepered in 2004, was not the subject of capital investment in 2010. Instead, the SGNR recognised that the Miling line would be 'due [for re–sleepering] in about 2016'.[578] No such campaign has been announced, but the Miling line is now approaching a critical point: performance standards on that line have been lowered to facilitate its ongoing use, but at present that use is subject to significant speed and weight restrictions.

7.177 Speaking about the Miling line, CBH Group's Acting General Manager of Operations, Mr Andrew Mencshelyi said that:

> *it is not a sleeper problem; it is an actual rail problem. The rail is snapping on a considerably high occurrence and that is causing the restrictions of [not] being able to run two locomotives next to each other and the length of train … so it is a different maintenance*

577 ibid.

578 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, p 59.

> *requirement for that line that is to the other tier 1, tier 2 lines that has just recently had the injected funds—it is about replacing the steel sections. The number that is being proposed is around the $40 million mark to replace the steel to bring that line back to full train length, normal line speed and still 16 tonne per axle, which, if you look at the tonnes on that one particular line section, it is probably about 400 000 tonnes—$40 million over 400 000 tonnes per annum, it is a case of a big pay back; a long time to pay that back.*[579]

7.178 Whatever the cost of meeting the ongoing maintenance requirements for the Miling line, there is clearly a question as to who will pay for it. The view expressed by Ms McCarrey of the PTA, however, is quite different. According to Ms McCarrey:

> *when it comes to the Miling line, there has been no state government decision and, from a state government perspective, Brookfield Rail is responsible for operating that line at the performance standard in the lease, and there has been no agreement otherwise in relation to that rail line … No decision has been taken in relation to the Miling line; [Brookfield Rail] must meet the performance standards under the lease.*[580]

7.179 This view was further emphasised by PTA's Mr Browne, who explained that:

> *in relation to the Miling line … Brookfield are required to keep it at the performance standards that have been agreed to, so there is no change there. In this case the lease does apply and we can hold them to comply with those requirements. If Brookfield come back and again trigger some of the requirements in the lease about potentially handing some of these back, then a case would be considered. To date, that has not happened.*[581]

7.180 Asked to confirm that the lessee could not unilaterally take the Miling line out of service by placing it into a regime of 'care and maintenance,' Ms McCarrey confirmed that:

579 Mr Andrew Mencshelyi, Acting General Manager of Operations, CBH Group, *Transcript of Evidence*, 11 June 2014, p 5.

580 Ms Sue McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 10.

581 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 15.

> *[a]t this stage there has been no agreement with government on any change in relation to the lease agreement, so they have to continue operating those at the initial performance standard.*[582]

7.181 On this point, Mr Browne explained that if the lessee was to seek to place the Miling line into a regime of 'care and maintenance' a specific process would need to be followed. According to Mr Browne:

> *[i]n accordance with clause 16 of the lease, the process would come back to us to assess and for government to make a decision. They would have to justify why those lines are either uneconomic or [had] suffered a significant reduction in use.*[583]

7.182 This statement is concerning as it does not accurately reflect the provisions of the lease. There are three requirements, all of which must be satisfied under clause 16, if a line is to be proposed for surrender:

- freight transported over the line must have, in one year, either dropped below 200,000 tonnes, or be less than half of the average over the previous three years; and
- maintaining the lines must be more expensive than revenue generated on those lines; and
- the lessee remains otherwise capable of fulfilling its lease obligations.

7.183 It is also interesting to note that when the Miling line was the subject of a re–sleepering campaign in 2004, its performance standards were increased. This makes the recent reduction in performance standards somewhat difficult to understand insofar as it again appears that the lease was being inconsistently interpreted by the operator. On this question, Mr Waldock explained that the government had not seen fit to establish the post-2004 higher performance standard as a new standard within the lease:

> *In a policy sense—the rail regulator certainly would look at that and make decisions—they could argue that the lessees, which they had, when they pay for anything, the performance standard is the performance standard and fit for purpose is fit for purpose, as laid out in the lease. It is different when the government funds things; we are able to negotiate an increase in those standards as a partner of*

582 Ms Sue McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 16.

583 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 16.

> *variation. It is a different sort of package. Where we have put funds into upgrades, we have changed the performance standards. Where it is their business on their lines, the lease—again, we come back to the lease—that is the performance standard laid down that they have to meet.*[584]

7.184 Though Mr Waldock's evidence suggests that the investment made into the Miling line in 2004 was done at the volition of the lessee, that investment was actually made in satisfaction of a requirement within the lease—a requirement that had been included as part of the agreement to lease the network out in the first place. Mr Waldock, however, had a simple explanation as to why the Miling line had been permitted to return to the lower, pre-upgrade performance standards, explaining that when the lease was entered into, 'it was never envisaged that the standards would change'.[585]

7.185 In any event, the Committee does not accept that the only time the PTA could secure a permanent increase in performance standards along a line would be 'when the government funds things'. The view of the Committee is that a more appropriate approach for the PTA to take would be to enter into negotiations with the lessee whenever an upgrade is to be performed on the freight rail network, irrespective of where the funds for that upgrade are to be sourced. Having a freight rail network that performs to a high standard is clearly in the interests of the state, and ensuring such an outcome is obviously squarely within the objective of protecting 'the long-term functionality of the rail corridor and railway infrastructure'.

7.186 The concern with PTA's current approach in relation to increased network performance standards achieved through private investment is that the state-specified performance standards will remain as stipulated in the 2000 lease through to its end. In 2049 the government may resume possession of an asset that, while able to meet performance standards that were appropriate in 2000, is unable to meet contemporary requirements. This poses a risk to the future development of the state.

Finding 27

The process for securing performance standard upgrades achieved through private negotiations is inadequate for ensuring the freight rail network is maintained to a useful standard over the life of the lease.

Recommendation 12

The Western Australian Government work with the lessee to establish a process by which upgrades to performance standards achieved through private negotiations are maintained.

584 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 13.

585 ibid.

Managing the concerns of other stakeholders

7.187 Another critical aspect of the PTA's lease management role involves protecting the rights of persons who, by virtue of living in close proximity to a rail corridor, are directly affected by the operation of the freight rail network. Indeed, protecting the rights of those who live in close proximity to the freight rail network is a clear example of a situation in which the interests of the State and the interests of the lessee are likely to diverge. In any such instance, a proactive approach to lease management by the PTA would clearly be appropriate. This would involve the PTA seeking to align the lessee's operation of the freight rail network in a way that reduced any negative consequences for the State. Evidence received by the Committee, however, indicates that the PTA has historically preferred to take a different approach.

7.188 A particular example that has been brought to the Committee's attention relates to the rights of persons for whom the freight rail network creates a nuisance. One of the submissions received by the Committee was written by Mr Robert Jennings, a member of the Jandakot Residents Association.

7.189 A resident of Glen Iris, Mr Jennings' home backs onto the freight rail line that runs to Fremantle. His submission to this Inquiry arose out of dissatisfaction with efforts made by the PTA to ameliorate the environmental and residential impact of freight trains running on the Fremantle line. Specifically, Mr Jennings submitted that:

- the lease is 'inadequately managed by the Public Transport Authority as they do not recognise the safety, health and lifestyle impact'[586] that freight rail network operations have upon the local community; and
- an 'unethical or inappropriate relationship appears to exist between the Public Transport Authority and Brookfield Rail'.[587]

7.190 In support of these submissions, Mr Jennings explained that although the freight rail line was already in existence when he purchased his home ten years ago, 'the frequency of trains was considerably less [then] and caused minimal annoyance'.[588] Over the course of the past ten years, however, Mr Jennings had perceived a marked increase in the frequency, speed and length of the trains using the Fremantle line, factors which have combined to create a greater disturbance throughout his neighbourhood. This increased disturbance resulted in the Jandakot Residents Association making a formal complaint to the PTA in 2013.

586 Submission No. 7 from Mr Robert Jennings, 15 April 2014, p 1.
587 ibid.
588 ibid.

7.191 Mr Jennings further explained that in March 2013 the PTA engaged private consultants 'to conduct vibration and noise testing on four properties for 7 days'.[589] During that period, a total of 245 trains were detected by the tests (an average of 35 trains each day). Though the results of the testing gave rise to the conclusion that the vibrations caused by trains were 'unlikely to cause major structural damage' to properties, the testing revealed that 40 per cent of all trains exceeded the recommended vibration levels, and at night the recommended vibration level was on average exceeded by 50 per cent. Notwithstanding these test results, Mr Jennings also submitted that residents in the affected area noted 'a reduction in the speed of the trains … during the testing period', which gave rise to suspicions that 'drivers had been made aware of the testing process by a member of the PTA'.[590] This allegation was refuted by the PTA: in a response to residents dated 31 July 2013, the PTA acknowledged that vibration levels were above the acceptable criteria, but stated that 'this should be expected by residents purchasing homes in close proximity to an existing freight line'.[591]

7.192 Indeed, when the Committee put these concerns to PTA representatives, Mr Waldock noted that 'these freight corridors have been there for a mighty long time'.[592] On this point the Committee notes that, in Australia, it is no defence to a claim in nuisance that the plaintiff 'came to the nuisance'.[593] Quite aside from this, however, PTA's view in no way represents an attempt to reach a constructive solution to a problem that is unlikely to diminish naturally. Rather, the response demonstrates excessive concern for the interests of the lessee and a lack of empathy for the interests of the affected residents.

7.193 According to Mr Jennings, subsequent to the March 2013 testing he continued to request assistance from the PTA, often without response. This lack of response ultimately prompted him, along with a number of other Jandakot residents, to make a formal complaint to the State Ombudsman. After this complaint was lodged, the PTA arranged a briefing on 11 December 2013, at which PTA representatives explained that:

- the line in question is subject to a speed limit of 80 kilometres per hour;
- monitoring and regulating the speed of trains is not done by the PTA, as Brookfield Rail is responsible for operating the line;

589 ibid, p 2.
590 ibid, p 4.
591 ibid, p 2.
592 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 22.
593 In Australia, the Courts consider *Sturges v Bridgman* (1879) 11 Ch D 852, which makes it clear that a legal right to have a nuisance stopped is unrelated to how long the nuisance-causing activity may have occurred, to be good law. This is demonstrated in *Challen v McLeod Country Golf Club* (2004) Aust Torts Reports 81–760.

- freight volumes conveyed over the Fremantle line are likely to continue to increase; and
- the 'effects on the neighbouring community' are not taken into account by Brookfield Rail in determining speed limits.[594]

7.194 These explanations were of no consolation to the Jandakot residents in attendance. Indeed, in response Mr Jennings expressed frustration that the PTA has 'no long term plan to address noise and vibration concerns even though significant growth in rail freight is expected and the problems will magnify considerably'.[595]

7.195 Appearing before a Committee hearing on 13 June 2014, Mr Jennings explained that he and his neighbours appreciated that the Fremantle freight line is a critical piece of state infrastructure and that:

> *we are not against rail transport. We are not asking for it to be moved. We are not naïve. We appreciate that it is an important part of state infrastructure and it is necessary. What we are asking for is some reduction in speed, primarily, to make our [homes] habitable.*[596]

7.196 In addition to the noise and vibrations created by freight rail operations, Mr Jennings also registered his concern at what might transpire if an accident involving a freight train carrying toxic chemicals at a speed of 80 kilometres per hour were to occur in the area. As Mr Jennings put it:

> *if there is a catastrophic derailment, the danger to the community would be widespread if there is a leakage of toxic chemicals. We are built right on top of the Jandakot water mound, so any seepage into that water mound of toxic chemicals would be an issue for the entire community.*[597]

7.197 On this point, Mr Jennings said that he was surprised to learn that it was Brookfield Rail, and not the PTA, who are charged with the responsibility of being the 'hazard management authority' for freight trains. This was particularly concerning for Mr Jennings because:

> *the speeds of the trains are [also] being managed by Brookfield. They are, if you like, policing themselves. They are also managing their own emergencies, if you like, with no oversight.*[598]

---

594 Submission No. 7 from Mr Robert Jennings, 15 April 2014, p 3.
595 ibid, p 5.
596 ibid, p 2.
597 ibid.
598 ibid.

7.198 The Committee understands that hazardous substances, including such highly toxic compounds as sodium cyanide, are indeed conveyed along this line. Therefore, it is easy to appreciate the concern of residents in the area, particularly as the risk of derailment can never be totally eliminated. In his submission, Mr Jennings also explained that the 2009 *State Planning Policy 5.4 Road and Rail Transport Noise and Freight Considerations in Land Use Planning* sets more stringent regulations for new or redeveloped transport infrastructure, such that the physical distance between his home and the rail line would be insufficient for present planning requirements. These regulations, however, obviously cannot be retrospective in effect, and indeed this issue was raised by the Member for Jandakot, Hon Joe Francis, MLA, in a grievance to the then Minister for Transport, Hon Troy Buswell, MLA, in 2012.

7.199 The Committee regards the grievance by the Member for Jandakot as striking:

> *I have stood at the back of some of the affected houses. I have stood in the bedrooms of these houses. It can be best described as a small earthquake when these trains go past. The houses shake, the pictures move, and the glass in the windows rattles. Some of these residents are elderly. It ruins their lives—they cannot sleep at night. I have taken a couple of pictures of some cracks in the walls associated with this rail line. Clearly, they are not small cracks in plaster. I am particularly concerned also that a weakened wall could cause an unfortunate accident as, clearly, foundations have moved… My concern is that this could result in an unfortunate accident. I am hesitant to guess who would actually be liable if a wall is cracking to that degree because of vibrations from a train.*[599]

7.200 In response to the grievance, Minister Buswell explained that it is indeed true that 'if this land were to be subdivided now, with a rail corridor through the middle, there would be a much more significant degree of physical separation between railway line and the residents'.[600]

7.201 When the Committee asked PTA representatives for their response to the assertions put by Mr Jennings, a different perspective emerged. As Mr Waldock explained:

> *those particular complaints … are well known to us. It is an issue that we have been grappling with for some time. In fact, it is a failure of planning … It is a massive issue in which local governments and*

599 Mr Joe Francis, MLA, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2012, pp 2784b–2786a.

600 Hon Troy Buswell, MLA, Minister for Transport, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 May 2012, pp 2784b–2786a.

> *planning agencies have allowed in these very narrow corridors sensitive land uses, including urban development, to take place.*[601]

7.202 Mr Waldock also characterised the issue as being more about vibration than noise. According to Mr Waldock:

> *the issue … is not generally about noise, because noise comes at some cost and we then question why the public taxpayer should pay for this when there have been bad planning decisions. But there are particularly issues surrounding vibration, which is a lot more difficult to manage. It is a more imprecise science. Much depends on the geotech conditions and many other things. We have had a look at that and we have done a lot of analysis.*[602]

7.203 Mr Burgess then provided some insight into the source of the concern, informing the Committee that:

> *[o]ften the freight network is required to run at unusual hours, not necessarily through this part. However, if it is connecting to the port, the port uses the same bridge. It is a dual gauge track over the bridge at Fremantle and we therefore restrict when the freight trains can run. It does create a bit of an issue.*[603]

7.204 Mr Burgess further explained that, while the PTA took the view that 'in an ideal sense the houses would not be that close to the freight network,' in responding to the concerns raised by residents, the PTA has:

> *engaged with them as best we can. We have had people out there talking to them. I think we have done as much as we can do as a lease manager in terms of bringing Brookfield to the table and to the meetings with the residents. They have made some modifications to the track and have repaired and replaced some joints and sleepers.*[604]

7.205 Asked as to whether the PTA could impose a speed restriction on the line segment in question, Mr Burgess answered that he did not believe the PTA would be able to impose any such restriction, before explaining that 'to be honest, I do not think [such a

601 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 22.
602 ibid.
603 Mr Mark Burgess, Managing Director, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 22.
604 ibid.

course of action] would be pragmatic for the state,' and that 'we do not regulate [Brookfield Rail], we just lease manage them'.[605]

7.206 On this point, both Mr Waldock and Ms McCarrey explained that it is the role of the Environmental Protection Agency to determine and, if appropriate, impose speed restrictions along specific line segments. Ms McCarrey stated that:

> *the lease does say is that they must comply with all the environmental laws and environmental regulations. The intent of the lease was just the management of the track standards. One of the reasons certain regulators were put in place is that they were privatising. … there is a rail safety regulator, a rail access regulator and, of course, they have to abide by EPA regulations.*[606]

7.207 Finally, Mr Browne questioned some of the evidence given by Mr Jennings:

> *we did a significant amount of noise and vibration monitoring. We had people in there for a week. We put our sensors through. Some of those sensors were tampered with by some of the residents so they were taken out of the sampling. We had people videoing. As a result of all of that the noise and vibration testing said that it was below the threshold for any damage. It was being asserted that the vibration was causing cracks in the walls. That was not found to be the case but it was found that it was on the cusp of the annoyance level that is generally accepted for noise and vibration. As a result of our relationship with Brookfield Rail they did some work down there on the sleepers and removed some of the joints. As you can imagine there is a 'clanka-clanka-clank' as the wheels clunk over on the freight line. We approached Brookfield and very quickly they removed those joints and welded the line so there was no more 'clanking'.*[607]

7.208 Interestingly, recent work being conducted on the Fremantle freight line afforded residents the opportunity to test the hypothesis that reduced train speeds would help to ameliorate the nuisance. According to Mr Jennings, in April 2014 a 'community meeting' was facilitated by Brookfield Rail and the PTA, where details of re–sleepering work that was being conducted on the line were revealed. Residents were told that while this work was being undertaken the speed limit along the line in the relevant area would be reduced to 40 kilometres per hour. In providing context to this temporary speed reduction, Mr Jennings explained that:

---

605 Ibid.

606 Ms Sue McCarrey, Deputy Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 23.

607 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 17 September 2014, p 23.

