

**ECONOMICS AND INDUSTRY
STANDING COMMITTEE**

**INQUIRY INTO THE MANAGEMENT OF
WESTERN AUSTRALIA'S FREIGHT RAIL NETWORK**

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 18 JUNE 2014**

SESSION TWO

Members

**Mr I.C. Blayney(Chair)
Mr F.M. Logan (Deputy Chair)
Mr P.C. Tinley
Mr J. Norberger
Mr R.S. Love**

Hearing commenced at 11.05 am**Mr LYNDON GEOFFREY ROWE****Chairman, Economic Regulation Authority, examined:****Mr GREG WATKINSON****Chief Executive Officer, Economic Regulation Authority, examined:**

The CHAIR: Good morning. On behalf of the Economics and Industry Standing Committee, I would like to thank you for your appearance before us here today. The purpose of this hearing is to assist the committee in gathering evidence for its inquiry into the management of Western Australia's freight rail network. You have been provided with a copy of the committee's specific terms of reference. At this stage, I would like to introduce myself and the other members of the committee present today. I am the Chair, Ian Blayney. Next to me is the Deputy Chair, Hon Fran Logan. Our other committee members here are Jan Norberger, Peter Tinley and Shane Love. The Economics and Industry Standing Committee is a committee of the Legislative Assembly of the Parliament of Western Australia. This hearing is a formal proceeding of Parliament and therefore commands the same respect given to proceedings in the house itself. Even though the committee is not asking witnesses to provide evidence on oath or affirmation, it is important that you understand that any deliberate misleading of the committee may be regarded as a contempt of Parliament. This is a public hearing and Hansard is making a transcript of the proceedings for the public record. If you refer to any documents during your evidence, it would assist Hansard if you would provide the full title for the record. Before we proceed to the inquiry-specific questions we have for you today, I need to ask you the following. Have you completed the "Details of Witness" form?

The Witnesses: Yes.

The CHAIR: Do you understand the notes at the bottom of the form about giving evidence to a parliamentary committee?

The Witnesses: Yes.

The CHAIR: Did you receive and read the information for witnesses briefing sheet provided with the "Details of Witness" form today?

The Witnesses: Yes.

The CHAIR: Do you have any questions in relation to being a witness at today's hearing?

The Witnesses: No.

The CHAIR: Do you have a short statement to make for us today?

Mr Rowe: Chair, I would like to make one correction to the submission we sent you. It is on page 1 of the submission. If I can take you to the last paragraph and indeed the fourth line of the last paragraph, the sentence that starts, "The parties are free to negotiate terms including price outside the code". Can I change the submission to put a full stop after "code" and delete the words "with only limited exceptions in relation to safety train management and train path policy"? The reason for that is that the code was actually changed in June 2009 to exclude the 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. In our view, that is a bit of a difficulty because in a practical sense train path and train management guidelines need to apply to the whole rail line. In a practical sense, I think that has happened anyway, but we have raised that with Treasury as part of their current review of our review that we did in 2010–11 and I understand they are considering that. We are required to do another review of the rail access code in the

beginning of the second half of this year and it is likely that issue will also come up in that. For the record, for the purpose of our submission, those words, “With only limited exceptions in relation to safety train management and train path policy”, need to be removed. Thanks, Chair.

The CHAIR: So, in effect, those things are now negotiable—is that right?

Mr Rowe: It means that, as 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. Currently, there are no access arrangements under the code.

Mr F.M. LOGAN: Lyndon, is it reasonable to say that one of the reasons that the ERA exists is to redress market failures and natural monopolies, and those natural monopolies arise as a result of history, population in Western Australia and our geography?

[11.10 am]

Mr Rowe: And in some cases as a result of government legislation. Yes. If we look simply at the ERA’s regulatory role in terms of access, then, yes, it is all about dealing with natural monopolies, whether it be electricity poles and wires, gas pipelines, transmission and distribution or whether it be railway lines.

Mr J. NORBERGER: Just to be clear, so it is reasonable to say that the ERA exists to redress that market failure to certainly ensure as much as possible fairness when you are dealing with a monopoly?

