

23 May 2006

Mr Lyndon Rowe
Chairman
Economic Regulation Authority
PO Box 8469
Perth Business Centre 6849
Western Australia

Attention: Mr Mike Jansen

Draft Determination on WestNet Rail's Part 5 Instruments

The Transport Industry Policy Division of the Department for Planning and Infrastructure has reviewed the Economic Regulation Authority's (ERA) draft determinations on WestNet Rail's (WNR) proposed:

- Train Path Policy;
- Train Management Guidelines
- Costing Principles; and
- Over-payment Rules.

We are generally supportive of the ERA recommendations. As most of the suggested amendments are to clarify the intent of the policy, guidelines, principles and/or rules, they will have the effect of improving the submissions as provided by WNR.

There are, however, a number of comments we would like to provide to the ERA on its draft determinations of the Train Path Policy (TPP) and Over-payment Rules.

1. Train Path Policy

Required Amendment 3 – *WNR to make provision for the introduction of traffic specific capacity for bulk commodities on mainlines where demand for capacity is high, in order to remove potential barriers to entry for new operators.*

Comment: We are not aware that new operators are currently experiencing difficulties in accessing the WA network because of the lack of scheduled, reserved and/or conditional train paths. It would be reasonable to assume that the lack of any train paths for new operators negotiating in the Regime would trigger Section 10 of the *Railways (Access) Code 2000*. If the ERA believes that there is indeed a need for this level of prescriptive approach to managing conditional train paths for bulk commodities, it should identify and evaluate the various ways in which conditional

train paths for bulk commodities can be efficiently managed, including the status quo, and consult with WA bulk customers such as Alcoa – bearing in mind that the suggestion did not originate from a bulk customer on the WA network – before arriving at a recommended approach. Consistent with the ERA’s other arguments that WNR is now owned by Babcock and Brown and is no longer a vertically integrated railway owner, we are of the view that WNR, in consultation with operators and end customers, is best placed to determine how it can best manage train path capacity as a below rail operator. Unless WNR is happy to comply with this amendment to the TPP, we would like to suggest that the ERA monitors this “problem” in the first instance to ascertain that it is indeed real before imposing the requirement on WNR.

Required Amendment 8 – *WNR to allow operators to sell a train path to another operator subject to the approval of WNR, which cannot unreasonably be withheld. A set of criteria needs to be specified setting out the conditions under which WNR would provide its approval.*

Comment: The previous arguments provided by the Independent Rail Access Regulator to not permit the on-selling of train paths were any on-selling would likely compromise WNR’s ability to price discriminate as permitted under Clause 13, Schedule 4 of the *Railways (Access) Code 2000*, and increase the likelihood of gaming by operators to effect barriers to entry. We continue to support these arguments. We would also point out that this required amendment will conflict somewhat with Clause 2.6 (Removal of a Train Path) of the TPP as written and will need to be addressed by the ERA if the amendment is to be made. Without a detailed assessment of the yet-to-be developed criteria envisaged by the ERA, we would continue to hold the view that, on balance, competition in the market place for train paths is not a better alternative than ensuring that WNR assumes full responsibility and accountability for maximising traffic and reducing barriers to entry on the network.

2. Over-payment Rules

Clause 32 – *The purpose of government subsidies are mainly for level crossings which are to improve the safety standards by enabling the railway owner to install safer protections rather than being a subsidy intended to enable lower freight rates.*

Comment: The situation has been changing over the last couple of years. For your information (and recognising that the Fremantle Loop is not part of the WNR network), the State Government provided \$15.42 million towards the Fremantle Loop in 2005-06, after the Commonwealth’s contribution in 2004-05 of \$10.72 million under AusLink. In the same year, \$0.66 million was also provided for the Albany spur line, and \$8.70 million for North Greenbushes. We have projected in the current State Budget papers a further \$5.75 million for North Greenbushes in 2006-07, as well as \$14.00 million in AusLink funds and \$4.00 million in State Government funds to upgrade the Eastern Goldfields Railway in 2007-08.

Schedule 1 of the Over-payment Rules – Australian Railroad Group (ARG) as the guarantor on the Over-payment Account.

Comment: The ERA has recognised that WNR is now a subsidiary company owned by Babcock and Brown, and that ARG is sold with separate owners for the “above rail” and “below rail” components of the business (p.8, Draft Determination on the Proposed TPP). The ERA would therefore be aware that the guarantor of the Over-payment Account could no longer be ARG. We believe Babcock and Brown Infrastructure will have to assume the guarantor’s role but such a change has not been identified in the draft determination, and will need to be added as a required amendment to the WNR submission on Over-payment Rules. Needless to say, a legal agreement with Babcock and Brown Infrastructure would have to be entered into formally to effect the arrangement.

We have invited Mr Mike Jansen over a week ago to discuss our comments to the ERA draft determinations, as well as to update him on other access-related developments arising from the recent Council of Australian Governments Agreement and the Fortescue Metals Group State Agreement.

We look forward to hearing from Mr Jansen soon to arrange a suitable time.

Yours sincerely

Bruce Chan
Director
Land Transport Policy Group
Transport Industry Policy Division
Department for Planning and Infrastructure