> *previously the westbound line had been improved over the 10 years. When I initially purchased in that area, I recall the speed signs being posted there at 60 kilometres an hour. Now, I believe the westbound line has been improved over the 10-year period and the speed went up to 80 kilometres an hour. The speed on the eastbound line, being an older line, was always 60 kilometres an hour to the best of my knowledge. That was reduced to 40 whilst they were doing works. It is now back up to 80 kilometres an hour. Since the testing was done we have now had an increased speed again on a new line, and it is worse.*[608]

7.209 The Committee asked Mr Jennings if he had noticed an improvement during the time the train speed was restricted to 40 kilometres per hour. Mr Jennings responded that:

> *yes it is; [noise and vibration] is significantly less [at 40 kilometres per hour]. The Public Transport Authority and Brookfield have acknowledged in writing and at the meetings that a reduction in speed does equate to a reduction in noise and vibration levels experienced by residents.*[609]

7.210 Having so recently experienced the benefit of a reduction in train speeds along the relevant section of the Fremantle line, Mr Jennings was direct in explaining that he and his neighbours would like to see freight trains:

> *from the Karel Avenue overpass to be slowed to 40 [kilometres per hour], through the residential area of Jandakot–South Lake.*[610]

7.211 The Committee regards this as a reasonable request and has trouble understanding why the PTA has opposed it. To put the request into context, if train speed were reduced from 80 to 40 kilometres per hour over the six kilometres between the overpasses at Karel Avenue and Spearwood Avenue, journey time would be increased by just four minutes and 30 seconds. More than 150 houses back directly onto the Fremantle line along this stretch; the Committee has no doubt that the people who reside in these properties would share Mr Jennings' view that '[i]t would be nice to have a good night's sleep'.[611]

7.212 The Committee acknowledges that this is an extremely difficult situation—a situation that is unlikely to be solved to the satisfaction of all parties. Furthermore, the Committee accepts Mr Waldock's description of the situation as having arisen as a consequence of 'a failure of planning'. The cause of the problem, though, offers

608 Mr Robert Jennings, Jandakot Residents Association, *Transcript of Evidence*, 13 June 2014, p 3.
609 ibid.
610 ibid, p 6.
611 ibid, p 9.

nothing in the way of a solution. Nonetheless, the Committee is pleased with Mr Waldock's explanation that, because '[t]he Cockburn development along the coast is very close to the Fremantle rail,' the PTA is 'going to take a leadership role in the planning space because that has not [previously] been done'.[612]

Finding 28

Protection of the private interests of parties who live or operate in close proximity to rail corridors is important. To date, planning has failed to recognise this.

Recommendation 13

The Public Transport Authority takes a leadership role in planning future land use along rail corridors.

7.213 In relation to the present problem, Mr Jennings advised the Committee that that he and his fellow members of the Jandakot Residents' Association:

> *have asked for a reduction in speed. We were bluntly told by [the PTA] that, no, it would be unprofitable for industry and [not] competitive against road transport if there was a reduction in speed.*[613]

7.214 Though the Committee is unable to confirm the veracity of this statement, it is broadly in line with the tenor of the evidence given by PTA representatives and, as such, is a matter of some concern. The profitability of Brookfield Rail is a matter for Brookfield Rail, not the PTA; the Committee notes in passing that parent company Brookfield Infrastructure reported that Brookfield Rail generated funds from operations[614] of $US187 million for the year ending 31 December 2013.[615] While it is clearly in the interests of the state that the operator of the freight rail network is capable of commercially viable operation, the view of the Committee is that the PTA should place greater emphasis on protecting the rights and interests of Western Australian citizens who are directly affected by the operation of the freight rail network.

Through to 2025 and beyond …

612 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 23.

613 Mr Robert Jennings, Jandakot Residents Association, *Transcript of Evidence*, 13 June 2014, p 6.

614 Funds from operations, often abbreviated as FFO, is a measure of company performance often used for companies operating as real estate investment trusts. Brookfield Infrastructure defines FFO as 'net income excluding the impact of depreciation and amortization, deferred income taxes, breakage and transaction costs, non-cash valuation gains or losses and other items'. In a basic sense, FFO is representative of operating profit.

615 Brookfield Infrastructure Partners L.P. *Annual Report 2013*, 28 March 2014, p 72. Available at: https://www.brookfieldinfrastructure.com/_Global/22/img/content/SEDAR%20Brookfield%2020-F%20No%20Exhibits.pdf. Accessed on 4 September 2014.

7.215 In his 2013 report, the Auditor General—while acknowledging that managing the lease 'is a complex task'—similarly made a number of negative findings in relation to the PTA's management of the operator's lease.[616] Most notably, at the time of the publication of that report the PTA did not have a formal risk-based lease management plan in place, which made it difficult for the PTA 'to demonstrate that it has fully considered the impact of decisions about the lease and the network on the State's interests over the life of the lease'.[617] The view of the Auditor General was that effective management of the lease would 'require a more structured and risk based approach than has been employed to date'.[618]

7.216 The Auditor General's report contained five specific recommendations and, with almost 18 months having passed since the publication of the Auditor General's report, the Committee sought advice from the PTA as to what progress had been achieved in their implementation. It is useful to go through the progress made in respect of each recommendation in turn.

7.217 The first recommendation was for the PTA to 'clarify the appropriate accounting method for applying costs to 'uneconomic' lines'.[619] In respect of the progress made in implementing this recommendation, the PTA advised that:

> *the PTA is reviewing the accounting method for applying costs to 'Uneconomic' lines.*[620]

7.218 The Auditor General's report was tabled in Parliament in early 2013. This means that more than 16 months had passed between the Auditor General recommending that the PTA clarify the appropriate accounting method for applying costs to uneconomic lines, and the PTA advising this Committee that it was in the process of 'reviewing the accounting method'. Though it is important that the decision as to an appropriate accounting method is correctly taken, the Committee regards the time taken by the PTA in this review process as excessive. Plainly, it is now time for action in respect of this recommendation.

7.219 The second recommendation was that the PTA should 'clarify the meaning and intended operation of clauses regarding 'fit for purpose' and the related adjustment of

616 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, pp 8–10.
617 ibid, p 8.
618 ibid, p 6.
619 ibid, p 10.
620 Submission No. 27 from Public Transport Authority, 26 May 2014, p 3.

rail performance standards, to ensure standards stay up to date'.[621] In relation to the progress made in implementing this recommendation, the PTA advised that it:

> *is comfortable with its interpretation of the meaning and intended operation of clauses regarding 'fit for purpose' and the related adjustment of rail performance standards. PTA's position is that the State has no legal ability to impose increased performance standards on certain lines where they have been upgraded with non-government funding. The fundamentals underlying the network lease are that the lessee must return the network to the State at the expiry of the Term in 'a condition no worse than the Return Condition' (refer clause 15.6), with 'Return Condition' being defined in clause 1.2 as meaning 'that each part of the Leased Railway Infrastructure is Fit for Purpose at the expiration of the Term'. PTA's position is that the fact that a private third party may agree to fund upgrades to a particular line (e.g. Cliffs' Natural Resources funding of upgrades to Esperance line) means that the improved standard would necessarily apply for the life of that third party's project, and if there is no other party wanting to use the line to the same standard in future, it is not appropriate to compel the lessee to maintain the line to that higher standard. Market forces will determine whether the line is maintained to a higher standard or not– all the lease does is ensure that it is returned to PTA in no worse standard than the commencement date plus any improvements imposed by statute or any improvements effected through government funding.*[622]

7.220 The Committee interprets this statement by the PTA as representing a rejection by the PTA of the Auditor General's recommendation. While the Committee can understand the view expressed by the PTA—essentially that performance standards relate entirely to the intended use of the freight rail network—this view is not necessarily the obvious interpretation of the provisions of the lease. Furthermore, the view that the longevity of any upgrade to the performance of a section of the freight rail network should be determined solely by Brookfield Rail as operator represents another example of the PTA interpreting the lease so as to benefit the lessee, rather than the state. In any event, the PTA's chosen interpretation of the lease should—in line with the Auditor General's recommendation—be clarified, so that there is a clear understanding of what condition various network sections will be in at any given time.

621 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 10.

622 Submission No. 27 from Public Transport Authority, 26 May 2014, p 4.

7.221 The Auditor General's third recommendation was for the PTA to 'adjust its monitoring over time and where appropriate to reflect emerging risks on specific lines, such as those at risk of becoming uneconomic, receiving government funding, or needing major upgrades'.[623] In respect of the progress made in implementing this recommendation, the PTA advised that while it:

> *already monitors volumes on specific lines through Brookfield Rail's Annual Report, it is in the process of improving that monitoring through the development of a Geographic Information System covering the leased railway infrastructure, which will include lease related documentation, variations, performance standards and volumes for each line section.*[624]

7.222 The Committee regards this as a positive development, both insofar as it will enhance the ability of the PTA to manage the lease and bring far greater transparency to the operation of the freight rail network generally. The Committee looks forward to seeing this information made available via the PTA's website, sooner rather than later.

7.223 The fourth recommendation made by the Auditor General was that the PTA should, 'as part of the contract management plan, consider and formulate a strategy in relation to end of lease issues'.[625] This recommendation was based upon significant concerns expressed by the Auditor General in relation to the management of end-of-lease risks. Specifically, the Auditor General noted that:

> *as the end of the lease approaches, the interests of the lessee and the State are likely to diverge. The lessee faces a commercial risk that the future benefits from its investments may flow to the State or to a new lessee, and this will affect investment and maintenance decisions by the lessee. End of lease issues are already influencing the commercial relationship, and will require monitoring and proactive management by PTA.*[626]

7.224 As noted elsewhere in this report, the end-of-lease is a particular concern for the Committee. Therefore, further information was sought from PTA representatives regarding what end-of-lease arrangements had been devised and put in place in response to those concerns.

623 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 10.
624 Submission No. 27 from Public Transport Authority, 26 May 2014, p 4.
625 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 10.
626 ibid.

7.225 In relation to the progress made in implementing this Auditor General recommendation, the PTA advised that:

> *the PTA is working with the Department of Transport to formulate a strategy in relation to end of lease issues.*[627]

7.226 Subsequent to receiving this written advice, PTA was asked to explain the strategies being considered to ensure that maintenance of the below rail assets would continue as required right up to the expiry of the lease. In response, Mr Waldock explained that:

> *it is a question that we are all conscious of. Whilst we can talk about we have 36 years to go, we actually need to be thinking about that very clearly now. The fact of the matter is I am sure the current lessee might want to talk to government before, but we will need to be very clear what we expect in the next generation of lease and how it might work. To answer your question, I think we have done a lot of thinking about that. We have got a bit of time up our sleeve but we need to continue to look at that. We will get on with the enhancement state of talks.*[628]

7.227 That the lease itself already contains some cursory provisions in relation to end–of–lease maintenance was then outlined by Mr Browne, who said that the management of end–of–lease risk:

> *is already accounted for in the lease as well. The lessee is required, in the last five years towards termination, to put the last five years' maintenance into an escrow account. But that does not account for the issues… about the ongoing investment into the lines towards the end of the term and the ability of the lessee to be able to recover that investment.*[629]

7.228 The Committee is not convinced that sufficient attention is being given to future challenges that are likely to arise in the term of the lease. It would be prudent of the PTA to move on from simply thinking about end–of–lease risk management, and start devising and implementing a strategy to ameliorate these risks. This is particularly so given the strategic significance of the freight rail network and the very high probability that someone, whether it be Brookfield Rail or another operator, will want to lease that asset at the end of this first term. The issue of the end of the lease period is discussed further in Chapter 10.

---

627 Submission No. 27 from Public Transport Authority, 26 May 2014, p 4.

628 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 16.

629 Mr David Browne, Executive Director, Safety and Strategic Development, Public Transport Authority, *Transcript of Evidence*, 25 June 2014, p 17.

7.229 The Auditor General's fifth recommendation was that the PTA should 'collate and update all lease-related documents, variations, maps, plans, and performance standard agreements in a comprehensive lease management volume, to provide a transparent view of the lease and the network'.[630]

7.230 In relation to any progress made in implementing this recommendation, the PTA advised that:

> *the PTA has agreed with the recommendation regarding a risk based contract management plan and has implemented its Lease Management Plan … for the near-term and long-term management of the lease and the network.*
>
> *The PTA is also developing a Geographic Information System covering the leased railway infrastructure, which will include lease related documentation, variations, performance standards and volumes for each line section.*[631]

7.231 Accompanying this response, the PTA provided the Committee with a copy of its Lease Management Plan, a 45-page document specifying the function of the lease and the objectives of the PTA in managing the lease. The Lease Management Plan also seeks to identify and quantify the risks that are inherent to the lease over the remainder of its duration. The Committee regards the implementation of the formal Lease Management Plan as a positive development.

7.232 A final point on managing risks associated with enforcing the lease relates to the investment into lines characterised as 'Tier 1' and 'Tier 2' in 2010 must be made. The government's investment into these lines has not changed the fundamental reality that, if use of those lines is to continue, their re-sleepering will again be required on at least one more occasion while the lease is still in operation.

7.233 Whether this is periodic or on-going is one decision that needs to be made. The Committee notes that a possible interpretation of the definition of Tier 2 in the Project Agreement is a commitment by government to periodic rather than ongoing re-sleepering in maintaining dedicated grain lines. While the Committee is not sure if the definition of Tier 2 does, in fact, signal a government commitment to periodic re-sleepering, the ultimate question is whether this responsibility will fall to the lessee or government. This question ought to be addressed before such a maintenance campaign again becomes critical.

630 Auditor General Western Australia, *Management of the rail freight network lease: Twelve years down the track*, Office of the Auditor General Western Australia, Perth, 2013, p 10.

631 Submission No. 27 from Public Transport Authority, 26 May 2014, pp 4–5.

Finding 29

Re-sleepering of the freight rail network will be required at least once more before the end of the lease term.

Recommendation 14

The Western Australian Government addresses the issue of re-sleepering responsibility beyond the current phase of investment.

Chapter 8

The Impact of the Current Freight Rail Network Policy on Local Governments

8.1 While the terms of reference for this Inquiry do not specifically include examining the cost of road versus rail freight—including economic, social and environmental costs—it is important to note that there are significant repercussions for local governments arising from the government's freight rail network policy. These, in turn, necessarily and significantly impact upon state development.

Increased truck movements on roads

8.2 The most significant impact for local governments comes from the increased number of heavy truck movements on their roads. This eventuality was recognised in Finding 7 of the 2009 Strategic Grain Network Review (SGNR):

> *Where rail lines become uncompetitive and cease to operate, grain will be carried by road, either to other more efficient low-cost bins, or directly to port. Some local and State roads will be used by greatly increased numbers of heavy vehicles carrying grain …*[632]

8.3 Some regions will be more affected than others, and there are various estimates of the number of extra freight truck movements that will occur following the closure of Tier 3 lines. The Shire of Bruce Rock estimates the closure of Tier 3 lines will result in an extra 6,800 truckloads, or 13,000 extra truck movements to transport that region's 340,000 tonne grain capacity.[633]

8.4 Increased truck movements is not only a concern for regional local governments. As the Shire of Kalamunda explained, Abernethy Road is one of the Shire's main thoroughfares and 'transports a substantial amount of grain in a harvest season'.[634] Shire of Kalamunda Director, Mr Charles Sullivan, expressed concern that 'should all of the tier 3 lines close, then that is several hundred thousand tonnes of grain in a good harvest

632 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, p 9.
633 Cr Stephen Strange, President, Shire of Bruce Rock, *Transcript of Evidence*, 27 May 2014, p 3.
634 Mr Charles Sullivan, Director, Shire of Kalamunda, *Transcript of Evidence*, 13 June 2014, p 6.

that has to be transported somehow to get to the port', primarily along Abernethy Road.[635]

8.5 Again, this represents heavy vehicle traffic, which according to the WA Local Government Association (WALGA), 'accounts for the majority of road wear', with the impact of 'one fully laden semitrailer' being the same as that of 6,000 cars.[636]

8.6 This view, though, differs markedly from that of Main Roads Western Australia (Main Roads WA). According to Mr Desmond Snook, Executive Director, Road Network Services:

> *if the tier 3 rail lines are discontinued, Main Roads has modelled what additional truck traffic is likely to go onto those red roads on the map. If the grain was moved every day of the year, then, on average, per day per year, there is about an additional 30 to 40 truck movements on those roads. That, by itself, is not a very large impact on that road network.*[637]

8.7 The Committee is not convinced by this argument. Grain is not moved every day of the year, but largely over a condensed period of time or 'campaign'. It is not clear if this fact has been adequately accounted for in the Main Roads WA modelling. Based on the evidence to this Inquiry and the Committee's own observations, regardless of the precise number of extra trucks and truck movements on the roads, it is reasonable to conclude that any increase in heavy truck traffic will be significant in terms of road wear.

8.8 In fact, the *Western Australian regional freight transport network plan* acknowledges that in the Wheatbelt and Great Southern Regions:

> *the adequacy of the regions' ageing road network, built mainly in the 1950s and 1960s, is being tested by general traffic growth and the cyclical nature of agricultural and forestry harvesting practices that create peak periods of high-intensity heavy freight movements.*[638]

635 Mr Charles Sullivan, Director, Shire of Kalamunda, *Transcript of Evidence*, 13 June 2014, p 6.
636 Mayor Troy Pickard, President, Western Australian Local Government Association, *Transcript of Evidence*, 13 June 2014, pp 2–3.
637 Mr Desmond Snook, Executive Director, Road Network Services, Main Roads Western Australia, *Transcript of Evidence*, 25 June 2014, p 6.
638 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, April 2013, p 53.

Road quality

8.9 Substantial increases in freight truck movements are of great concern to local governments affected by the closure of Tier 3 lines. The Committee heard considerable evidence in relation to the standard of existing roads, their capacity to bear increased loads and truck movements, and the quality of the upgrades intended to make the roads fit to handle the traffic generated by the closure of Tier 3 lines.

8.10 According to WALGA, 'most of the roads affected were not designed or indeed constructed to a suitable standard for sustained heavy vehicle loadings'.[639] Some of these roads were engineered in the 1950s. Similarly, Mr Greg Richards, Chairman of the Wheatbelt Railway Retention Alliance, advised that the state and local roads that will be used once the Tier 3 lines are closed 'have not been built to accommodate the size and weight of these truck configurations'.[640]

8.11 The Western Australian Farmers Federation also suggested that one of the problems associated with getting grain to port was that the state's 'road infrastructure that will not handle the road component that will give us the most efficient use of those roads. The roads we have got out there, especially in the tier 3 area, are roads that were made 50 years ago'.[641]

8.12 The Shire of Bruce Rock advised that the Bruce Rock to Merredin Road is 'inadequate for trucks. It is not wide enough'.[642] According to Shire President, Cr Stephen Strange:

> *the shoulders got graded probably two weeks into harvest and then they carted 5 000 tonnes of grain on that road, which within the first 24 to 48 hours blew those shoulders out and subsequently made it dangerous for all traffic. If you have two trucks coming either way, there is just not enough room, and there is actually footage of incidents that have occurred on that road.*[643]

8.13 For Cr Strange, 'ongoing maintenance would be one of the biggest issues, particularly at the time of the year that grain is moved'.[644] The situation is worse during a wet winter when receival sites are being emptied; 'roads can collapse very quickly'.[645]

---

639 Mayor Troy Pickard, President, Western Australian Local Government Association, *Transcript of Evidence*, 13 June 2014, p 3.
640 Mr Greg Richards, Chairman, Wheatbelt Railway Retention Alliance, Transcript of Evidence, 27 May 2014, pp2–3.
641 Mr Dale Park, President, Western Australian Farmers Federation, *Transcript of Evidence*, 25 June 2014, p 2.
642 Cr Stephen Strange, President, Shire of Bruce Rock, *Transcript of Evidence*, 27 May 2014, p 5.
643 ibid, p 5.
644 ibid, p 6.
645 ibid.

Figure 8.2: Two freight trucks passing near Kondinin.

Figure 8.1: Damage to road widening strip—installed in satisfaction of SGNR road upgrade recommendations—along the Quairading-York Road.