Mr Rowe: The 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. As I said at the start, that does not stop people doing commercial deals. Presumably 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.

Mr P.C. TINLEY: In that case, do you acknowledge that the market for access to WA’s freight rail network is a natural monopoly?

Mr Rowe: I guess the easy way for me to answer that is to say that the ERA is responsible for regulating railway lines that are under schedule 1 of the code and those railway lines are covered because the government has formed the view that they are natural monopolies.

Mr Watkinson: If I can add to that, also there is a difference between the policy role of government and the regulatory role. The policy role of government is to decide whether something is a natural monopoly or, if you like, a piece of regulated infrastructure, and there are provisions under the code criteria that need to be met for a railway line to become part of schedule 1. The regulator takes that as a given —

Mr P.C. TINLEY: It is an assumed starting point, yes.

Mr R.S. LOVE: Could you explain what you understand is meant by the term “light touch” in regulation and how that model would be seen to be able to address a situation such as this where there is a potential market misalignment or failure?

Mr Rowe: I guess we would contrast it 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 revenue they achieve. This is light-handed in the sense of what is called a negotiate–arbitrate model. So, we do not have a role in setting prices under the rail code. Where we have a role in is determining what are loosely called floor and ceiling costs: the floor cost being incremental costs that would be avoided should that proponent not use that railway line for the next 12 months; the ceiling cost, in effect, being a return to the provider of the total cost of providing that railway line, including a return on and of capital. Having established those, if somebody comes to us seeking access under the code, then the rail provider is required to provide us with their view of what those floor and ceiling costs are. We then assess that and either approve those floor and ceiling costs or determine our own floor and ceiling costs. That is the process we are currently undertaking at the moment with respect to Brookfield. Having done that, the parties can then enter into negotiation. Those floor and ceiling costs are significantly distant apart, so the range for negotiating is large. They then can negotiate within those broad parameters. In the event that they cannot reach agreement, one or either or both parties can apply to the ERA for the ERA to point an arbitrator for a binding arbitration decision. We are not the arbitrator. We establish a panel of potential arbitrators on the advice of the chairman of the Institute of Arbitrators—I think that is the right name—and we would then appoint an arbitrator who would then arbitrate the dispute and bring down a binding decision, enforceable by law. Our only further involvement in that process can be that the access seeker as part of that negotiation process can ask us whether we think a particular price is fair or not and we can be asked to express an opinion on it. It is light-handed in that sense, though, whereas under gas and electricity, we are actually far more involved in determining tariffs.

Mr R.S. LOVE: At the end of the day there is a price determination —

Mr Rowe: There is access to a binding arbitration.

Mr R.S. LOVE: If all else fails, there is a price determination under the umpire.

Mr Rowe: By an independent arbitrator; yes.

Mr J. NORBERGER: Are you happy with that model? Which model would you have preferred—and you might be happy with that model—in relation to managing this monopoly? Do you think it is an effective model?

Mr Rowe: I could take the easy way out and say that I am just there to enforce the legislation.

Mr P.C. TINLEY: I dare you!

Mr F.M. LOGAN: That is not normally like you, members!

Mr Rowe: And it is a government decision about whether they think that that is appropriate or not. It is actually a bit hard to call for us, because at the moment this is the first—Brockman Mining seeking access to TPI and CBH seeking access to Brookfield—are the first two applications we have had under the code. As I said earlier, all arrangements on regulated railway lines at the moment are commercial arrangements; have not been subject to regulation.

Mr J. NORBERGER: Can I just quickly follow on, chair. It does sort of lead us to a fairly poignant question, and that was, obviously, Karara mining. I do not know if you saw the comments in the newspaper—they were well and truly, in their opinion, damning on the inability of the ERA to provide them any assistance; they were of the opinion that they very much wanted support from the ERA. In their submission to the committee when they came and sought help in regard to what they were trying to achieve, in their words, they were more or less told to go off because the ERA had no way that they could get involved, and they are of the opinion, yes, a deal was struck, but—and as you have seen as it was reported in *The West* and certainly as it was told to the committee—their opinion was that the balance of power was against them the whole time; they were dealing with an absolute monopoly and the division of risk is well and truly in their court. How do you

respond to criticism that, in their view, the ERA has failed and in their opinion would continue to fail to provide any kind of meaningful assistance in managing a monopoly created by government?