8.14 The 2009 SGNR also acknowledged that 'many affected roads are not of a standard (width and pavement strength) to carry this traffic, and will warrant investment and incur increased maintenance costs'.[646]

8.15 As noted in Chapter 2, one common way of upgrading roads is to widen them using what is referred to as licorice or band-aid strips, and concern has been expressed in relation to the quality and suitability of those upgrades.

646 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, p 9.

8.16 Main Roads WA confirmed that, rather than undertake full-width construction, their process of road widening involves 'widening on the sides'.[647] According to Main Roads WA:

> *the process of widening on the side of the existing formation … means you have got the existing formation, you widen on the side of it and then you put your base course material on the side and compact it.*[648]

8.17 Main Roads WA has used this process in developing roads 'for many, many years'; 'it is not a new technique; it is a well-proven technique'.[649] The agency cited the Northam to Cranbrook road from Brookton to Wagin as an example of where this technique has been used over the past two years and has produced 'what looks to be a very good piece of road'.[650] The Committee was advised that licorice strips are expected to last for between 10 and 15 years.[651]

8.18 However, it is clear that this method of road widening does not always yield the anticipated outcomes. In discussing the upgrade of the Quairading to Bruce Rock Road, Mr Darren Mollenoyux, Chief Executive Officer for the Shire of Bruce Rock, explained that:

> *the impact is obviously our ongoing maintenance, because whilst we have funding to upgrade our roads, the licorice strips do not last, as we have seen; they fall apart. So it is all good and well to put a strip down each side, but in one to two years' time, councils are going to have to foot that bill and we have an increasing pressure on roads.*[652]

8.19 The Livestock and Rural Transport Association also expressed concern at the quality of some of the road upgrades. Mr Darren Power, the Association's Vice President, advised that some of the road works have 'not been built to a standard where it should have been'.[653] Association member, Mr Grant Robins explained the differences in the quality of the work being undertaken as follows:

> *some local governments and some contractors are doing a very good job in the work they are providing, and when they do the licorice strip down the edge they remove all the burden and put fresh gravel in*

---

647 Mr Desmond Snook, Executive Director, Road Network Services, Main Roads Western Australia, *Transcript of Evidence*, 25 June 2014, p 7.
648 ibid.
649 ibid.
650 ibid.
651 ibid, p 8.
652 Mr Darren Mollenoyux, Chief Executive Officer, Shire of Bruce Rock, *Transcript of Evidence*, 27 May 2014, p 5.
653 Mr Darren Power, Vice President, Livestock and Rural Transport Association, *Transcript of Evidence*, 13 June 2014, p 4.

> *before they actually do that seal. There are roads out there that that was done to 20 or 30 years ago, and they are still going well.*
>
> [but]
>
> *some of them are just leaving the existing burden on the shoulder of the road and sealing straight over the top, and that is never going to stand up to it. I do not know what sort of restrictions or what sort of checking is done on the grants they are given for the quality of the investment.*[654]

8.20 In relation to road construction—as opposed to maintenance—from Kondinin to Brookton, Mr Robins drew particular attention to:

> *a big difference on some of the original contract work that built the road in the first place. That is no different from the freeway; about three months later they were resealing part of that. There are sections of road out there that were open last year on the work from Brookton Highway—the bitumen was peeling up a month after it was laid.*[655]

8.21 WALGA confirmed local governments' concerns about the quality of some road works. Speaking from his own observations, Mayor Pickard explained that:

> *when the road widening has occurred in isolation of any other work, in the main it has failed. The majority of that, in my understanding, is actually on state roads. Many local governments actually went through a complete resurfacing and widening—the Shire of Bruce Rock is a good example. That road network is still in good condition. It is only several years old but it is in good condition and has not been damaged to the extent that some of the road isolation—so the licorice strips you talk about—there has been significant deterioration. It is disappointing to see the extent of the duration of many of those licorice strips, but obviously the work was not performed to an appropriate standard but it is always going to struggle to be a sustainable solution because you cannot knead in the new with the old. You just do not get that bedded in that you would with a complete resurfacing and a widening at the same time.*[656]

654 Mr Grant Robins, Committee Member, Livestock and Rural Transport Association, *Transcript of Evidence*, 13 June 2014, p 4.

655 ibid.

656 Mayor Troy Pickard, President, Western Australian Local Government Association, *Transcript of Evidence*, 13 June 2014, p 6.

8.22 When asked how Main Roads WA ensured the quality of the work that was being done by road contractors, Mr Snook explained that 'proper supervision' does happen and that the agency has 'contract supervisors out there to ensure that the work is done to the correct standard … [and for work] being done by our maintenance contractor, we have people there as well'.[657]

8.23 The Committee is not convinced that the method of upgrading roads by using licorice strips is sufficient to allow the roads to cope with the anticipated increased heavy truck movements or that there is sufficient supervision by Main Roads WA over the quality of the upgrade and construction works.

8.24 While this Inquiry has received evidence mainly in relation to road maintenance in agricultural areas, road maintenance and upgrading to meet freight demand is critical to all roads and to state development. It is essential that government ensures that adequate funding is provided to meet this need. To fail to do so can only have a negative impact on state development.

Investment in roads and cost shifting

8.25 The Department of Transport reported that its investment priorities for the strategic and major freight routes in the Wheatbelt and Great Southern Regions would 'centre on road upgrades and renewal programs to increase capacity by widening and duplicating certain sections of the road and rehabilitating and strengthening ageing pavements and bridges'.[658]

8.26 According to the SGNR:

> *investment in road corridor upgrades worth up to $320 million would complement the long term rail network including roads not fit for purpose for use by heavy grain haulage trucks …. Some of these roads will be impacted by cessation of uncompetitive rail services on lines which will consequently be redundant and should be formally closed.*[659]

8.27 The Committee understands that Main Roads WA 'has been delivering a $118 million program … $51 million for state roads and $67 million for local roads'.[660] Main Roads WA was not able to advise where the balance of $202 million had been, or would be,

657 Mr Desmond Snook, Executive Director, Road Network Services, Main Roads Western Australia, *Transcript of Evidence*, 25 June 2014, p 7.

658 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, April 2013, p 53.

659 Freight and Logistics Council of Western Australia, *Strategic grain network report*, December 2009, p 7.

660 Mr Desmond Snook, Executive Director, Road Network Services, Main Roads Western Australia, *Transcript of Evidence*, 25 June 2014, p 2.

allocated. As at the end of May 2014, expenditure on state and local roads was $50 million and $51 million respectively. Mr Snook advised that the agency planned to complete the expenditure by the end of the 2014–2015 financial year.[661]

8.28 The Committee received considerable evidence from local governments in relation to the impact of road upgrades and maintenance on their budgets. One example of how expensive road maintenance can be was provided by Cr Frederick Storer, President of the Shire of Koorda. According to Cr Storer, following the movement of over 100,000 tonnes of grain harvest from Beacon to Koorda, which equates to approximately 2,000 truck movements, the Shire faced a cost of $560,000 to reconstruct a five kilometre section of road. As this road was in good condition prior to harvest, Cr Storer was confident there was a direct correlation between the cost and the truck movements.

8.29 Cr Storer also advised that the Shire's total annual road budget is $1.8 million, which means that the $560,000 reconstruction works represented over 25 per cent of their budget.

8.30 WALGA has carried out extensive work in relation to the cost of upgrading and maintaining road assets. In June 2011 it finalised modelling on the upgrade and maintenance costs for strategic grain transport,[662] and in May 2012, WALGA published a comprehensive report on local government road assets and expenditure.[663] These reports confirm the evidence presented to the Committee that some councils will need to spend more than their total revenue capacity to maintain roads.

8.31 The June 2011 report identified 1,289 km of local roads that would be used 'to fulfil the aim of rapid and direct transfer of grain from local bins to the nearest viable railhead or Main Road, for the purpose of bin-to-bin and bin-to-port carting'.[664] The median costs for upgrading and maintaining this proposed network to a suitable standard was estimated to be around $126 million, 'with an annualised replacement cost of $8.5 million per annum over 20 years'.[665]

8.32 As noted above, the State allocated $118 million to a four-year program, with $67 million of that going to local roads. Mayor Troy Pickard confirmed that part of the

661 ibid.

662 Western Australian Local Government Association, *Local government grain freight network heavy vehicle strategic pathway mapping and access policy*, report prepared by Cardno Eppell Olsen, Perth, June 2011.

663 Western Australian Local Government Association, *Report on local government road assets & expenditure 11/12*, Perth, May 2012.

664 Western Australian Local Government Association, *Local government grain freight network heavy vehicle strategic pathway mapping and access policy*, report prepared by Cardno Eppell Olsen, Perth, June 2011, p I and p 10.

665 ibid.

required $126 million 'is covered by $67 million provided by the state'.[666] Nevertheless, as Mayor Pickard explained, 'there is still a funding shortfall of the gap, but then on top of that, as identified by the grants commission, there is already a shortfall of the road network of $63 million'.[667] Mayor Pickard also acknowledged that the exact funding shortfall was difficult to precisely quantify because of the fluctuations in the use of rail and road transport.[668]

8.33 WALGA's May 2012 report provides equally sobering data. Across the state, as a proportion of total road expenditure, local government 'provided 51.8 per cent of its expenditure from its own resources', the Commonwealth 22.9 per cent, the Western Australian Government 22.3 per cent (excluding Main Roads WA funding) and private sources 3 per cent.[669]

8.34 According to this WALGA report, in the Wheatbelt South Region, local governments:

> *would have to spend 104% of their entire estimated revenue capacity on road preservation to make up the difference between their road preservation needs and the road grants they receive for preservation.*[670]

8.35 A local government's revenue raising capacity includes the Financial Assistance Grants it receives plus its own revenue, which is generated through commercial, industrial, agricultural, pastoral and/or mining rates, as appropriate, and extraordinary revenue.[671]

8.36 In the Wheatbelt North Region, local governments would have to spend 86 per cent of their revenue capacity on road preservation. These figures are in stark contrast to the situation for local governments in the metropolitan area. Here, local governments need only 19 per cent of their revenue capacity to fund the shortfall between road preservation needs and road grants received.[672]

666 Mayor Troy Pickard, President, Western Australian Local Government Association, *Transcript of Evidence*, 13 June 2014, p 4.
667 ibid.
668 ibid 4.
669 Western Australian Local Government Association, *Report on local government road assets & expenditure 11/12*, Perth, May 2012, p 3.
670 ibid, p 3 and p 115
671 ibid, p 18.
672 ibid, p 3 and p 107.

8.37 Examination of data for individual local governments makes the severity of the situation even clearer. The percentage of revenue capacity required to meet the funding for road preservation for a selection of local governments follows:

- Beverley—129 per cent
- Wandering—162 per cent
- Bruce Rock—115 per cent
- Quairading—114 per cent
- Wandering—162 per cent
- Dalwallinu—120 per cent
- Trayning—114 per cent
- Victoria Plains—134 per cent[673]

8.38 For some local government areas, all roads are allocated as local government roads; that is, there are no state roads in some shires. The Great Eastern Country Zone's submission provides the Shire of Koorda as an example, as shown in Table 7.1.

Table 7.1: Shire of Koorda roadworks 2013–2014[674]

Total road length—sealed	245 km
Total road length—unsealed	840 km
Total road expenditure	$1.8 million
Road damaged	2 per cent sealed road network 0.4 per cent total road network
Cost of road damage	31.3 per cent of total road allocation

8.39 WALGA's 2012 report also shows that the Shire of Koorda will need to spend 92 per cent of its revenue capacity to meet its net road preservation needs.[675]

8.40 Local governments are extremely concerned about this situation. According to WALGA, managing and maintaining the local government network is 'the core of local government's existence'.[676] If local governments spend the funds needed on the road

673 ibid, p 107 and p 115.
674 Submission No. 32 from Great Eastern country Zone, 27 June 2014, p 2.
675 Western Australian Local Government Association, *Report on local government road assets & expenditure 11/12*, Perth, May 2012, p 107.
676 Mayor Troy Pickard, President, Western Australian Local Government Association, *Transcript of Evidence*, 13 June 2014, p 11.

network they would not be able to pay for 'administration, let alone all the other services that communities demand in local government'.[677]

8.41 The local government sector has expressed serious concerns about this situation. As Mayor Pickard explained:

> *given the overarching concern about the recent decisions to freeze federal assistance grants and reduce the vehicle licence fee allocation to local government by $70 million over the next three years, these issues, coupled with increased movement of freight on the local road network, are raising serious concerns within the sector.*[678]

8.42 According to Mayor Pickard, local governments are having conversations along the following lines:

> *'Well, we don't have the physical capacity to raise the funds from our rate base; how do we maintain the road network so that we can put our hand on our heart when we go to bed and say that we have a safe road network for our communities and for the users of the road?'*[679]

8.43 For WALGA, there are two options: either the state government provides increased funding to meet the upgrade and maintenance costs or certain local roads are handed over to the state government and are, thus, no longer a local government responsibility.[680]

8.44 Again, it needs to be noted that while many regional local governments face this dilemma, it is not exclusively a regional problem. Perhaps the most obvious example is Abernethy Road, which is the responsibility of the Shire of Kalamunda. This road now carries an enormous amount of freight and it is difficult for the Committee to understand why this would remain a local road. Main Roads WA advised that the allocation of Abernethy Road as a local government road has not been reviewed since 1995.[681] Main Roads WA was also not able to advise when such a review would be scheduled. It is reasonable to suggest that Abernethy Road would not be the only metropolitan road in this situation.

677 ibid.
678 ibid.
679 ibid.
680 ibid.
681 Mr Desmond Snook, Executive Director, Road Network Services, Main Roads Western Australia, *Transcript of Evidence*, 25 June 2014, p 4.

8.45 It is clear that:

- there is a funding shortfall to deliver an economical, efficient and safe integrated road-rail freight network;
- many local governments do not have the revenue raising capacity to allow them to generate sufficient income to meet the required road upgrade and maintenance costs; and
- the allocation of roads to either state or local government jurisdiction needs to be reviewed as a matter of priority.

8.46 Failure to provide appropriate funding to local governments impacted by the closure of Tier 3 lines would amount to cost shifting on the part of the state government.

Finding 30

There is a funding shortfall to deliver an economical, efficient and safe integrated road-rail freight network.

Finding 31

Many local governments do not have the revenue raising capacity to allow them to generate sufficient income to meet required road upgrade and maintenance costs.

Finding 32

Failure to provide appropriate funding to local governments impacted by the closure of Tier 3 lines amounts to cost shifting on the part of the state government.

Finding 33

The allocation of roads to either state or local government jurisdiction has not been reviewed since 1995.

Recommendation 15

The Western Australian Government conduct a cost impact study for local governments affected by the closure of grain freight lines.

Recommendation 16

Main Roads Western Australia schedule a review of its allocation of roads to either state or local government jurisdiction, similar in scope to those conducted in 1976 and 1995, as a matter or priority.

Chapter 9

Freight Rail Networks in Other Jurisdictions

Introduction

9.1 In light of the problems evident in the lease arrangements and management of Western Australia's (WA's) freight rail network, a brief consideration of the situation in other jurisdictions is instructive. This chapter presents an overview of the ownership and management arrangements in other Australian states, and highlights the fact that attempts by states to find market-based solutions to handling the rail freight task have not always proven successful. By contrast, the chapter also examines the situation in the United States (US), where deregulation of the rail freight business has proven to be an immense success, and where several government initiatives have resulted in significant increases in capital expenditure on US freight lines. The US is home to the most cost-effective freight rail network in the world, with these policies helping to stimulate significant investment into rail infrastructure across the country, from arterial lines that accommodate heavy volumes of traffic, right through to low-volume branchlines that in some instances only serve a single freight task.

A common problem in Australia

9.2 While the specific ownership and maintenance regime in WA is unique, the problem of maintaining low-volume freight lines is not. Indeed, similar difficulties have been faced by every other state in Australia over the course of the past 15 years, with some efforts to devise a market-based solution to this problem failing to such an extent that the State found it necessary to buy back the lease or provide considerable rescue packages.

9.3 A table summarising track ownership and operations in Australian states is provided at Table 9.1. A map showing Australian railway network operator assets is provided at Figure 9.1.

Victoria

9.4 In Victoria, all below rail infrastructure is owned by VicTrack, which is a State-owned enterprise.[682] All railways used for public transport are leased by VicTrack to the government's public transport agency, Public Transport Victoria (PTV). PTV then sub-

682 VicTrack is the trading name of the Victorian Rail Track Corporation. There is one railway that is not owned by VicTrack, being the Puffing Billy Railway, which is a heritage railway (and tourist attraction) owned by the Emerald Tourist Railway Board.

leases these railways depending on the railway task served. For the intrastate freight task, rural rail track is leased to V/Line, a state government authority operating both passenger and freight trains on those lines. V/Line is also responsible for maintaining the below rail infrastructure that they use. That is, in Victoria, freight rail operation and maintenance is undertaken by the state government. In 2013–2014, the Victorian Government provided V/Line with a 'franchise subsidy' of almost $297 million, as well as a further $131 million in 'project reimbursements'.[683]

9.5 It is important to note that this investment follows that State's attempt at divesting itself of the intrastate freight business. In March 1999, the Victorian Government executed a program of franchising the Public Transport Corporation, which resulted in V/Line Freight being sold to a consortium known as 'Freight Victoria'. This sale included a 15-year lease (with two renewal options—in effect a 45-year lease) on 4,756 km of intrastate rail track across regional Victoria.[684] In 2000 the company became known as 'Freight Australia', after expanding into other states.

9.6 In March 2004 Freight Australia was sold to Pacific National for $285 million and Pacific National assumed control of all of Victoria's non-urban rail track.[685] This did not work out well for the state of Victoria: in 2007 Pacific National announced that it would sell or close its grain transport and rural container business operations in the state.[686] This prompted the Victorian Government to buy back the lease on the rural rail network—which had deteriorated into a very poor state of repair—for $133.8 million.[687] Thus, in 2007 VicTrack became the owner (and V/Line the lessee) of Victoria's intrastate freight rail network.[688]

New South Wales

9.7 In New South Wales, below rail infrastructure is owned by Transport for New South Wales, a statutory authority of the Government of New South Wales. Outside the

683 V/Line, *Annual Report 2013–2014*, 27 August 2014, p 56.

684 'RailAmerica backed Freight Victoria consortium wins Australian V/Line freight bid', *Business Wire*, 22 February 1999. Available at: http://www.thefreelibrary.com/RailAmerica+Backed+Freight+Victoria+Consortium+Wins+Australian+V%2FLine...-a053924910. Accessed on 2 October 2014.

685 McInerney, Bernard, (Company Secretary),*Victorian Government grants consent to Pacific National acquisition of Freight Australia*, Media Statement, Toll Group, 16 August 2004. Available at: http://www.asx.com.au/asxpdf/20040816/pdf/3mgw6h9nyfx57.pdf. Accessed on 2 October 2014.

686 Hopkins, Philip, 'Off the rails', *The Age*, 21 March 2008. Available at: http://www.theage.com.au/business/off-the-rails-20080320-20qv.html. Accessed on 2 October 2014.

687 *Pacific National sells Victorian rail network to Government*, Media Statement, Toll Group, 13 October 2006. Available at: http://www.tollgroup.com/media-release/pacific-national-sells-victorian-rail-network-to-government. Accessed on 2 October 2014.

688 Hopkins, Philip, 'Off the rails', *The Age*, 21 March 2008. Available at: http://www.theage.com.au/business/off-the-rails-20080320-20qv.html. Accessed on 2 October 2014.

Sydney area, the network is essentially divided into two sections based on freight task: rail lines through the Hunter Valley are dedicated to the conveyance of coal freight, while the remaining regional network—the 'Country Regional Network'—is primarily used for the conveyance of grain freight.

9.8 These two separate sections of the network are each operated by a distinct private company. The Hunter Valley coal network is operated by the federal government's Australian Rail Track Corporation (ARTC) under the terms of a 60-year lease entered into in 2004. The ARTC maintains the coal network by charging a fee for access to the network that provides for the maintenance cost. By contrast, the Country Regional Network is operated by John Holland Rail, which won a contract with the NSW Government to undertake this task in 2012. John Holland Rail also charges a fee for network access, but the true cost of maintaining the Country Regional Network is ultimately met via a subsidy provided by Transport for NSW.

Queensland

9.9 In Queensland, a government agency, Queensland Rail, owns and maintains about 7,000 km of track, which is the majority of the state's below rail infrastructure.[689] Queensland Rail also operates all inner-city and long-distance passenger services in the state. In 2004 a subsidiary known as QR National was established to handle freight rail operations. QR National was privatised in 2010 and received a 99-year lease over the 2,300 km 'coal network'. Under this lease, QR National is responsible for maintaining that network.[690] QR National, which was rebranded as Aurizon in 2012, is Australia's largest rail freight company: it undertakes above rail operations in almost every state.[691] In Queensland, then, the task of maintaining lines in the rail freight network is undertaken by the entity that also operates the vast majority of trains on those lines.

South Australia

9.10 In South Australia, all intrastate freight rail services (including grain freight) are provided by Genesee & Wyoming Australia,[692] which leases and maintains the relevant narrow and standard gauge track from the South Australian Government.[693] As in Queensland and Victoria, then, the grain freight task is handled by a vertically

689 Queensland Rail, *Access and Regulation*. Available at: http://www.queenslandrail.com.au/NetworkServices/AccessandRegulation/Pages/AccessandRegulation.aspx. Accessed on 2 October 2014.

690 Aurizon, *Central Queensland Coal Network (CQCN)*. Available at: http://www.aurizon.com.au/network/central-queensland-coal-network. Accessed on 2 October 2014.

691 Aurizon, *Corporate Profile.* Available at: http://www.aurizon.com.au/aboutus/corporate-profile. Accessed on 2 October 2014.

692 Genesee & Wyoming Inc., *Genesee & Wyoming Australia*. Available at: http://www.gwrr.com/operations/railroads/australia/genesee_wyoming_australia. Accessed on 2 October 2014.

693 Genesee & Wyoming Inc., *2013 Annual Report*, p 29.

integrated rail freight company, responsible for both operating trains and maintaining the tracks on which those trains run.

Tasmania

9.11 Although vastly less grain is grown in Tasmania, which makes the situation different from each of the other states, a particular episode from its recent history is strikingly similar. AN Tasrail was a subsidiary of the federal government's 'Australian National' railway operator, which was privatised (along with AN Tasrail) in 1997.[694] AN Tasrail was the sole operator of Tasmania's rail network. One year subsequent to purchasing AN Tasrail, Pacific National announced to the Tasmanian and federal governments that it would withdraw all services unless a subsidy in the order of $100 million was provided.[695]

9.12 Ultimately, in 2004, a $120 million 'rescue package' was announced, Pacific National purchased AN Tasrail, and the below rail infrastructure was returned to the Tasmanian Government under the terms of that deal.[696] In 2009, the Tasmanian Government purchased the remaining (above rail) elements of the Tasmanian rail business, which meant that all rail operations in Tasmania are now undertaken by the government authority TasRail.[697] For 2012–2013, TasRail reported a 'total comprehensive loss for the year' of $47.4 million.[698]

694 Department of Infrastructure and Regional Development, *Background—Organisation of Australia's Railways*. Available at: http://www.infrastructure.gov.au/rail/trains/background/index.aspx. Accessed on 2 October 2014.

695 ABC Online, *Rail network maintenance not our job: Govt*, 28 September 2005. Available at: http://www.abc.net.au/cgi-bin/common/printfriendly.pl?/news/australia/tas/northtas/200509/s1470448.htm. Accessed on 2 October 2014.

696 The Age, *Govt signs off on Tassie rail package*, 29 September 2006. Available at: http://www.theage.com.au/news/National/Govt-signs-off-on-Tassie-rail-package/2006/09/29/1159337327392.html. Accessed on 2 October 2014.

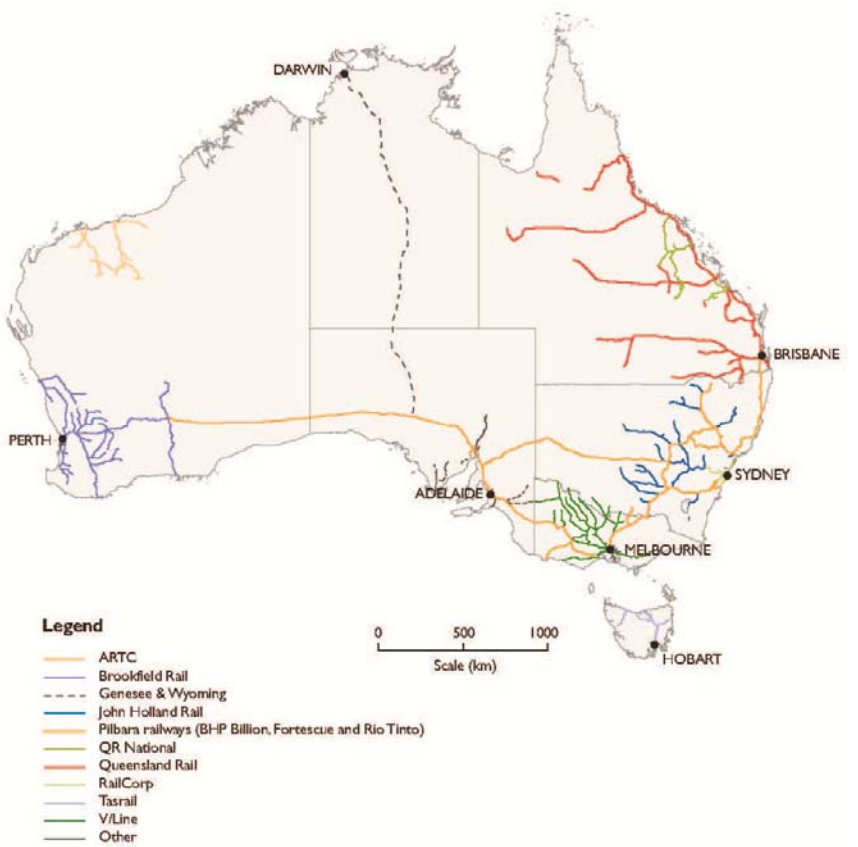
697 TasRail, *Annual Report 2012-2013*, 21 September 2013, p 5. Available at: http://www.tasrail.com.au/client-assets/downloads/annual_reports/2012-2013_Annual_Report.pdf. Accessed on 2 October 2014.

698 ibid, p 52.

Table 9.1: Track ownership and operations in Australian states

State	Track owner	Track operator	Above rail
Western Australia	Government agency (Public Transport Authority)	Private entity (Brookfield Rail), via long-term lease	Multiple private operators, via contracts with Brookfield Rail
Victoria	Government agency (VicTrack)	Government agency (V/Line)	Government agency (V/Line)
New South Wales	Government agency (Transport for NSW)	Federal Government corporation (Australian Rail Track Corporation), via lease; Private corporation (John Holland Rail), via contract	Multiple private operators, via contracts with either ARTC or John Holland Rail
Queensland	Government agency (Queensland Rail)	Government agency (Queensland Rail); Private corporation (Aurizon), via lease	Government agency (Queensland Rail) and Aurizon
South Australia	Government agency	Private entity (Genesee & Wyoming Australia), via long-term lease	Private entity (Genesee & Wyoming Australia)

Figure 9.1: Map of Australian railway network operator assets[699]



699 Department of Infrastructure and Transport, *Trainline 1 Statistical Report*, June 2012, p 12.

Why is it so difficult?

9.13 The basic problem associated with transporting grain freight is volatility of volume: owing to a high dependence on rainfall, grain yield can vary markedly between years. As a result, determining an appropriate level of supply chain capacity for the task is extremely challenging. Exacerbating this challenge is the fact that maintaining excess capacity is expensive.

9.14 This fact was central to the observations made in a National Transport Commission (NTC) 2009 position paper. In that paper, the NTC observed that it is:

> *difficult for governments to clearly prioritise capital investment and major maintenance needs between individual regional routes, and between rural and urban routes, in an environment where there is never enough money to maintain the existing networks to optimal standards.*[700]

9.15 According to the NTC, the specific challenges associated with grain transport added to this challenge, by creating an 'additional need for governments to weigh up the need for rail track provision, particularly to lightly populated growing areas which are already serviced by roads'.[701] As the NTC paper noted, '[t]he grain industry has consistently argued for ongoing rail provision, but returns to track owners from the resulting services have been very low'.[702]

9.16 The NTC paper also observed that the true cost of providing rail freight services was often not properly appreciated. As the NTC described it:

> *regional services on most rail lines outside these heavy haul corridors do not generate more than a fraction of full long term track costs in access revenue. The application of full cost recovery would in some cases increase the current charges by a factor of 10–20. Charge increases of this scale would have the immediate effect of making rail services unviable in the face of increased road competitiveness.*[703]

9.17 In summarising these observations, the NTC made the point that:

> *[t]he ongoing provision of branchline track at reasonable quality has become problematic in all states. On many outlying lines, track quality has been allowed to run down over many years through the delaying*

700 National Transport Commission, *Supply Chain Pilots Draft Position Paper*, March 2009, p 31. Available at: http://ntc.wdu.com.au/filemedia/Reports/SupplyChPilotsDraftPosMar09.pdf. Accessed on 2 October 2014.
701 ibid.
702 ibid.
703 ibid.

> *of regular programmed heavy maintenance. This typically results in lower train speeds or temporary closures, and loss of confidence in the future of services.*[704]

9.18 The NTC was also critical of actions that had been taken by governments around Australia in the face of the problem:

> *In many instances, the threat of imminent closure of lines in this condition, leads to the dedication of emergency or abnormal funding allocations, which are used to bring the line up to a standard where limited services can be reinstated for a short period. These allocations are generally ad hoc, and not the result of any considered long term plan. The targeting of lines for 'rescue' is not based on any recognised objective criteria – usually combinations of political and financial factors are involved.*[705]

9.19 The promoted economic merit of vertical separation—wherein the above and below rail tasks are separated and handled by different entities—was considered by the NTC to present a particular problem. According to the NTC, specialisation does not always generate the economic efficiency that it promises:

> *The Productivity Commission in 1999 and 2006 found that for low-volume intrastate rail lines, vertical separation provides few benefits and high costs. The rationale for vertical separation is to encourage above rail competition. However, in the current rail environment it is very unlikely that competition for rail grain transport will emerge in any State. Vertical separation leads to increased costs as the interface between above and below rail providers cannot easily be optimised. This is also a problem when considering grain lines as governments run the risk of upgrading rail lines that will not be used in the future, for example, due to a lack of rolling stock. As a result, vertical separation of grain lines can be considered as one of the impediments to supply chain performance.*[706]

9.20 This assessment suggests that regulation is a necessary to ensure that low-volume freight rail networks are able to survive. A strong counterpoint to this assertion, though, can be seen in the situation in the US, which is home to a network that has experienced sustained growth and prosperity since its operations were deregulated in 1980. Furthermore, low-volume branchlines across the US have been the subject of significant capital investment over the course of the past decade, further enhancing the

704 ibid.
705 ibid.
706 ibid, p 32.

ability of the US freight rail network to offer an unrivalled solution for meeting the country's freight task. As the following case study demonstrates, there may be lessons that WA could learn from the US approach.

Case Study: United States Short Lines

9.21 As noted in Chapters 3 and 6, in December 2010 CBH Group entered into a 10-year agreement with Watco WA Rail (Watco) for the transfer of grain by rail in WA. CBH Group simultaneously announced that it planned to invest up to $175 million in rolling stock as part of its decision to enter into the contract.[707] The agreement, which commenced in March 2012, involves Watco providing a 'comprehensive rail logistics planning service' including train planning and scheduling, tracking, maintenance, inventory control and crew management.[708] Basically, Watco operates and maintains the 22 locomotives and 574 wagons acquired by CBH Group in 2011.[709]

9.22 Watco WA Rail is the Western Australian subsidiary of Watco Companies, whose primary business is the operation of 'short line railroads'—those with annual operating revenue of less than US$20 million.[710] Watco Companies operates 29 short line railroads in the US and one in Australia, counting its agreement with CBH Group as operating a short line railroad.[711]

9.23 It was through discussions with Watco that the viability of Tier 3 lines was determined. According to CBH Group's Acting General Manager, Mr Andrew Mencshelyi, Watco expressed interest in operating on a Tier 3 line. Subsequent analysis showed that 'purely on an economics of what the freight rates are road versus rail that those line sections would be viable with a Watco operation going forward'.[712]

9.24 According to Mr Mencshelyi, as at June 2014, CBH Group was:

> *moving record tonnes per day on that part of the network. We are bringing greater efficiencies to that network even at the performance standards that they are at today. […] Even at that lower performance*

707 CBH Group, *Annual Report 2012*, p 10. Available at: https://www.cbh.com.au/annual-reports/2012/index.html. Accessed 19 September 2014.

708 Watco Companies is a transportation company formed in 1983 and based in Pittsburg, Kansas.

709 Redman, Hon Terry, (Minister of Agriculture and Food), *Major new investment in WA grains industry*, Media Statement, 24 August 2012. Available at: http://www.mediastatements.wa.gov.au/pages/StatementDetails.aspx?listName=StatementsBarnett&StatId=6320. Accessed on 19 September 2014.

710 Watco Companies, *Western Australia*. Available at: http://www.watcocompanies.com/Railroads/WA/WA.htm. Accessed on 19 September 2014.

711 ibid.

712 Mr Andrew Mencshelyi, Acting General Manager, Operations, CBH Group, *Transcript of Evidence*, 11 June 2014, p 3.

> *standard we are still moving record tonnes on those long sections—cheaper than road transport to port.*[713]

9.25 Watco's assessment is informed by its experience in operating short line railroads in the US. According to CBH Group, Watco:

> *were the catalyst to actually look at this differently; they brought some other consultants over from the US that do track maintenance and maintain those, what they call, short line railways, in the US, which have low volume and relatively short sections of track. It is about an annualised maintenance regime. It is about replacing assets that are end of life and really running assets down to end of life and investing the revenues that are derived from the track back into that track and not taking any profit out of it. They were the ones that brought the different methodology and the different mindset.*[714]

United States short line railways

9.26 Given the Committee's views on the regulation of network access and the management of the network lease, the current situation of the Tier 3 lines, and the agreement between CBH Group and Watco, the Committee investigated the situation in the US, with the hope that this may provide some insight into how to do things differently.

9.27 Information was sought from the American Short Line and Regional Railroad Association (the ASLRR Association) in relation to whether the owners of branch lines operate their own trains or make the lines available for access to above rail operators. Mr David Whorton, General Manager of Communications for the ASLRR Association, explained that:

> *the owners of the new branch lines, in almost all circumstances, operate the trains, but they generally own only the locomotives that move the trains. In the US, generally cars are owned by third party car companies (such as TTX or GATX) or the Class I railroads, although there are some larger short lines that do own their own cars, but this is generally around 6% of the total cars operating on short lines.*[715]

9.28 As to whether diffuse ownership of branch lines has created any complications for rail network access seekers—such as situations in which the ownership of a particular line might be split between multiple entities along its length—Mr Whorton explained that:

713 ibid.
714 ibid, pp 8–9.
715 Mr David Whorton, General Manager of Communications, American Short Line and Regional Railroad Association, Email, 16 September 2014.

> *generally the branch lines are quite short (usually around 20–40 km in length), but in all cases one railroad company owns the entire length. If anything, the opposite is true, where some railroad companies own three or four separate branches, and they negotiate a trackage rights agreement with another railroad (almost always a Class I railroad) to be able to move traffic between their branches.*[716]

9.29 It is instructive at this point to examine the capital and maintenance expenditure on the US short lines. Table 9.1 provides this data for years 2002 to 2008. This data indicates significant increases in both capital and maintenance expenditure relative to a more modest increase in mileage.

Table 9.1: Capital works and maintenance expenditure: United States short line tracks[717]

Year	Capital Expenditure	Maintenance Expenditure	Kilometres of Track	CAPEX/km	OPEX/km	Total Track Cost/km
2002	$240,500,000	$256,000,000	74,405	$3,232.32	$3,440.63	$6,672.95
2004	$322,300,000	$264,000,000	76,670	$4,203.71	$3,443.32	$7,647.03
2006	$495,500,000	$301,000,000	81,425	$6,085.34	$3,696.64	$9,781.98
2008	$646,200,000	$432,700,000	82,586	$7,824.57	$5,239.39	$13,063.96

9.30 Further information was sought from the ASLRR Association as to whether the volume of freight carried over the short line network had increased or whether there was some other explanation for this increase in expenditure. The Association was also asked, if increased freight volumes had driven the expenditure increases, whether that could be attributed to government policy.

9.31 Mr Whorton advised that while the volume of freight had not returned to the 'high-water mark of 2006', freight volumes had 'been steadily increasing since the recession of 2008–09'.[718]

9.32 According to Mr Whorton, two pieces of legislation were primarily responsible for the increase in capital expenditure, namely the *Staggers Rail Act of 1980* (US) and the *45G Short Line Tax Credit* provision of the US tax code. In addition to these legislative provisions there were other government initiatives that helped the short rail infrastructure upgrades: the RRIF (Railroad Rehabilitation and Improvement Financing) loans, and TIGER (Transportation Investment Generating Economic Recovery) grants.[719]

716 ibid.
717 Mr Ken Potts, Watch WA Rail, Email, 5 August 2014.
718 Mr David Whorton, General Manager of Communications, American Short Line and Regional Railroad Association, Email, 12 September 2014.
719 ibid.