Mr Rowe: I am happy to respond, but I need to say that I am responding solely on the basis of what I have seen in *The West Australian*. I have not heard what Karara said to you. I have not seen their submission, so I am responding on the basis of reports in *The West*. Can I say that I was very surprised by the report that appeared in *The West*. 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.

Mr R.S. LOVE: A little bit on from that, when you mentioned before that people could contract, if you like, out of the arrangements, or decide not to use the arrangements—to step aside from those arrangements—is there anything to stop the monopoly from demanding that people step outside those arrangements before they commence negotiating with them? How do we in a practical sense stop the monopoly from saying that, you know —

Mr Rowe: Either party can—well, the access seeker can simply apply to the ERA for access under the code. That puts the code process—starts the code process; requires within one week or two weeks—I am not sure which—the railway provider to provide us with floor and ceiling costs; for us to determine those floor and ceiling costs so that the negotiation process can start; and in the event the negotiation cannot be agreed, the arbitration process can start. I am aware that there may well have been some commercial agreements that are nothing to do with the ERA, because they were entered into outside the ERA, that are required—those commercial agreements have required the access user not to seek a regulatory solution until at least, at the earliest, three months before that agreement is to expire. That could limit it, given the time these things take.

[11.20 am]

The CHAIR: It has been suggested to us that to ensure market power is not abused, either transparency or competition is critical; would you agree with that?

Mr Rowe: It goes back to this issue of whether or not you think these assets are natural monopolies. If they are natural monopolies, then the problem is you cannot get competition, because it does not make commercial sense to have more than one set of railway lines that are running down; and that is debatable because it is a serious debate within the Pilbara because you do have three railway lines running on very similar routes in the Pilbara. But your question was: do we need competition? The answer is, probably not. If it is a genuine natural monopoly, what you need is good regulation.

The CHAIR: How about transparency, though? Comparing what we have got here to what they have in Queensland, where —

Mr Rowe: My understanding is that we are required to have a registrar of agreements that would be reached in WA, just the same as the Queensland legislation does, it is just that we do not have any agreements; we do not have any regulated agreements.

The CHAIR: Regulated agreements, yes.

Mr F.M. LOGAN: And that brings me to the next question, which is, I think, a criticism of the state of play at the moment—that, in fact, because there are no registered agreements, what we have got or seem to have is an unregulated monopoly in place, because, as you pointed out, you cannot exercise any regulation if there is no agreement in place to exercise; so what we have is, in fact, an unregulated monopoly which is —

Mr Rowe: Except that all it takes—I understand the point you make—for us to get involved, as is the case with both Brockman and CBH, is for an access seeker to make access under the code. I think a newcomer would not make this, and I think we have hinted at it—well, more than hinted at it in our submission, that there are concerns about the time that those processes might take place. There may be improvements that can be made in that. It is also not to say that the ERA does not do everything expeditiously as it can, but there are aspects of the code that we think could be made more efficient.

Mr Watkinson: It is also important to understand that even in gas pipelines the effectiveness of the regulatory arrangements does not mean that parties need to have agreements within the regulatory arrangements; so they may not actually have an agreement under the access arrangement. The point of regulation is to provide a backstop; so if commercial negotiations break down, they have got that backstop to go under the code.