9.33 These programs, 'as well as private commercial loans, are all related to the effort of upgrading the maximum weight capacity of the entire US rail system'.[720]

9.34 The following provides a brief outline on these programs.

The *Staggers Rail Act of 1980* (US)

9.35 The *Staggers Rail Act 1980* (US) (the SR Act) 'decreased the US federal government's role in regulating the industry'.[721] Most importantly for the ASLRR Association, and for the purpose of this Inquiry, the SR Act:

> *made it easier for Class I railroads (the largest railroads, mostly supra-regional operations) to sell under-performing branch lines to local entrepreneurs. These lines became the backbone of the US short line rail system as it currently exists. […]*
>
> *Also, at the time of the Staggers Rail Act, the standard US freight car capacity was 263,000 lbs. of axle weight per car. However, after Staggers was passed, the Class I railroads diverted more money to increase that limit to 286,000 lbs. per car. And so while there is not a huge increase in track miles, the investment by short lines to upgrade the track and bridges so they can accommodate and accept the heavier rail cars, represents the majority of the capital invested.*[722]

9.36 For comparative purposes, 263,000 lbs is approximately 120 tonnes, and 286,000 lbs is approximately 130 tonnes gross. Each CBH class narrow gauge wagon is 76 tonnes gross.

The short line tax credit

9.37 The 'short line tax credit', the 45G Tax Short Line Credit, was inserted into the *Internal Revenue Code* (US) through the *American Jobs Creation Act 2004* (US), and came into effect in January 2005. It creates an incentive for the private sector to invest in rail infrastructure by providing a tax credit of 50 cents for every dollar the railroad, or a qualified customer or supplier, spends on track improvements, capped on the basis of a mileage formula.[723]

9.38 Though the credit expired on 31 December 2013, a Bill to extend its operation is currently before the Subcommittee on Trade. Its passage is assured as it has been co-

720 ibid.
721 ibid.
722 ibid.
723 American Short Line and Regional Railroad Association, *Legislative/Short Line Tax Credit Extension*. Available at: http://www.aslrra.org/legislative/Short_Line_Tax_Credit_Extension/. Accessed on 19 September 2014.

sponsored by 250 of the 435 members of the House of Representatives and by 50 of the 100 Senators.[724]

9.39 The case presented by ASLRRA for extending the operation of the credit is compelling:

> *Over 550 short line railroads preserve nearly 50,000 miles of track that otherwise would have been abandoned. This track received little investment by its previous owners and must be upgraded and maintained if over 10,000 rail customers are to stay connected to the national main line rail network. […] While highway infrastructure is maintained by federal and state governments, freight rail infrastructure in America is maintained by private sector investments.*[725]

9.40 The ASLRRA further argues that short lines:

- use approximately 184 million gallons or approximately 697 million litres of fuel to move 10 million carloads of freight annually. By comparison, trucks would require 540 million gallons or more than 2044 million litres to move the same freight;
- save shippers 20 per cent to 50 per cent over comparable road freight costs; and
- 'keep 30 million truckloads per year off American highways', producing highway maintenance cost savings that can be measured in billions per annum.[726]

Railroad Rehabilitation and Improvement Financing (RRIF)

9.41 The RRIF program was established by the *Transportation Equity Act for the 21st Century* (1998) (US) and amended by the *Safe, Accountable, Flexible and Efficient Transportation Equity Act*: *A Legacy for Users* (2005) (US). Under the RRIF, direct loans and loan guarantees of up to US$35 billion can be authorised 'to finance the development of railroad infrastructure'.[727] The Federal Railroad Administration holds

724 United States Congress, *Short Line Railroad Rehabilitation and Investment Act of 2013*. Available at: https://beta.congress.gov/bill/113th-congress/house-bill/721/cosponsors (House of Representatives) and https://beta.congress.gov/bill/113th-congress/senate-bill/411/cosponsors (Senate) Accessed on 19 September 2014.

725 American Short Line and Regional Railroad Association, *Legislative/Short Line Tax Credit Extension*. Available at: http://www.aslrra.org/legislative/Short_Line_Tax_Credit_Extension/. Accessed on 19 September 2014.

726 ibid.

727 United States Department of Transportation, Federal Railroad Administration, *Railroad Rehabilitation and Improvement Financing (RRIF)*. Available at: http://www.fra.dot.gov/Page/P0128. Accessed on 19 September 2014.

US$7 billion in reserves 'for projects benefiting freight railroads other than Class 1 carriers'.[728]

9.42 According to the Federal Railroad Administrations, its loads are provided to:

- *Acquire, improve, or rehabilitate intermodal or rail equipment or facilities, including track, components of track, bridges, yards, buildings and shops;*
- *Refinance outstanding debt incurred for the purposes listed above; and*
- *Develop or establish new intermodal or railroad facilities.*[729]

9.43 Up to 100 per cent of an approved project can be funded by a direct loan. Repayments can be over 35 years, with interest charges limited to the government's borrowing cost. Those eligible for the RRIF program 'include railroads, state and local governments, government-sponsored authorities and corporations, joint ventures that include at least one railroad, and limited option freight shippers who intend to construct a new rail connection'.[730]

9.44 Between 2010 and 2012, a total of almost US$877 million worth of loan agreements have been executed—including a loan of US$563 million to Amtrak in 2011.[731]

Transport Investment Generating Economic Recovery (TIGER) grants

9.45 The TIGER Discretionary Grant program provides an avenue for the US Department of Transportation 'to invest in road, rail, transit and port projects that promise to achieve critical national objectives'.[732] Since 2009, the US Congress has dedicated more than $4.1 billion over six rounds, funding a total of 238 qualifying projects.[733]

US policy and investment in freight rail networks

9.46 The merit inherent in US freight rail policy is underscored by the fact that the US rail freight network is the most cost-effective in the world.[734] According to information

728 ibid. Class 1 railroads are those that have annual carrier operating revenues in excess of US$250 million.

729 United States Department of Transportation, Federal Railroad Administration, *Railroad Rehabilitation and Improvement Financing (RRIF)*. Available at: http://www.fra.dot.gov/Page/P0128. Accessed on 19 September 2014.

730 ibid.

731 ibid.

732 United States Department of Transportation, *About TIGER Grants*. Available at: http://www.dot.gov/tiger/about. Accessed on 19 September 2014.

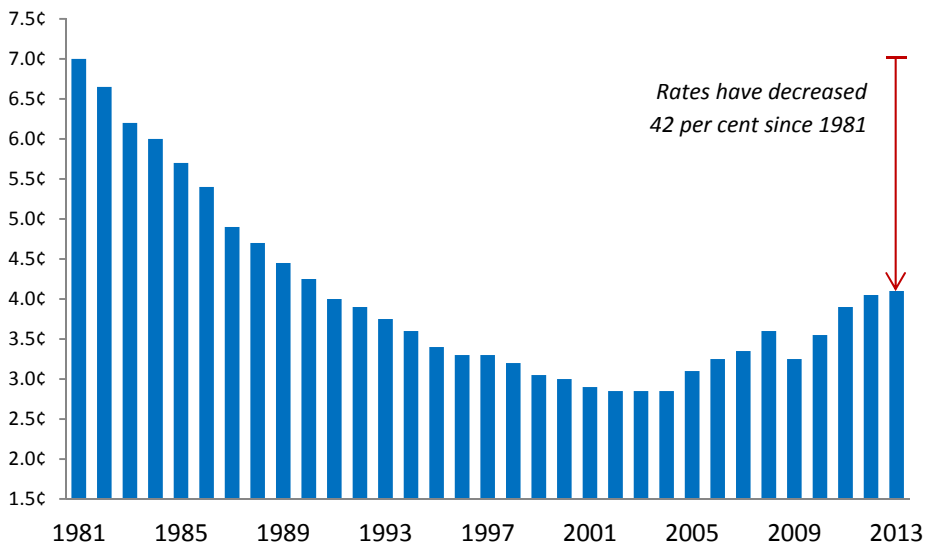
733 ibid.

734 'Back on Track', *The Economist*, 13 April 2013. Available at: http://www.economist.com/news/business/21576136-quiet-success-americas-freight-railways-back-track. Accessed on 19 September 2014.

published by the Association of American Railroads, US railroads offer 'the most efficient and affordable freight service in the world,' and account for 40 per cent of intercity freight volume—more than any other mode of transportation.[735]

9.47 The status of rail as the American supply chain method of choice is easy to understand when US rail rates are considered: adjusted for inflation, the price of carrying a specified unit of mass over a specified distance, have, on average, fallen 42 per cent since the SR Act was enacted.[736] As the Association of American Railroads states, '[t]his means that the average rail customer today can ship close to twice as much freight for about the same price as it paid more than 30 years ago'.[737] Figure 9.1 shows the specific data on this decrease in rail rates.

Figure 9.1: Average inflation-adjusted US freight railroad rates since the passage of the *Staggers Rail Act of 1980* (US)[738]



9.48 This sustained decrease in rail rates began when the SR Act was enacted. The SR Act deregulated the US freight rail network, permitting questions of which routes could be used, the freight services that could be offered and the prices that could be charged to

735 Association of American Railroads, *The Economic Impact of America's Freight Railroads*, May 2014, p 1. Available at: https://www.aar.org/keyissues/Documents/Background-Papers/Economic%20Impact%20of%20US%20Freight%20RRs.pdf. Accessed on 19 September 2014.

736 Association of American Railroads, *The cost effectiveness of America's freight railroads*, May 2014, p 1. Available at: https://www.aar.org/keyissues/Documents/Background-Papers/Cost%20Effectiveness%20of%20Freight%20RRs.pdf. Accessed on 19 September 2014.

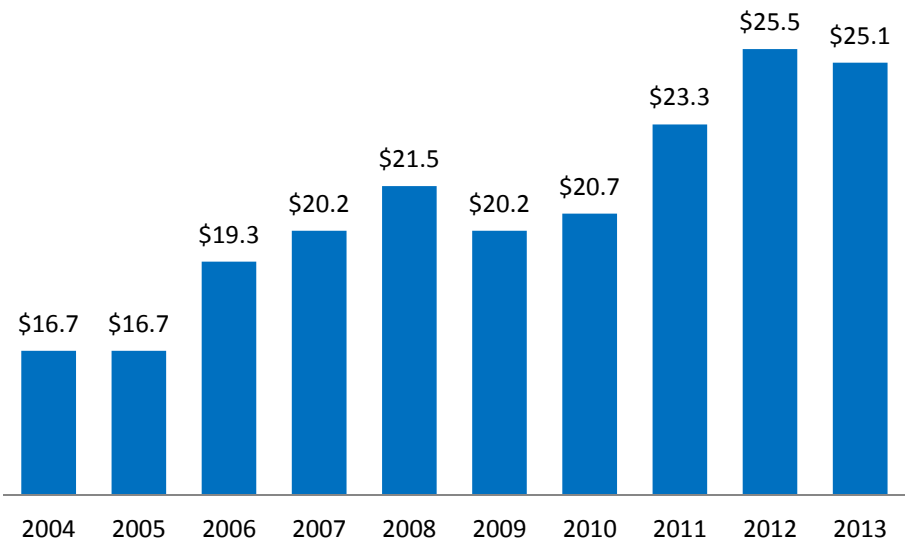
737 ibid.

738 Ibid. 'Class 1 revenue per ton-mile, average all commodities.'

be determined by market forces. On this point, it is worth noting that there are around 650 common carrier freight service railroads in the US.[739]

9.49 An important facet of the efficiency of US freight rail operations is that the SR Act paved the way for vast capital investment into US rail networks. In the time since deregulation, rail companies have invested more than US$480 billion into the network—a figure representing about 17 per cent of their collective operational revenue.[740] Furthermore, as the rail rates provided in Figure 9.2 indicate, there has been a slight increase in rates over the past decade, meaning almost half of this capital investment has occurred in the course of the past decade.

Figure 9.2: US freight railroad spending on infrastructure and equipment (US$ billions)[741]



9.50 Since 2004, US rail networks have been the target of significant capital spending 'on everything from tracks to IT' in the name of modernising and further enhancing these networks so that they are able to handle rising future traffic.[742] Quite clearly, this capital spending has also directly resulted from the implementation of the RRIF policy

739 Railinc Corporation. Available at: https://www.railinc.com/findusrail/pub/mark/search.do?fwd=init. Accessed on 19 September 2014.

740 'Back on Track', *The Economist*, 13 April 2013. Available at: http://www.economist.com/news/business/21576136-quiet-success-americas-freight-railways-back-track. Accessed on 19 September 2014.

741 Association of American Railroads, *The cost effectiveness of America's freight railroads*, May 2014, p 3. Available at: https://www.aar.org/keyissues/Documents/Background-Papers/Cost%20Effectiveness%20of%20Freight%20RRs.pdf. Accessed on 23 September 2014. 'Capital spending + maintenance expenses. Data are for Class 1 railroads.'

742 'Back on Track', *The Economist*, 13 April 2013. Available at: http://www.economist.com/news/business/21576136-quiet-success-americas-freight-railways-back-track. Accessed on 19 September 2014.

in 1998 and, in particular, its 2005 enhancement, as well as the availability since 2009 of TIGER grants.

9.51 Both the RRIF policy and the TIGER grants represent government policy aimed at stimulating private investment in critical supply chain infrastructure by making capital more easily available for appropriate projects. Not only have these policies been drawn upon extensively, they have made railway companies an attractive investment option for private investors. In 2009, for example, Berkshire Hathaway spent US$44 billion to acquire the remaining 77.4 per cent that it did not already own of America's second-largest freight rail network, the Burlington Northern Santa Fe.[743] As the deal was completed, Berkshire Hathaway President, Mr Warren Buffett, described the purchase as an 'all-in wager on the economic future of the United States'.[744]

9.52 While Mr Buffett's sentiments indicate that railroad companies are an attractive investment option for private capital, the availability of public capital to finance upgrades to infrastructure is a critical element of the success of the US freight rail story. On this point, it is important to recognise that rail infrastructure is expensive, and returns on capital investment into this infrastructure may not be realised for many years. That is, while there will ultimately be a direct dollar return on public investment in rail infrastructure projects, the investment yield may be so far into the future as to be unattractive to private investors.

9.53 Returns on public capital, however, can be generated in numerous ways. While dollar yields will always be important, the positive externalities generated by having extensive and highly-competitive supply chain logistics infrastructure available will also be enormous.

9.54 While there are differences between the US and Western Australian situations, such as the extensiveness of the rail network, and the location of population and industry centres, there seems to be lessons that WA could learn from this proactive investment in the freight rail network.

743 BNSF Railway, *Berkshire Hathaway Inc. to acquire Burlington Northern Santa Fe Corporation (BNSF) for $100 Per Share in Cash and Stock*, 3 November 2009. Available at: http://www.bnsf.com/media/news-releases/2009/november/2009-11-03a.html. Accessed on 19 September 2014.

744 'Back on Track', *The Economist*, 13 April 2013. Available at: http://www.economist.com/news/business/21576136-quiet-success-americas-freight-railways-back-track. Accessed on 19 September 2014.

Chapter 10

The Freight Rail Network and State Development

Introduction

10.1 The Western Australian Government's 2013 regional freight transport network plan recognises the importance of a robust freight transport system for state development. This 2013 plan, which sets out the state government's regional transport network planning, policy and project priorities to 2031, states that 'an effective freight transport network is essential for the long-term development of Western Australia'.[745] According to this plan:

> *a strong freight network ensures remote, regional and metropolitan businesses and communities have reliable access to goods and services. It underpins the capability to move these goods efficiently and sustainably into, around and out of the State thereby making a substantial contribution to the overall prosperity and liveability of Western Australia.*[746]

10.2 The plan also acknowledges government's responsibility to manage the pressures on the regional freight transport network that arise from the growth in demand for freight movement in Western Australia (WA).[747] In fact, the plan 'focuses mainly on the Western Australian Government's role in planning, managing, building and maintaining network infrastructure on which freight operations occur'.[748]

10.3 The inclusion of the state's road, rail and port networks in the plan clearly indicates government's recognition of the necessity of an overall, comprehensive freight transport strategy for an integrated freight transport network in WA.

10.4 However, the evidence to this Inquiry, as outlined throughout this report, signals that government practice has fallen short of implementing its strategy as it applies to the freight rail network and, therefore, of providing a strong and effective freight transport network. In particular, the government's passive management of WA's freight rail network has some serious implications for state development and exposes the

745 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, April 2013, p 16.
746 ibid.
747 ibid, p 17.
748 ibid, p 36.

government to increased risks, especially in relation to road funding and the standard and capacity of the network at the end of the lease period.

Loss of state control over a state asset

10.5 While the freight rail network has been leased to a private operator, it remains an asset owned by the Western Australian public and managed by the State. The Public Transport Authority (the PTA) is charged with overseeing the lessee's compliance with its obligations under the lease, and the Department of Transport's role is to manage long-term planning and determine investment priorities for network infrastructure.

10.6 As Chapter 7 demonstrated, PTA's 'light touch' approach to managing the lease, together with the policy decision that resulted in the care and maintenance performance standard, has, in effect, placed the control of a state asset into the private hands of a monopoly provider. In the absence of more effective regulation, the PTA's approach to discharging its responsibilities needs to be much more proactive and engaged. The government also needs to consider the implications of policy decisions in their broader context.

10.7 This current situation is not in the best interests of the state and does not provide confidence that the government knows whether the rail freight network is currently operating to optimise state development or whether it has the capacity to meet future development needs.

Lack of transparency

10.8 Chapter 1 outlined the efforts of the Committee in obtaining information from the Department of Transport, the PTA and Brookfield Rail. Not only has this made the work of the Committee unnecessarily more difficult, it provided the Committee with first-hand experience of what it has heard from others in evidence. As demonstrated in Chapter 2, the lack of publicly available information in relation to the lease, including performance standards and subsequent lease amendments, has created a significant amount of concern, anxiety, mistrust, scepticism and frustration in the community.

10.9 The lack of transparency about the lease provisions also directly impacts on state development as it creates uncertainty about the 'sustainability of the grain freight network'.[749] Such uncertainty 'is a significant concern to local governments in Western Australia', which, in the short–term have been evident in a number of ways. These were outlined by Mayor Troy Pickard, President of the Western Australian Local Government Association as follows:

749 Mayor Troy Pickard, President, Western Australian Local Government Association, *Transcript of Evidence*, 13 June 2014, p 3.