Mr J. NORBERGER: Let me just unpack that for a moment, because I think that when you are dealing with a monopoly—and let us face it, we are dealing with a monopoly—any reasonable person would probably prefer not to have to enter into a negotiating agreement because you have just thrown away—you have got one arm tied behind your back. You are dealing with someone who has no desire, or no requirement, to really give ground, because they do not have to—they are the only provider. Then you have got to ask yourself, why would people not want to use the ERA process? I can only imagine that—I mean markets are smart; if they see it as a failed model and a waste of time, why would they do it? So the question would be—you have already indicated before that the floor and ceiling prices are just disparagingly far apart. I mean, the ceiling prices is basically the cost of building your own rail line, so really that adds no value. It takes time to go through the process to end up with such a massive band of, you know, when in the end, if you could, you could just build your own railway line. My question is this: I know you can eventually go to an arbitrator. In your submission you mentioned a number of aspects of the code that binds you to take certain things into consideration when you are doing your own price determination, and, you know, the first one being the railway owner's legitimate business interest and investment. In fact, there is one here that quite specifically makes reference to, do not forget the railway owner—we are talking Brookfield here—the least power that they have and all that. So does the arbitrator have to abide by those same guidelines?

Mr Rowe: No.

Mr J. NORBERGER: So the arbitrator is completely free, if they choose to, to come up with any pricing —

Mr Watkinson: No, the arbitrator has to abide by the floor and ceiling costs in terms of making a decision with those. Can I just make this point clear: even in the Queensland approach, on the alternative approach that we apply to gas pipelines, the capital costs that are calculated as part of that are actually not too dissimilar, because what happens in rail is that we work out an annuity, which is the recovery of the capital costs over the life of the asset—it gives both a return on and of the asset over the life. When you work that out on an annual basis, the calculation is not a higher rate of return; the calculation is actually not too dissimilar to the way we work it out for Western Power or for gas pipelines. The assumption in rail, to make it equivalent, would be that the service provider invests in the rail network to maintain the modern equivalent asset value. If you make that assumption, then both regimes are actually quite similar in how you calculate the capital costs.

Mr J. NORBERGER: But we know that that is not the case. In the case of tier 3 rail, the quality is continually degrading. It is borderline pathetic in relation to the restrictions that are placed on CBH—speed and all manner of things—yet the ceiling price is still as if you basically had a brand new rail. Furthermore—I want to put this out there—it seems as if you are charging at the higher end, and why would not Brookfield? Because it has got full reign, that there would be an expectation that the higher up that band you go, the greater component of your pricing charge is

actually for the capital; do you understand me? Your variable costs are at the bottom, but further up that band you go, you are now taking a bigger and bigger chunk into building a brand new railway. Yet the moment any kind of capital needs to be sunk into these lines, Brookfield comes to the government and puts their hand out and says, “Oh, we want another couple of hundred million dollars to fix the lines up”. It just seems very broken.

Mr Watkinson: Again, if you assume that the rail operator is acting efficiently and will replace and maintain the quality of that railway line over the life of the asset, it is the same, actually, as a gas pipeline. A gas pipeline will get a return on and of that asset over time, and the average calculating will be same for the capital costs. Can I just clarify also, that the role of the arbitrator is clarified in the code, that in the case of tier 3 lines, the arbitrator can—as one of the issues that you might consider—take into account the service standard of the railway line. So it is separate matter that then provides for determination by the arbitrator for somewhere between the floor and ceiling costs.

Mr J. NORBERGER: What is the time frame from whoa to go? From CBH saying, “Guys, help us out”, knowing that it will never work out from a negotiation point of view? It does not matter what floor or ceiling price you determine, the end game will most likely be arbitration. So from the moment they come and talk to you to the moment that an arbitrator comes up with a price, what is the likely time frame?

Mr Watkinson: I refer you to the last page of our submission where it has a time line. The negotiation or arbitration process is required to take place within 90 days. However, the whole process, and if we use the Brookfield application as an example, that started in mid-December, and the ERA termination would not be until the end of June. So there is provision under the code, with the agreement of CBH, in this case, to extend the timeline. So that is just over six months for the ERA, plus then 90 days for arbitration.

Mr F.M. LOGAN: How practical would it be for the network access fees to be based on a completely transparent equation of supplying tonnage distance, specific line maintenance requirements and a reasonable rate of return to the network operator? Particularly, the information that could be gleaned to come to that conclusion on the audits that have been done, and they were required to under the act? Audits have been done by the rail operator—the last being in 2010, which is a complete audit of the entire network, and I am not too sure whether the ERA has received a copy of that.

Mr Rowe: In a sense what you are asking is: would we be able to persist in the regulation as we do with gas pipelines or electricity networks, where we either have a price cap or a revenue cap? I have not turned my mind to that; obviously, we would need to change the legislation to enable us to do that.

Mr F.M. LOGAN: Yes, of course.

Mr J. NORBERGER: But you have got the mechanism to do that every five years or four years?

Mr Rowe: We have got the opportunity to review the code and one of the difficulties we have had in the reviews up to now, as I said, 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 have the experience to draw on from both —

[11.30 am]

Mr J. NORBERGER: But even that you could address, could not you? You could put a recommendation, if you felt like it—I am not putting words in your mouth, but you could put a recommendation that you feel that the code should be changed so that no negotiation can take place outside of the code. The only access can be through the code and then, if you made a recommendation to government that there is a formula approach, be it a revenue cap or whatever, combined with a constraint that that is the only access mechanism, in theory, you would stop the type of situations now where people are having to negotiate—not having to, but choosing, for

whatever reason—outside of the code, negotiating and creating all these agreements that are completely confidential. No-one knows who has done what, but generally there is a feeling of great dissatisfaction.

Mr Rowe: In theory, the authority can do that, and I need to stress the authority is not me. The authority is three people, in which I am but one member. In theory, the authority could do that. I think it is actually unlikely, and I am expressing a personal view now, not an authority view. 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.

Mr P.C. TINLEY: But I just might add though, you talk about commerciality of an agreement, it is obviously within defined parameters of what is possible; so what is profitable. It can quite often be different to what is commercial. But also the ERA—tell me if I am wrong here—has not got a responsibility necessarily to agree as to what is in the most efficient interests of the state as an international participant. What I am saying here is, if CBH have to pay the price that Brookfield has set and regardless of what mechanisms are available for them to negotiate it, does that leave Western Australian grain growers and the GSP of the state any better or worse?

Mr Rowe: I will answer that in a roundabout way.

Mr P.C. TINLEY: It is a roundabout question!

Mr Rowe: The theory underlying all economic regulation is about economic efficiency. So how do you arrive at arrangements that result in efficient use of assets—both the assets themselves and to allow the efficient use of the assets upstream and downstream from those assets? So how do you get an efficient allocation of resources—both dynamically, productively and allocatively? When we look at either gas or electricity or indeed rail, one of the issues we look at, for example, is: what is a reasonable rate of return for the risk this asset bears in the marketplace compared to other assets, and so making sure that those issues are being dealt with efficiently. I do not understand, and maybe your inquiry will answer the question for me, why there have not been more applications under the code, because this is not—I mean, there are a range of large companies out there with access arrangements with Brookfield who have not sought access of another code. I am thinking of major mining companies who have access outside the code.

The CHAIR: Following on from that then, Karara told us that their 15-year agreement was negotiated to expressly exclude the operation of the Railways Access Code 2000, over the course of that 15-year agreement.

Mr Rowe: Yes, and I made the comment earlier, my understanding is there are some arrangements where that is done; that was a commercial—we had no involvement in that, could not have an involvement in it.

Mr P.C. TINLEY: Just following on then, if there was to be a legislative remedy, if you like, to this—if it was agreed that it was a monopoly and it was not helpful—do you think that regulatory or legislative remedy to the situation in relation to how a railway is governed using the ERA model, do you think that would have an impact on the lease that Brookfield currently has? Does it set it aside?

Mr Rowe: I do not know the answer to the question.

Mr J. NORBERGER: Sorry, we were just talking about Karara, the only thing I would say, Lyndon—far be it for me to tell you guys how to suck eggs—but I would really recommend that you avail yourself to the transcripts of Karara, because there are obviously two opinions in regard to what happened. And when you read the transcript, you will see from Karara's point of view, they made advances, communication—I am not suggesting they indicated, I cannot remember if they said it was a formal request, but they may have approached the ERA, asked the ERA, certainly the impression we got was that they sought some advice from the ERA. And you will see in the transcript their exact wording, but basically the view that they were given was, “No, you're better off negotiating that on your own. Go off and do your own thing.” They have achieved obviously an outcome, but they are clearly not extremely happy with it, and obviously one of our key terms of reference is: does the current arrangement aid or hinder state development? And when we look at the midwest, it would be quite clear that Karara would not be keen to go down that road again and, even now, they believe it is creating some financial stress on them.