> *Firstly, the investment in rapid rail-loading facilities in Brookton and Kellerberrin that enables the Brookton strategy, proposed in the strategic grain network review, has not proceeded. Secondly, there has been little investment in efficient road loading equipment to grain receival bins serviced by the tier 3 lines; and, thirdly, the future of the Miling–Bolgart line is being questioned.*[750]

10.10 The low level of transparency has resulted in a lack of clarity surrounding the 'management and funding responsibilities' and the 'network maintenance obligations' agreed between the government and the leaseholder. According to WALGA:

> *it is unclear whether, following significant state government investment in tier 2 rail lines, the leaseholder is now setting aside a portion of revenue for future capital renewal or whether, in future, it is expected that further public funding will be required.*[751]

10.11 WALGA expressed further concern that there was also:

> *no detailed contemporary transport impact assessments of changes in the grain supply chain brought about by decisions regarding rail availability and, indeed, pricing and other decisions, such as export of grain through the Bunbury port.*[752]

10.12 The Committee notes that one of the imperatives for action in the government's regional freight transport network plan is to 'ensure robust and *transparent* investment in State assets'.[753]

10.13 The Committee agrees that investment in State-owned assets should be robust and transparent. The Committee also agrees with the government's statements that 'the regional transport network is one of the State's most important and valuable assets' and that it 'is prudent to have a plan that guides Government's investment in the network and ensures best use of the State's money'.[754]

10.14 However, the Committee also notes that the funding decisions relating to the State's investment in the rail freight network and the lessee's responsibilities in relation to network maintenance obligations and capital works are anything but transparent.

10.15 Any uncertainty about funding responsibilities needs to be addressed as a matter of priority. PTA, as lease manager, needs to ensure that the lessee will be able to meet its

750 ibid.
751 ibid.
752 ibid.
753 Department of Transport, *Western Australian regional freight transport network plan*, Government of Western Australia, Perth, April 2013, p 17. Emphasis added.
754 ibid.

re-sleepering requirements on the entire network throughout the remaining term of the lease.

Finding 34

There is a lack of clarity surrounding the management and funding responsibilities of the State and the network maintenance and capital works obligations of the lessee.

Recommendation 17

The uncertainty surrounding funding decisions relating to the State's investment in the freight rail network and the lessee's network maintenance and capital works obligations needs to be addressed as a matter of priority

Recommendation 18

The Public Transport Authority implement the necessary lease management procedures to ensure that the lessee will be able to meet its re-sleepering requirements on the entire freight rail network throughout the remaining term of the lease.

Regulation of the freight rail network

10.16 As Chapters 5 and 6 demonstrate, the Committee has concerns about the appropriateness of the regulatory regime in place for the freight rail network, including the limited role of the Economic Regulation Authority (the ERA) in the negotiate–arbitrate model that is in place. For example, the ERA does not have a role in establishing specific access prices, despite the rail operator being a monopoly provider. It has also been difficult for the ERA to discharge its obligations to review the *Railways (Access) Code 2000* (WA) as up until December 2013 there had been no access proposals proceed under the Code.[755]

10.17 The two case studies presented in Chapter 6 demonstrate the potential risk the current regulatory regime poses to state development, particularly when coupled with the provisions of the lease that allow Brookfield Rail to take full advantage of its monopoly position.

10.18 The current regulatory regime allows the ERA to approve or determine floor and ceiling costs in relation to freight rail access proposals, but not specify an actual price for access. It also allows Brookfield Rail to operate with minimal transparency, with no competition and no requirement to surrender lines it deems unviable to allow access to others who may wish to operate the lines. To have lines placed into care and

755 As noted in Chapter 5, there had been one other application under the Code, but it was abandoned.

maintenance when they could be operating cannot be said to facilitate state development.

10.19 The Committee is not able to verify or dispute CBH's claims that the Tier 3 lines would be viable under its operating model. However, in the Committee's view, for the State to allow one of its strategic assets to be idle when it might be put to effective use is not the best use of that asset.

10.20 The situation that Karara Mining faced in finding a way to get its magnetite from the Karara mine site to port is also of concern to the Committee. As noted in Chapter 6, the Code was not of any assistance to Karara Mining in its negotiations with Brookfield Rail because the operator is under no obligation to perform any upgrade, extension or expansion to any route. The lack of existing access pricing information was also problematic. In effect, Karara Mining found itself having to negotiate with a monopoly provider while not being informed about prevailing market rates.

10.21 The required upgrade for the Karara Mining project was priced at $450 million, for which Karara Mining provided $300 million in security by way of bank guarantee. Thus Brookfield Rail largely avoided carrying the risk in upgrading the Tilley Siding–Geraldton route. While Karara Mining was in a position to provide the security required by Brookfield Rail, not all project proponents would be in a similar situation. This situation is exacerbated by the inability of the ERA to determine costs associated with any required expansion of, or extension to, the existing network.

10.22 The likelihood that this situation will be repeated when other significant network upgrades or extensions may be required poses an enormous risk to state development.

10.23 The fact that Karara Mining was only able to gain access to the freight rail network by committing to a 'take or pay' contract and agreeing to an express exclusion of the future operation of the Code are concerning because both conditions are barriers to industry. Clearly this is not conducive to state development.

Return condition of the state asset

10.24 The original lease, at clause 15.6, provided that, at the end of the lease period, the lessee 'must ensure that Leased Railway Infrastructure must be in a condition no worse than the Return Condition'. This means that the railway infrastructure must be fit for purpose which, in turn, means it can sustain the use of the infrastructure by third parties under access agreements.[756]

756 'Fit for purpose' also includes meeting various legal obligations under State Agreements, the *Rail Freight System Act 2000* (WA) and the *Rail Safety Act 1998* (WA) (now 2010).

10.25 Rather than mean that the network must be returned in a condition no worse than at the beginning of the lease period, as per the initial performance standards, this has been interpreted by PTA as meaning to:

> *ensure that it is returned to PTA in no worse standard than the commencement date plus any improvements imposed by statute or any improvements effected through government funding.*[757]

10.26 This statement from PTA fails to address two important points. First, it does not address *decreases* in standards such as those agreed to so that Tier 3 lines could be placed into care and maintenance, a term introduced in the 2010 *Project Agreement for Capital Works* under clause 1.1(10).

10.27 Second, it is silent on the issue of those non-operational lines no longer being under government control and not available for use by access seekers.

10.28 The issue of the return condition of the lease has been exacerbated by government policy changes. One example is the *Project Agreement for Capital Works*, entered into by the PTA.[758] This agreement reduced some initial performance standards, introducing the new standard of 'care and maintenance', and increased others. This agreement also meant that the government was conceding that re-sleepering was not something it considered to be part of rail network maintenance. Rather, it was capital works, the cost of which was to be met by government.

10.29 The current situation appears to be far removed from the intent of the original lease and has enormous consequences for the state. The Committee is concerned that, despite PTA's reassurances to the contrary, subsequent negotiations with the lessee may result in further deterioration of the performance standards and costs shifted from the lessee to the taxpayers of WA.

The way forward

10.30 The Committee does not agree with Mr Waldock's statement that 'the lease is the lease is the lease'.[759] In discussing whether it was possible to change the current lease, particularly now that the freight business was no longer a vertically integrated concern, Mr Waldock stated:

757 Submission No. 27 from Public Transport Authority, 26 May 2014, p 4.

758 The *Project Agreement for Capital Works* was executed by the PTA under Common Seal by its Chief Executive Officer, Mr Reece Waldock, as authorised under ss 7(1) and 7(2) of the *Public Transport Authority Act 2003* (WA) and ss 42(1) and 47(1) of the *Rail Freight System Act 2000* (WA).

759 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 25 June 2014, p 7.

> *of course not, and we have gone through that. We have looked and looked and looked, and there is no way of getting out of it. That is just weaknesses of the lease that do not allow that. … if we did it again, we would draft it better, but we did not do it and we will not have a chance to draft it again.*[760]

10.31 Leases are certainly legal documents, but they can be varied by agreement between parties.

10.32 While the Department of Transport was not responsible for drafting the original lease, it is reasonable to expect it to have considerable input into any renewal of the existing lease or negotiations with a new prospective lessee. It has also been responsible for the development of lease variations and capital works agreements. It is to be hoped that the lessons learned from the management of the lease to date would be incorporated into that process.

10.33 Ultimately, the Western Australian Government needs to decide whether it wants to ensure the freight rail network remains of benefit to the state. If the answer is 'yes', government needs to take action to amend the lease to keep the network open to those who seek, and are willing to pay for, access. As Cr Cole, Zone President, Great Eastern Country Zone, stated, 'if there is no infrastructure out here, nothing will come'.[761]

10.34 The Committee notes that the Royalties for Regions funding is 'channelled into projects that help build regional communities'.[762] Decisions in relation to funding are based upon the following six principles:

- *Building capacity in regional communities*
- *Retaining benefits in regional communities*
- *Improving services to regional communities*
- *Attaining sustainability*
- *Expanding opportunity*
- *Growing prosperity.*[763]

760 Mr Reece Waldock, Director General, Department of Transport, *Transcript of Evidence*, 17 September 2014, p 11.

761 Cr Rhonda Cole, Zone President, Great Eastern Country Zone, *Transcript of Evidence*, 27 May 2014, p 8.

762 Department of Regional Development, *Royalties for Regions*, nd. Available at: http://www.drd.wa.gov.au/royalties/Pages/default.aspx. Accessed on 15 October 2014.

763 ibid.

10.35 The Committee considers that the use of Royalties for Regions funding for upgrades to the freight rail network is an appropriate use of that funding and meets the broad aims of the program.

Recommendation 19

The Western Australian Government undertakes urgent negotiations with Brookfield Rail to allow access to Tier 3 lines.

Recommendation 20

In the absence of an agreement allowing access to Tier 3 lines, the Western Australian Government investigates and pursues all means to recover those lines.

Recommendation 21

The Minister for Regional Development clarify whether Royalties for Regions funding can be made available for upgrades to the freight rail network and, if so, what process is in place to allow access to that funding.

10.36 The absence of an effective price control regime, coupled with little or no pricing information being available to customers, is not conducive to ensuring the rail operator in the state is operating in the most efficient manner. Evidence presented to the Committee from customers with extensive experience in rail operations throughout Australia and abroad would suggest that the sale and lease of the State-owned enterprise has not introduced a contestable market for access. This is a failing of the lease and the regulatory environment.

10.37 The lessons learnt here must be taken into account in any future privatisation of public assets whether by lease, licence or outright sale. Arrangements must be put in place that enable transparency of pricing and investment decisions, and enable either strong forces to be applied to pricing and cost efficiency through market competition or effective government oversight.

Finding 35

The natural monopoly status of the freight rail network together with the current regulatory regime promotes a cost plus approach to access pricing and less than optimal efficiency.

Recommendation 22

The lessons learned from the sale and lease of the freight rail network be taken into account in any future privatisation of State-owned enterprises, particularly those which could constitute a natural monopoly.

MR I.C. BLAYNEY, MLA
CHAIRMAN

Appendix One

Inquiry Terms of Reference

On 12 March 2014, the Economics and Industry Standing Committee resolved to inquire into and report on whether the current lease arrangements and management of the Western Australian freight rail network comprising Tier 1, Tier 2 and Tier 3 lines facilitate or hamper state development. In particular the Committee will investigate:

- the recent strategic directions and policy decisions relating to the current network lease, particularly in relation to the low-traffic lines;
- the regulatory arrangements in place for the network; and
- the management of the network by the Public Transport Authority.

Appendix Two

Committee's functions and powers

The functions of the Committee are to review and report to the Assembly on: -

a) the outcomes and administration of the departments within the Committee's portfolio responsibilities;

b) annual reports of government departments laid on the Table of the House;

c) the adequacy of legislation and regulations within its jurisdiction; and

d) any matters referred to it by the Assembly including a bill, motion, petition, vote or expenditure, other financial matter, report or paper.

At the commencement of each Parliament and as often thereafter as the Speaker considers necessary, the Speaker will determine and table a schedule showing the portfolio responsibilities for each committee. Annual reports of government departments and authorities tabled in the Assembly will stand referred to the relevant committee for any inquiry the committee may make.

Whenever a committee receives or determines for itself fresh or amended terms of reference, the committee will forward them to each standing and select committee of the Assembly and Joint Committee of the Assembly and Council. The Speaker will announce them to the Assembly at the next opportunity and arrange for them to be placed on the notice boards of the Assembly.

Appendix Three

Submissions received

Denotes closed or partly closed submission

No.	Name	Position	Organisation
1	Ms J Beckerling Mr P Robertson	Convenor State Coordinator	WA Forest Alliance The Wilderness Society WA
2	Mrs M Kevill		
3	Mrs S Pike		
4	Dr E Wajon	President	Wildflower Society Western Australia (Inc)
5	Mr G and Mrs L Tuckwell		
6	Mr M Rainsford		
7	Mr R Jennings		
8	Ms H Westcott	Executive Officer	Great Eastern Country Zone
9	Mrs L Tuckwell	Deputy Chair	Agribusiness Council of Australia
10	Mr R Waldock	Chief Executive Officer	Public Transport Authority
11	Mr C Sullivan	Director Infrastructure Services	Shire of Kalamunda
12	Mr D Power	Vice President	Livestock and Rural Transport Association of Western Australia (Inc)
13	Mayor T Pickard	President	WALGA
14	*Mr D Harris*	*Chief Executive Officer*	*Karara Mining Ltd*
15	Dr T Kuypers	General Manager Regulation	Asciano
16	Ms P MacKenzie	Vice President Marketing	Aurizon Operations Ltd
17	Mr D Park	President	The Western Australian Farmers Federation (Inc)
18	Mr R Dew	Executive Officer	Avon–Midland Country Zone, WALGA
19	Ms J Fuchsbichler	Coordinator	Wheatbelt Railway Retention Alliance

No.	Name	Position	Organisation
20	Ms B Peake	Government and Industry Relations Manager	CBH Group
21	Ms J Fuchsbichler		
22	Mr P Larsen	Chief Executive Officer	Brookfield Rail Pty Ltd
23	*Mr P Larsen*	*Chief Executive Officer*	*Brookfield Rail Pty Ltd*
24	Mr L Rowe	Chairman	Economic Regulation Authority
25	Mr B Robinson	Convenor	Australian Association for the Study of Peak Oil & Gas
26	Mr R Jennings		
27	*Mr R Waldock*	*Chief Executive Officer*	*Public Transport Authority*
28	Mrs L Tuckwell		
29	Ms W Newman	Chief Executive Officer	Wheatbelt Development Commission
30	Ms J Fuchsbichler	Coordinator	Wheatbelt Railway Retention Alliance
31	Ms Br Peake	Government and Industry Relations Manager	CBH Group
32	Ms H Westcott	Executive Officer	Great Eastern Country Zone
33	Ms J Fuchsbichler	Coordinator	Wheatbelt Railway Retention Alliance
34	Mr P Larsen	Chief Executive Officer	Brookfield Rail Pty Ltd
35	Mr L Rowe	Chairman	Economic Regulation Authority
36	*Mr P Larsen*	*Chief Executive Officer*	*Brookfield Rail Pty Ltd*
37	Mr P Larsen	Chief Executive Officer	Brookfield Rail Pty Ltd
38	Hon D Nalder, MLA	Minister for Transport	
39	*Mr R Waldock*	*Director General*	*Department of Transport*
40	*Mr R Waldock*	*Director General*	*Department of Transport*
41	Mr R Waldock	Director General	Department of Transport
42	*Mr R Waldock*	*Director General*	*Department of Transport*

Appendix Four

Status of documents provided to the Inquiry

Date provided / Submission No.	Provided by	Document	Status
17 April 2014 *Submission 23*	Brookfield Rail	Lease document: Narrow gauge lease. 17 December 2000.	Tabled
		Lease document: Standard gauge lease. 17 December 2000.	Tabled
		Lease variation: Narrow gauge lease. Grain Line Strengthening Plan timeframe variation. 10 May 2004.	Tabled
		Lease variation: Narrow gauge lease. Agreement for the purchase by the State of the Albany rail spur and consequential variation to the corridor lease. 1 November 2005.	Tabled
		Lease variation: Narrow gauge lease. Project Agreement for Capital Works. 9 July 2010.	Redacted and tabled
		Lease variation: Narrow gauge lease. Provisions for temporarily re-opening certain Tier 3 lines. 13 October 2011.	Tabled
		Lease variation: Standard gauge lease. Update to 'fit for purpose' maintenance requirements on the line between Koolyanobbing and West Kalgoorlie. 21 June 2012.	Tabled
		Lease variation: Narrow gauge lease. Provisions for varying certain terms of the Project Agreement for Capital Works. 30 May 2013.	Tabled

Date provided / Submission No.	Provided by	Document	Status
26 May 2014 *Submission 27*	Public Transport Authority	Railway Infrastructure Lease Management Plan.	Tabled
		Bovis Lend Lease freight rail network audit verification. April 2004.	Not tabled
		Line condition reports: Yilliminning to Bruce Rock; Katanning to Nyabing. November 2003.	Tabled
		Correspondence from the Office of the Rail Access Regulator to WestNet Rail. 12 November 2003.	Not tabled
		Second audit (G J Willox) of freight rail network performance standards. May 2010.	Tabled
		Review (G J Willox) of proposed re-sleepering plan. August 2009.	Tabled
14 July 2014 *(obtained via summons)*	Economic Regulation Authority	ERA determination of floor and ceiling costs relevant to CBH Group's December 2013 access proposal. July 2014.	Redacted version published by the ERA on 24 September 2014
29 August 2014 *Submission 39*	Public Transport Authority	Ministerial briefing note: Grain freight improvement program—roads. June 2014.	Not tabled
		Ministerial briefing note: Grain freight road improvement program. March 2014.	Not tabled
		Ministerial briefing note: Tier 3 lines and grain exports through ports. 2014.	Not tabled
		Ministerial briefing note: Grain tier 3—communications plan. June 2014.	Not tabled
		Ministerial briefing note: Rail freight corridor land use agreement and railway infrastructure leases. December 2008.	Not tabled
		Ministerial briefing note: Tier 3 grain lines. August 2010.	Not tabled

Date provided / Submission No.	Provided by	Document	Status
29 August 2014 *Submission 39 (continued)*	Public Transport Authority	Ministerial briefing note: Proposal for way forward on narrow gauge grain lines. Undated.	Not tabled
		Ministerial briefing note: Grain lines—letter to WestNet Rail. June 2009.	Not tabled
		Ministerial briefing note: Grain Lines—Letter to WestNet Rail. November 2009.	Not tabled
		Ministerial briefing note: Grain Lines Review. August 2009.	Not tabled
		KPMG report to the PTA, assessing the commercial viability of certain lines within the freight rail network. August 2009.	Not tabled
17 September 2014 *Submission 40*	Public Transport Authority	Ministerial briefing note: Grain tier 3—communications plan. 25 June 2014.	Not tabled
9 October 2014 *Submission 42*	Public Transport Authority	WestNet Rail / Public Transport Authority strategic issues meeting minutes. 17 October 2008.	Not tabled
		WestNet Rail / Public Transport Authority strategic issues meeting minutes. 7 July 2008.	Not tabled
		WestNet Rail / Public Transport Authority strategic issues meeting minutes. 22 April 2008.	Not tabled
		WestNet Rail / Public Transport Authority strategic issues meeting minutes. 3 September 2007.	Not tabled
		WestNet Rail / Public Transport Authority strategic issues meeting minutes. 5 June 2007.	Not tabled
		WestNet Rail / Public Transport Authority strategic issues meeting minutes. 6 March 2007.	Not tabled