Mr Rowe: Yes, certainly we will look at the transcript. I can say to you that since we saw *The West* yesterday, we have done a bit of review, and yes, I can assure you that no applications have been made by Karara under the code. I am reasonably confident that Karara never made a submission to the code review—well, certainly not the last code review, which was in 2010–11, and I would have thought that would have been an ideal opportunity for them to express concerns. To the best of our knowledge, we have not had any discussion with them about rail access. We have had discussion with Karara about electricity, and I have been involved in some of those discussions—as has the secretariat, but to the best of my knowledge, not on rail.

Mr J. NORBERGER: As I said, I am not making judgement.

Mr R.S. LOVE: You mentioned before Brockman Mining, how far advanced is that process?

Mr Rowe: I cannot say too much about that, other than the fact that we have brought down a floor-and-ceiling cost decision and that decision is being appealed by TPI and is currently before the Supreme Court.

Mr J. NORBERGER: When did Brockman Mining initiate that process?

Mr Rowe: You are testing my memory now. It would have been in the first half of last year, I think.

Mr J. NORBERGER: Does that make a tiny little bit of mockery out of the time lines you told us earlier?

Mr Rowe: As I understand it, our floor-and-ceiling decision stands until overturned, although I need to be a little hesitant about that. That is certainly true if it was a merits review; this is actually a legal review, so I am not as confident on that as I might otherwise be. Whether those negotiations are still going on, I do not know, there has been no request from Brockman for us to appoint an arbitrator.

Mr Watkinson: Just to give you an example, in gas we have 13 months to make a decision. Often those decisions are then also appealed—in that case on their merits—to the Australian Competition Tribunal. That process can take another six months or so, so the whole process could take 18 months to two years.

The CHAIR: Okay, so when you are in the process of determining your floor-and-ceiling costs, section 20(4)(e) of the Railways (Access) Act 1998 requires the ERA to take into account —

firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;

Does that requirement mean that the ERA has records of every access agreement between Brookfield and above-rail operators in WA, whether made under the code or otherwise? So does

that mean that you have got a clear picture of the market for railway network access; and, if you do not have such records, should you have them?

Mr Rowe: No, we do not. In determining floor costs, the issue that we are required to determine is: what are the incremental costs that would be avoided over the next 12 months should the current applicant's own operations not take place? It is only the costs that would be avoided by that particular applicant. In looking at ceiling costs, it is the return of the total cost of that route section, regardless of any commercial contracts that are there. So we do not need that to determine either floor or ceiling costs.

Mr Watkinson: There can be circumstances where that information is useful, and that relates to a situation we had with the Brockman application to TPI, where the regulator has to formally approve the negotiations and in doing that consider whether approving and providing that approval for negotiations to commence, any other party may be impacted. There is a formal process that we go through including seeking public consultation and putting out a separate determination on that. There are different functions that we have.

[11.40 am]

Mr R.S. LOVE: So if it takes two years to get the determination under some of your processes, are you surprised that people step outside that process to negotiate directly? It would not be surprising to me.

Mr Rowe: The two years that Greg was referring to was the process that takes place under gas and electricity, when we actually set tariffs. That is not the process that takes place under rail —

Mr R.S. LOVE: I thought he was responding to a question about the development situation.

Mr P.C. TINLEY: The time line of Brockman or similar.

Mr Rowe: Well, the court process has interfered with that time line—that is true.

Mr J. NORBERGER: Hence, why sometimes to negotiate something, even though you are not 100 per cent happy with it, sometimes, especially with mining companies, every month when you are not producing, where rail access is just one bit of a huge capital investment and they cannot possibly maybe—and, of course, one could argue that Brookfield knows that.

Mr Rowe: Absolutely, but as Greg made the point also, although we have a much more heavy-handed regulation of gas and electricity, a lot of the access arrangements under those regulations are also outside and not consistent with the code.