Date provided / Submission No.	Provided by	Document	Status
9 October 2014 *Submission 42 (continued)*	Public Transport Authority	WestNet Rail / Public Transport Authority strategic issues meeting minutes. 4 December 2006.	Not tabled
		WestNet Rail / Public Transport Authority strategic issues meeting minutes. 4 September 2006.	Not tabled
		Corridor clearing meeting agenda. 13 February 2007.	Not tabled
		Corridor clearing meeting action list. 12 September 2006.	Not tabled
		Corridor clearing meeting minutes. 26 June 2007.	Not tabled
		Capital Works Program (re-sleepering) progress report: Albany Zone; Kwinana North Zone. April 2014.	Excerpt tabled
		Capital Works Program (re-sleepering) progress reports: Avon–Redmond Zone. August 2011; September 2011; October 2011.	Excerpts tabled
		Capital Works Program (re-sleepering) project control group minutes. 24 August 2011; 2 September 2011; 20 October 2011.	Not tabled
		Chain of correspondence between Mr Paul Larsen, CEO, WestNet Rail, and Hon Simon O'Brien, MLC, Minister for Transport. May—November 2009.	Tabled
		West-East rail feasibility study. 27 May 2013.	Excerpt tabled

Appendix Five

Hearings

Date	Name	Position	Organisation
21 May 2014	Closed hearing		
27 May 2014	Cr Stephen Strange	President	Shire of Bruce Rock
	Mr Darren Mollenoyux	Chief Executive Officer	
	Cr Nathan Buegge	Councillor	
	Cr Donald Heasman	Councillor	
	Cr Margaret Foss	Councillor	
27 May 2014	Mr Greg Richards	Chairman	Wheatbelt Railway Retention Alliance
	Mr Willliam Cowan	Vice Chairman	
	Ms Jane Fuchsbichler	Coordinator	
	Mr Graeme Fardon	Executive Member	
27 May 2014	Cr Rodney Forsyth	Delegate	Great Eastern Country Zone
	Cr Rhonda Cole	Zone President	
	Cr Eileen O'Connell	President, Shire of Nungarin	
	Ms Helen Westcott	Executive Officer	
	Cr Frederick Storer	President, Shire of Koorda	
27 May 2014	Cr Ken Seymour	Farmer and Moora Shire Councillor	
	Mrs Lindsay Tuckwell	Grain Grower	
	Mr Ian Lane	Farmer	
	Mr Rowlie Mellor	Treasurer, Quairading Land Conservation District Committee	
11 June 2014	Mr Paul Larsen	Chief Executive Officer	Brookfield Rail Pty Ltd
	Mr Allan Rose	Chief Adviser, Commercial	

Date	Name	Position	Organisation
11 June 2014	Dr Andrew Crane	Chief Executive Officer	Co-operative Bulk Handling Group
	Mr Andrew Mencshelyi	Acting General Manager, Operations	
	Miss Brianna Peake	Government and Industry Relations Manager	
13 June 2014	Mr Dale Park	President	Western Australian Farmers Federation
13 June 2014	Mr Robert Jennings		Jandakot Residents Association
13 June 2014	Mr Dale Harris	Chief Executive Officer	Karara Mining
13 June 2014	Mrs Janet Cooper	Executive Officer	Livestock and Rural Transport Association of WA
	Mr Darren Power	Vice President	
	Mr Grant Robins	Committee Member	
13 June 2014	Mr Charles Sullivan	Director	Shire of Kalamunda
	Cr Dylan O'Connor	Councillor	
	Mayor Troy Pickard	President	Western Australian Local Government Association
	Mr Paul Schollum	Economic Policy Manager	
	Mr Ian Duncan	Executive Manager, Infrastructure	
	Cr Stephen Strange	Chairman	Local Government Grain Infrastructure Group
18 June 2014	Dr Fred Affleck		
18 June 2014	Mr Lyndon Rowe	Chairman	Economic Regulation Authority
	Mr Greg Watkinson	Chief Executive Officer	
25 June 2014	Mr Desmond Snook	Executive Director, Road Network Services	Main Roads Western Australia

Date	Name	Position	Organisation
	Mr Pascal Felix	Director, Heavy Vehicle Operations	
25 June 2014	Mr Reece Waldock	Director General	Department of Transport
	Ms Susan McCarrey	Deputy Director General	
	Mr Mark Burgess	Managing Director	
	Mr David Browne	Executive Director, Safety and Strategic Direction	Public Transport Authority
26 June 2014	Mr Richard House		Self-employed farmer
	Mr Cam Taylor		Self-employed farmer
17 Sept 2014	Mr Reece Waldock	Director General	Department of Transport
	Ms Susan McCarrey	Deputy Director General	
	Mr Desmond Snook	Executive Director, Road Network Services	Main Roads Western Australia
	Mr Mark Burgess	Managing Director	Public Transport Authority
	Mr David Browne	Executive Director, Safety and Strategic Development	Public Transport Authority

Appendix Six

Glossary

ABARES	*Australian Bureau of Agricultural and Resource Economics and Sciences* A research bureau with the Federal Department of Agriculture that provides 'professionally independent research, analysis, and advice for government and private sector decision-makers on significant issues affecting Australia's agriculture, fisheries and forestry industries.
Above rail	Rail transport services and assets provided and maintained by passenger and freight transport operators. 'Above rail' does not include ownership of rail tracks (see Below rail).
ACCC	*Australian Competition and Consumer Commission* Australia's competition regulator.
ARG	*Australian Railroad Group Pty Ltd* A joint venture between Wesfarmers and Genesee & Wyoming, Australian Railroad Group was the buyer and lessee of the rolling stock and the freight rail network when the Western Australian Government divested the Westrail freight system in 2000. ARG was a vertically integrated company with subsidiaries operating both freight carriage and track management business activities. The ARG business traded as WestNet Rail an Australian-based company. ARG was sold in 2006, with the rail network lease going to Babcock and Brown Infrastructure (continuing to trade as WestNet Rail), and the rolling stock to Queensland Rail (now Aurizon).
ASLRR Association	*American Short Line and Regional Railroad Association*
Ballast	Porous material forming the trackbed of a railway track and packed between, below and around the sleepers. Ballast bears the load from sleepers and allows water to drain away from rail lines. In Western Australia, blue metal aggregate or naturally available red pea gravel are used as ballast.
Below rail	Rail infrastructure assets and services provided to freight and passenger rail transport operators, including rail tracks and associated infrastructure such as signalling.

Brookfield Rail	*Brookfield Rail Pty Ltd* The 'owner' and operator, by a 49-year lease, of the Western Australian Freight Rail Network.
Care and Maintenance	A term defined in the 2010 lease variation, *Project Agreement for Capital Works*. 'Care and Maintenance' describes the status of a line section of the Freight Rail Network which, due to the Performance Standards not being satisfied, is no longer maintained to an operational standard.
CBH Group	*Co-operative Bulk Handling Ltd* A grain growers' cooperative that handles, markets and processes grain produced by growers in Western Australia.
Ceiling costs	Ceiling costs are the total cost of allowing access to a specific section of the freight rail network—the total of all operating costs, capital costs and overheads attributable to the performance of access-related functions. Effectively, ceiling costs equal the cost of building new track for the route section in question. Ceiling costs are used in calculating rail access costs under the Railways (Access) Code 2000.
the Code	The *Railways (Access) Code 2000* is subsidiary legislation developed to regulate the market for access to the Freight Rail Network.
the Council	*Freight and Logistics Council of Western Australia* Established in 2009, the Freight and Logistics Council of Western Australia is a forum comprised of freight users and government. The Council functions 'to provide independent advice on strategic policy issues impacting the delivery of freight services' in WA.
Department of Transport	The part of the Transport Portfolio responsible for the network of roads, railways, airports, port and waterways in Western Australia.
EBITDA	*Earnings before interest, tax, depreciation and amortisation*

ERA	*Economic Regulation Authority* The Economic Regulation Authority is an independent statutory authority with a range of regulatory functions that aim 'to ensure utility consumers in Western Australia receive quality services for a reasonable price'. It regulates approximately 5,500 kilometres of railway track in Western Australia, including that leased by Brookfield Rail.
FFO	*Funds from operations*
Fit for Purpose	A term defined in the lease. In a broad sense railway infrastructure is 'Fit for Purpose' when it can sustain the safe operation of rail freight services at a level of efficiency that is satisfactory to the relevant above rail operator. For some line segments, 'Fit for Purpose' has been explicitly defined through either legislation or lease variation. With some exceptions, satisfying the 'Fit for Purpose' standard requires lines to be in a physical condition that is not less than their condition at the time of the original lease.
Floor costs	Floor costs are the combined operating, capital and overhead costs incurred that the rail network operator would be able to avoid in the 12 months following the proposed commencement of access if that access were denied. Effectively, floor costs are the minimum cost incurred by the rail network operator for allowing access to an above rail operator over a specific section of the network for a 12 month period. Floor costs are used in calculating rail access costs under the Railways (Access) Code 2000.
FOI	Freedom of Information, the right, under the *Freedom of Information Act 1992* (WA), to apply for access to documents held by public sector agencies in Western Australia.
FOI Act	*Freedom of Information Act 1992* (WA)
Freight and Logistics Council	A forum established in 2009 for industry decision-makers in Western Australia to talk government policy-makers about supply chain efficiency. The Freight and Logistics Council led to the production of the SGNR.

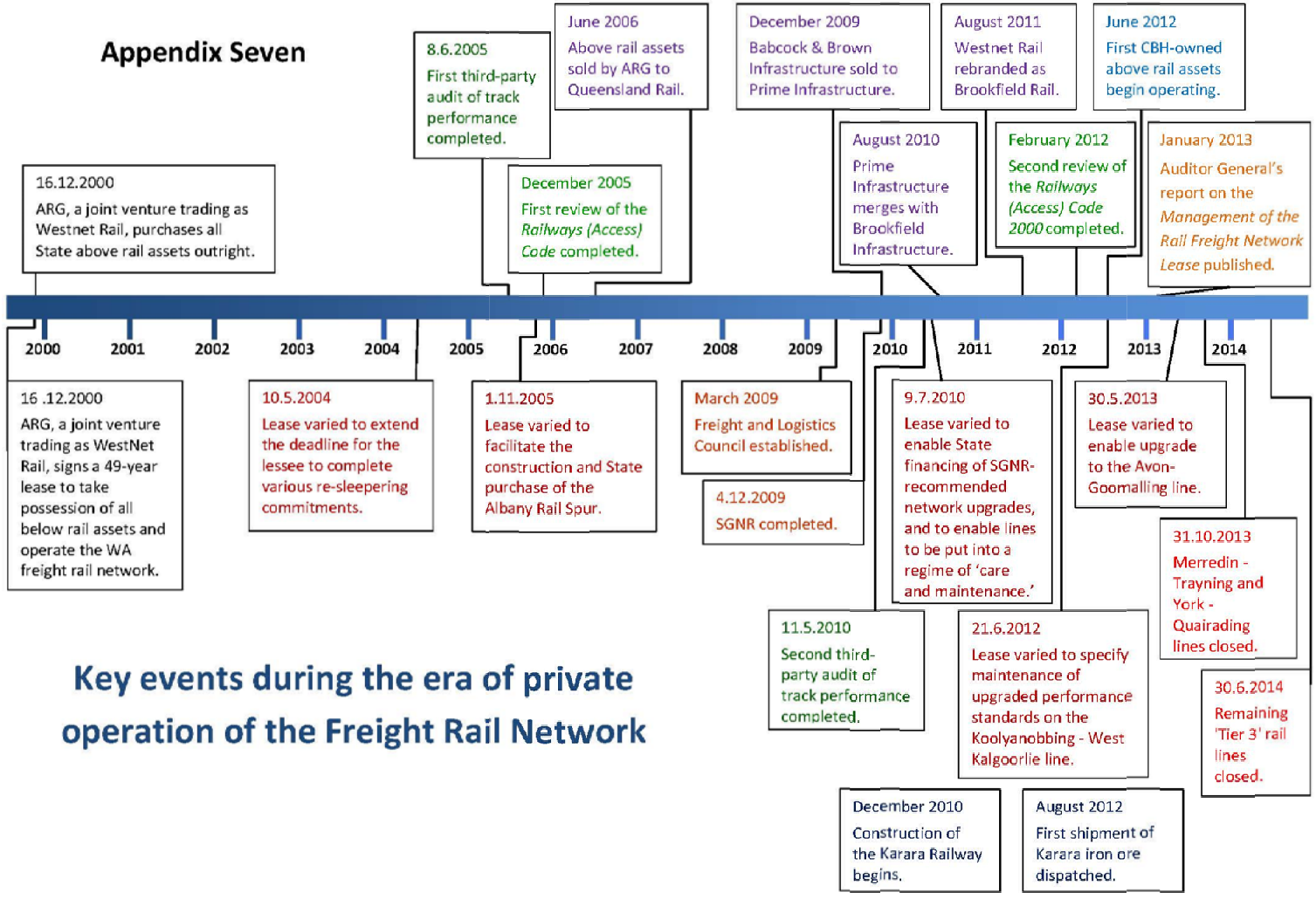
Freight Rail Network	The below rail assets in the network of standard and narrow gauge lines spanning the southern part of Western Australia, from Geraldton in the north to Kalgoorlie in the east and Esperance in the south. The Freight Rail Network consists of approximately 5,600km of track and other associated infrastructure, including bridges, platforms, crossing loops, signals and the land in the rail corridor.
GIG	*The Grain Infrastructure Group* A group comprised of representatives of the Department of Planning and Infrastructure, CBH Group, WestNet Rail, Australian Railroad Group and the Australian Wheat Board, undertook a review of the Western Australian grain logistics system. The Grain Infrastructure Group report was produced in March 2008.
Government Railway	Any railway belonging to the Crown in Western Australia, including all land upon which any railway is constructed and all below rail infrastructure. Every part of the Freight Rail Network is a Government Railway.
GRV	*Gross replacement value* A term of used within the *Railways (Access) Code 2000* to refer to the cost of replacing existing below rail infrastructure with modern equivalent assets able to meet appropriate performance standards.
lbs	*Pounds* A pound is a unit of weight equal to 16 ounces or 0.453952 kilograms.
the lease	A term used interchangeably for the 'Rail Freight Corridor Land Use Agreement (NarrowGauge) and Railway Infrastructure Lease' and the 'Rail Freight Corridor Land Use Agreement (StandardGauge) and Railway Infrastructure Lease'. Both leases were formally entered into on 17 December 2000 and contain mirror provisions.
Main Roads WA	*Main Roads Western Australia* The part of the Transport Portfolio responsible for the delivery and management of Western Australia's road network, excluding roads that are the responsibility of local governments.
Lessee	The party to a lease that takes possession of the leased asset. Brookfield Rail is the current lessee of the WA Freight Rail Network.

Lessor	The party to a lease that relinquishes possession of the leased asset in exchange for valuable consideration. The PTA is the lessor the WA Freight Rail Network.
Narrow gauge	A narrow gauge railway in Western Australia has a track gauge or space between the rails of 1,037 mm. See standard gauge.
NTC	*National Transport Commission*
Performance Standards	A term defined in the lease to mean the initial performance standards as set out for each line segment in Schedule 4 of the lease. Performance standards set a minimum standard of performance for the freight rail network.
PTA	*Public Transport Authority* The part of the Transport Portfolio responsible for the design, construction, maintenance and operation of regional and metropolitan transport services, including the Freight Rail Network.
PTV	*Public Transport Victoria*
Rail corridor	The land upon which a rail track exists. In Western Australia, all rail corridor land is defined in legislation relating to specific railway lines.
RAV	*Restricted Access Vehicle* In Western Australia, freight-carrying road vehicles are classified according to size, weight and capacity into one of three Restricted Access Vehicle categories. The access of freight road vehicles to particular roads is determined by their RAV category. Local governments designate certain roads for heavy vehicle use and Main Roads WA regulates RAV access to the state's road network via a system of notices and permits.
the Regime	*Railway Access Regime* A framework comprising the *Railways (Access) Act 1998* and the *Railways (Access) Code 2000* (WA) which aims to ensure 'fair and transparent competition on Western Australia's railway network'.
Rolling stock	Vehicles, both powered and unpowered, that move along a railway line.

SGNC	*Strategic Grain Network Review Committee* A committee consisting of a range of government, industry and wheatbelt community representatives established by the Minister for Transport, Hon Simon O'Brien, MLC, in 2009 'to provide advice to the Minister on emerging transport infrastructure issues in the export grain supply chain.'
SGNR	*Strategic Grain Network Review Report* The December 2009 report prepared for the Freight and Logistics Council of WA on behalf of the Strategic Grain Network Committee.
Sleepers	Rectangular supports for the rails in railroad tracks used to transfer loads to track ballast, hold rails in place and maintain the correct track gauge. In Western Australia, timber, steel or pre-stressed concrete sleepers are used.
Standard gauge	A standard gauge railway has a track gauge or space between the rails of 1,435 mm. See narrow gauge.
Tier 1, 2 and 3	A classification system for sections of the freight rail network devised by the Strategic Grain Network Committee and first used in the SGNR.
Tier 1	As defined in the SGNR, 'Tier 1' lines are core line sections that form the basic structure of the network and carry heavy volumes of freight. The SGNR determined that Tier 1 lines offered a competitive advantage over road freight and recommended an investment of public money into Tier 1 lines.
Tier 2	As defined in the SGNR, 'Tier 2' lines are branchlines where rail services were deemed viable based on SGNR-calculated access rates and above-rail costs. The SGNR determined that Tier 2 lines were economically competitive with road networks. The SGNR also recognised the social benefits derived from rail freight and recommended an investment of public money into Tier 2 lines.
Tier 3	As defined in the SGNR, 'Tier 3' lines are branchlines with light track that carry low volumes of freight. The SGNR determined that Tier 3 lines were not competitive with road networks and recommended against any investment of public money into Tier 3 lines.

Uneconomic	A term defined in the lease. The maintenance of a line is 'Uneconomic' if the cost of that maintenance over a three-year period exceeds all revenue that can reasonably be expected to be derived by the below rail operator (and any related entity) from operating that line.
WA	*Western Australia*
WAGR	*Western Australian Government Railways*
WALGA	*Western Australian Local Government Authority*
Watco	*Watco Companies Group* A transportation company providing above rail operations services to CBH Group in Western Australia.
WestNet Rail	WestNet Rail was the trading name of the Australian Railroad Group (ARG), the original lessee. While ownership of the lease of the below rail assets changed in 2006 and 2009, the name WestNet Rail was retained until 2011 when it started operating as Brookfield Rail.
WNR	*WestNet Rail*
WRRA	*Wheatbelt Railway Retention Alliance* The Wheatbelt Railway Retention Alliance was formed in December 2010 to advocate for the retention of Western Australia's grain freight task on rail.

Appendix Seven

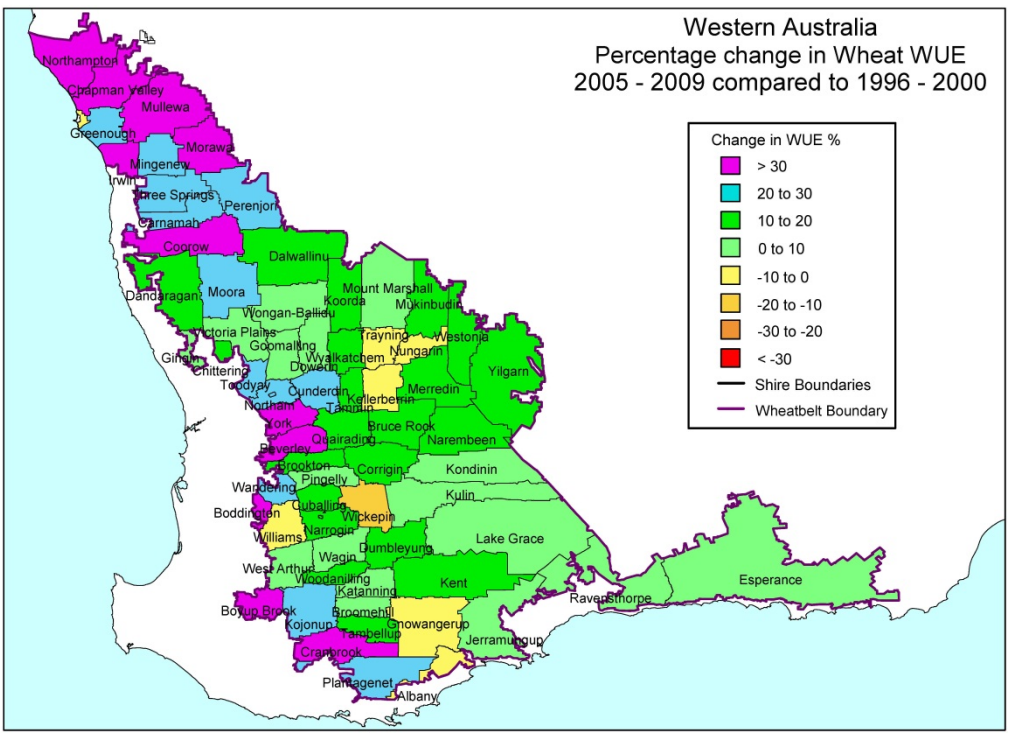


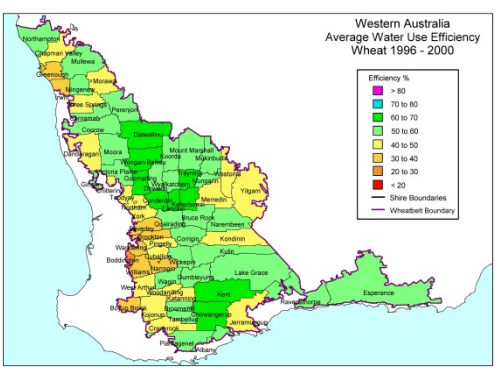
Key events during the era of private operation of the Freight Rail Network

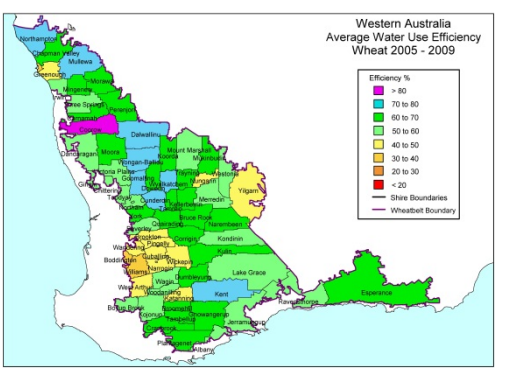
Appendix Eight

Wheatbelt water use efficiency

The following charts were provided by the Department of Agriculture and Food.







Appendix Nine

Responding submissions

By letters dated 24 and 25 September 2014 respectively, the Committee advised Brookfield Rail and the PTA of certain matters that would be contained within the report, and of the Committee's intention to also table certain other documents. The Committee received the following written submissions in response to this advice.

Brookfield Rail

Brookfield Rail Pty Ltd
ABN 42 094 721 301
2-10 Adams Drive
Welshpool WA 6106 Australia
GPO Box S1411 Perth WA 6845 Australia

T +61 8 9212 2800
F +61 8 9212 2922
E info@brookfieldrail.com
www.brookfieldrail.com

3 October 2014

Confidential communication

Mr Ian Blayney MLA
Chairman
Economics and Industry Standing Committee
Parliament House
Harvest Terrace
Perth WA 6000

Dear Mr Blayney

Parliamentary Inquiry into the Management of Western Australia's Freight Rail Network: Response to Committee decision on Closed Evidence

I refer to your letter dated 24 September 2014, informing me that:

(a) the Economics and Industry Standing Committee (**Committee**) has rejected the request by Brookfield Rail Pty Ltd (**BR**) that certain documents we have provided the Committee be accepted as closed evidence; and
(b) the Committee has decided to publicly release correspondence provided to the Committee by BR in confidence.

Set out below are BR's comments in relation to the publication of unredacted copies of the documents referred to in your letter.

Submissions

BR has no difficulty with the unredacted publication of the:

1. original submission by Brookfield Rail dated 17 April 2014; and
2. supplementary submission by Brookfield Rail dated 14 July 2014,

as BR provided these submissions on the expectation that they would be made public.

Land Use Agreements and variations

Regarding the:

1. Rail Freight Corridor Land Use Agreement (Narrow Gauge) and Railway Infrastructure Lease dated 17 December 2000;
2. Rail Freight Corridor Land Use Agreement (Standard Gauge) and Railway Infrastructure Lease dated 17 December 2000;
3. Deed of Variation Rail Freight Corridor Land Use Agreement (Narrow Gauge) and Railway Infrastructure Lease dated 10 May 2004; and
4. Deed of Variation (No.1) Rail Freight Corridor Land Use Agreement (Standard Gauge) and Railway Infrastructure Lease dated 21 June 2012,

Brookfield Rail

BR made oral submissions to the Committee in respect of these documents in closed session on 21 May 2014, which was recorded.

In addition, BR is concerned that if the Committee discloses to the public commercial contracts negotiated between the State and private sector it may set a precedent that will discourage future private sector dealings with government, including investing in government assets. Discouraging private sector dealings and investment (particularly in the current economic climate) may not be in the interests of the public, or the State. However, although we disagree with the Committee's decision to disclose the documents for this and other reasons stated previously, BR does not further contest its decision.

Project Agreement for Capital Works Dedicated Narrow Gauge Grain Lines

Regarding the Project Agreement for Capital Works Dedicated Narrow Gauge Grain Lines dated 9 July 2010 (**Project Agreement**), we repeat the submissions made to the Committee in closed session on 21 May 2014 and in Paul Hamersley's letter to you dated 9 May 2014, and make the following further submissions.

BR has previously identified to the Committee four components of the Project Agreement which if disclosed would have a real potential to cause BR prejudice and harm:

1. clause 10, including all of its headings;
2. the final column and the footnotes to Schedule 5;
3. related definitions in clause 1.1; and
4. the title of clause 10 in the contents page.

As a preliminary matter and as has already been submitted, the terms of the Project Agreement are only relevant to the PTA and BR. There is no public interest in the terms of the Project Agreement being disclosed.

(a) Clause 10

Clause 10 is particularly commercially sensitive to BR as the information in it regarding fee cap agreements with the PTA and processes for dealing with annual profits would be fundamentally misleading to potential users of our railway network and would have the potential to unnecessarily disrupt negotiation processes both within and outside the Code.

The release of this information would prejudice BR's position in the current access proposal by CBH under the rail access regime and in particular the terms of future access negotiations, which will follow the arbitrator's determination in current arbitration proceedings under the *Railways Access Code 2000* (WA) (**Code**).

In this regard, BR makes the following submissions:

i. Although the Committee is not a court of law, it is worth reflecting on the approach that courts take noting, in particular, that courts have a discretion whether to order the production of documents: *Kimberley Mineral Holdings Ltd (in liq) v McEwan* [1980] 1 NSWR 210.

ii. In this regard, courts will take into account whether the risk of damage or loss to the producing party, or possibly to others, is so significant that some restriction on production is justified: *Alcoa of Australia Ltd v Apache Energy Ltd [No 4]* [2013] WASC 377 at [7].

iii. Courts will give consideration to whether the documents in question are commercially sensitive and the relevant parties are trade rivals: *Cazaly Iron Pty Ltd v Minister for Resources* [2007] WASCA 60 at [7] – [10]; *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 2]* [2010] WASC 217 at [55] – [59]; *Civic Video Pty Ltd v Paterson* [2013] WASCA 107 at [26].

iv. When it is said that the information is 'commercially sensitive', what is meant is that 'a rival in the market place who obtains access to it may turn the material to the advantage of that rival and to the disadvantage of the party who seeks to keep it secret': *Civic Video Pty Ltd v Paterson* at [27]; *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 at 38.

v. These considerations apply not only in circumstances of current trade rivalry but also where it is clear from the circumstances that the parties are potential trade rivals: *Co-operative Bulk Handling Ltd v Brookfield Rail Pty Ltd* [2014] WASC 31 at [48]; *Hotrox Charcoal Company v Gerbauer Nominees Pty Ltd* [2002] WASCA 293, [51]-[53] (Sheppard AUJ). See also: *Lenark Pty Ltd v Chairman1 Pty Ltd (No 2)* at [11] (Black J) (cited in *Alcoa of Australia Ltd v Apache Energy Ltd [No 4]* [2013] WASC 377 at [8] (Le Miere J)); *Gebauer Nominees Pty Ltd v Cole* [2008] WASCA 38.

vi. As set out above, clause 10 of the Project Agreement is confidential and commercially sensitive, in particular as against trade rivals.

vii. Currently, in addition to seeking commercial access to BR's railway infrastructure, CBH is a potential trade rival of BR, having announced its desire to operate BR's Tier 3 lines, which was referred to by His Honour Justice Edelman at paragraph 48 in his reasons in *Co-operative Bulk Handling Ltd v Brookfield Rail Pty Ltd* and has been evidenced in numerous media statements. There are also other trade rivals who would benefit from this information to BR's detriment.

(b) Schedule 5

In respect of Schedule 5, the final column and footnotes of that Schedule should also not be made publicly available for two reasons.

First, this provides information that forms part of the meaning of Annual Operating and Overhead Costs, which is then used in clause 10, the sensitivity of which is discussed above.

Brookfield Rail

Additionally, the data in the final column and the footnotes to Schedule 5 contain highly commercially sensitive data belonging to BR relating to its costs of operation. While the information is from 2009/2010, it is still confidential and current, because the definition of 'Annual Operating and Overhead Costs' states that the 2009/2010 figures are to be adjusted by CPI each year. Consequently, its disclosure would prejudice BR today in negotiations with any existing or future customers.

(c) Definitions

In order to ensure that this commercially sensitive information is properly protected, the defined terms and associated definitions of:

'Additional Non-Grain Revenues';

'Annual Grain Track Access Revenues';

'Annual Track Access Revenues';

'Annual Operating and Overhead Costs';

'Annual Profit';

'CPI'; and

'Excluded Grain Track Access Revenues',

should also not be made publicly available.

In light of the submissions made above, BR requests that if the Committee is minded to table the Project Agreement, that it table only the redacted version of the Project Agreement, a copy of which was attached to Paul Hamersley's letter dated 9 May 2014 to the Committee.

Variations to Project Agreement and correspondence

Regarding the:

1. Tier 3 Grain Lines Reopening Requirements for 2011/2012 Grain Harvest Letter Agreement dated October 2011;
2. Deed of Variation to Project Agreement for Capital Works Dedicated Narrow Gauge Lines dated 30 May 2013; and
3. Letter from Brookfield Rail dated 9 July 2014 providing information on line access,

BR submits that the same principles of confidentiality and commercial sensitivity apply to these documents, as we believe should apply to the other railway infrastructure lease documents and variations. However, given that the Committee has rejected BR's previous submissions, BR will not contest the Committee's decision further.

Brookfield
Rail

Procedural fairness

I refer to Orders 16, 17 and 19 of the Speaker's Procedural Rules on Committee Evidence under the Standing Orders of the Legislative Assembly of the Parliament of Western Australia. Those orders state:

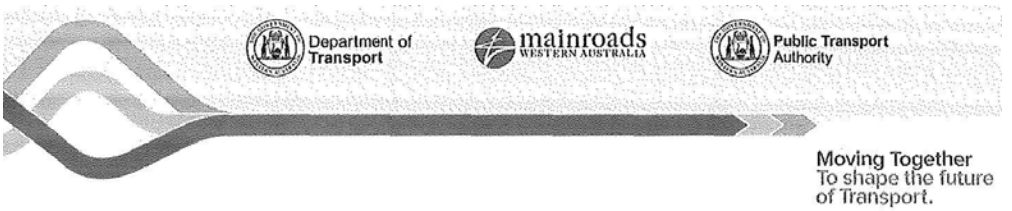
> ***'Notification of persons adversely referred to in committee inquiries***
>
> *16. If significantly adverse references are made against a person in the course of a committee inquiry, a committee will notify that person at the time the committee deems appropriate.*
>
> ***Time for persons adversely referred to in committee inquiries to provide a response***
>
> *17. The committee will give a person a reasonable opportunity to provide a response.*
>
> ***Response to draft adverse findings***
>
> *19. If a person is the subject of significant adverse findings, a committee will provide a copy of the relevant draft findings and allow a person a reasonable period to respond to those findings.'*

To date, BR has not been informed of any adverse references throughout the course of this inquiry by the Committee, nor been provided with any findings/extracts from the Committee's report, which is due to be tabled on 16 October 2014. We do not expect that adverse findings will be tabled, nor that adverse references have been made in any associated documentation (e.g. submissions from other parties). However in the event that adverse references/findings have been made, we draw the Committee's attention to the above procedural rules and expect that the Committee will comply fully with its obligations.

Additionally, if there are any other documents to which BR is a party and that the Committee intends to table, which are not listed in your letter dated 24 September 2014, we request details of those documents and an opportunity to respond.

Yours sincerely

Paul Larsen
Chief Executive Officer
Brookfield Rail Pty Ltd



Our ref: A5444862
Enquiries: director.general@transport.wa.gov.au

Mr Ian Blayney MLA
Chairman
Economics and Industry Standing Committee
Legislative Assembly Committee Office
Parliament House
PERTH WA 6000

By email: laeisc@parliament.wa.gov.au

Dear Mr Blayney

INQUIRY INTO THE MANAGEMENT OF WESTERN AUSTRALIA'S FREIGHT RAIL NETWORK: CURRENT CLARIFICATIONS AND REQUESTS

I refer to your and Dr Abernethie's correspondence dated between 17 September 2014 and 1 October 2014 requesting a number of clarifications and documents.

Firstly I provide you an update on all of the requests that are currently before me:

Your reference	*Date Received*	*Short Title*	*Status*
A466156	17/09/2014	Provide evidence of discussions in 2007 - 2009 to support OAG's statement in relation to surrender of the lines	Awaiting advice prior to response
NIL – Email	23/09/2014	Clarification of evidence: Evidence by Ms Susan McCarrey: references to KPMG	Completed – in this advice
NIL – Email	23/09/2014	Clarification of evidence: Ms Susan McCarrey: Feasibility study for the Brookton to Kwinana line	Completed – in this advice
A466867	25/09/2014	Clause 10 of Capital Works Agreement	Completed – in this advice
A466933	25/09/2014	Clarification of Resleepering Surplus	Completed – in this advice
A466951	29/09/2014	Committee assessment of closed evidence	Completed – in this advice
NIL – Email	29/09/2014	Request for meeting notes of Corridor Clearing Meetings on 13/02/2007 and 26/06/2007	Awaiting advice prior to response
NIL – Email	01/10/2014	Request for safety review report of T3 rail lines	Awaiting advice prior to response

140 William Street, Perth, Western Australia 6000
GPO Box C102 Perth WA 6839
Tel: (08) 6551 6000 Fax: (08) 6551 6001 www.transport.wa.gov.au
ABN 27 285 643 255

In relation to the three outstanding items in the status report above I anticipate being able to provide final advice to your inquiry by 9 October 2014.

In regard to Dr Abernethie's request for Ms McCarrey to clarify her evidence in relation to the references to KPMG I can advise that Ms McCarrey has looked back at the documentation from 2009 and considers both answers appear to apply. The important issue was the need for the Government to receive independent advice with the appropriate expertise, which KPMG could provide. Independence was important because a part of PTA is a customer of Brookfield and so that the Strategic Grain Network Review Committee and Government were receiving independent advice with the expertise required.

In regard to Dr Abernethie's request for Ms McCarrey to provide a copy of the feasibility study for the Brookton to Kwinana line, please find it enclosed **(Attachment 1)**. I also make an application for the study to be accepted as closed evidence as it contains significant references that are commercial in confidence to the Government and third parties, as well as containing information that is extremely complex which to non-engineers may be misinterpreted leading to incorrect assumptions that would not be in the public interest.

The feasibility study for the Brookton to Kwinana line confirms that government investment in the line was not viable.

In response to your request referenced as A466867, the PTA, in ensuring compliance to date has discussed the requirement to comply with clause 10 with Brookfield Rail and is satisfied with its response. The matter will be reviewed once the current access negotiations between Brookfield Rail and CBH are finalised. To ensure future compliance PTA reserves the right to appoint an independent third party to review and confirm that Brookfield Rail has complied with its obligations as stated in clause 10.1.

In response to your request referenced as A466933 I can advise that $23 million of the $156 million underspent is attributed to the Grain Freight Re-sleepering Program.

In response to your request referenced as A466951 I request a consistent approach by Parliamentary committees in the assessment of closed evidence. I have some concerns with the Committee's process relating to the publication of various documents as detailed in the two letters sent to me and Brookfield on the matter dated 25 September 2014 and 24 September 2014 respectively. It appears that for several documents which both Brookfield Rail and PTA were parties to, only one party was advised by the Committee of its intent in relation to that document and invited to make comment in relation to the publication of the document where applicable.

This is concerning if one of those parties may object to the publication of the document but has not been provided with the opportunity to do so. I believe that where two organisations are a party to a document, then both of those parties should be advised of the Committee's intent in relation to that document and both parties invited to make comment in relation to the publication of the document where applicable. In relation to the publication of the documents, I reiterate Brookfield Rail's position which was stated in a letter from the Minister for Transport to the Hon Ken Travers MLC Chair, Standing Committee on Estimates and Financial Operations **(Attachment 2)**. It is my understanding that based on the Minister's request that Committee maintained the evidence as closed, and I respectfully request that in light of this previous decision that your Committee reviews its decision to publically release these documents.

I look forward to finalising our outstanding items with the Committee as soon as I have the necessary advice to provide you.

Yours sincerely

Reece Waldock
Director General

31/10/2014

Att

CC: Hon Dean Nalder MLA; Minister for Transport