Mr J. NORBERGER: And are they published? They are also private, are they?

Mr Rowe: Yes.

Mr R.S. LOVE: The Brockman rail proposal: what rough geographic area is that in Brookfield's network?

Mr Rowe: It is not. It is in the Pilbara. It is TPI's railway line.

The CHAIR: On page 4 of your submission, you express concern that the railway owner might use the provisions of section 10 of the code to unnecessarily delay the access process. Has that ever actually occurred? Has Brookfield Rail ever made use of section 10 in that way, in your opinion?

Mr Watkinson: That is the section I was referring to in my previous comments, and Brookfield rail has not sought to use that section.

Mr J. NORBERGER: Greg, you mentioned before the Queensland model. We sort of broadly spoke about that and you indicated that there are aspects of it that are not completely dissimilar to the model here. But are there any aspects of the Queensland model where you go, "Actually, you know what? That'd be nice to have over here." If you have got a code review coming up, can you maybe see some of the way that the Queensland model, especially with its transparency and the like

and its formulated methodical way of working out prices, could maybe be of benefit to us here in WA?

Mr Watkinson: When we did our last code review, we did actually look at the financial implications of what is called the building block approach—which is the alternative methodology that we actually use with gas and Western Power—and whether that could be used for rail. We examined that and came to the conclusion, “Well, maybe it is actually not too dissimilar.” From that perspective, it is not too dissimilar. From the perspective of whether it provides more information and facilitates access, that is a question that we should look at as part of our code review coming up later this year, because now we have more experience, as Lyndon indicated, with both the CBH and Brockman applications. The code has been around since 2000, so over 14 years, we have only had those two applications plus one other by Portland Cement in 2001, which was overtaken by commercial negotiations. In those 14 years, there has only been three, two of which we are doing this year, so it is not clear that you need that degree of heavy-handedness, if you like.

Mr F.M. LOGAN: But there are some elements of transparency that are already required under the code. To that, section 7A of the Railways (Access) Code, which states that a railway owner subject to this code “must make a publication containing the required information available for purchase in hard copy format”. That information required is described in schedule 2 of the code. Schedule 2 contains a list of information that looks like it would comprise performance standards. How would you interpret that section of the code and how does it operate in practice? For example, is the ERA able to grant an exemption to certain sections of the code; and, if so, has it done so?

Mr Rowe: Sorry, I need to take your question on notice.

Mr F.M. LOGAN: Thanks, if you could provide an answer to that.

The CHAIR: We have heard evidence that regulation of the state rail access is spread over two or three agencies including the ERA, PTA, Office of Rail Safety and the Department of Finance and this creates difficulties for those trying to determine who has responsibility for what. Do you have a view on how regulation of the network might be made more efficient and more effective?

Mr Rowe: My easy answer to you is: ask me after we have done the review. 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 be inappropriate for me to comment.

The CHAIR: When will you come to the end of that process?

Mr Rowe: Usually the middle of next year. Sorry, the middle of the next calendar year, just to be clear.

Mr F.M. LOGAN: In that review, Lyndon, would you also be looking at the number of departments or agencies that have involvement in rail access—for example, there is yourselves, the PTA, the Office of Rail Safety and then there is the Department of Finance?

Mr Rowe: No, is the answer. Our review is a review of how the code is operating, so it will be about the code.

The CHAIR: I would like to thank you for your evidence before the committee today. A transcript of this hearing will be forwarded to you for the correction of minor errors. Any such corrections must be made and the transcript returned within 10 days from the date of the letter attached to the transcript. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be added via these corrections and the sense of your evidence cannot be altered. Should you wish to provide additional information or elaborate on particular points, please include a supplementary submission for the committee’s consideration when you return your corrected transcript of evidence.

I do not think we got through all of the things we wanted to ask you about, so will it be okay if we write to you and you provide us answers in writing? Is that okay?

Mr Rowe: Happy to do that, Chair. As part of the supplementary material, we will use the transcript to respond to the question from Mr Logan.

The CHAIR: Thank you.

Hearing concluded at 11.47 am
