

**WA Economic Regulation Authority
Independent Review of submissions
to the Review of WestNet Rail's Part
5 Instruments**

Final Report

April 2006

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Strategic design + Development

ABN 51 103 363 257

Suite 104, 51 Rawson Street Epping NSW 2121
PO Box 1075 Epping NSW 1710
Australia
Telephone +61 2 9868 2590
www.strategicdesign.com.au

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1 INTRODUCTION

This review has been prepared in response to an invitation from the Economic Regulation Authority of Western Australia (ERA). The Authority is undertaking a review of Instruments developed by WestNet as required under Part 5 of the Railways Access Code (2000) ("the Code").

The instruments are:

- Costing Principles
- Over-payment Rules
- Train Management Guidelines
- Train Path Policy

Instruments initially produced by WestNet in 2002 have been revised in 2005 with the benefit of three years operational and commercial experience by rail operators and the track owner. Under the review process, submissions in response to the revised Instruments were invited by the Authority during January 2006. This paper is an independent review of the 4 submissions received for internal use by the Authority in assessing the veracity of arguments and the need for any alterations to Instruments to be requested of WestNet.

Since the closure of the period for receipt of submissions to this review, the owners of Australian Railroad Group (ARG), of which WestNet is part, have announced the pending sale and division of ARG into separate entities, to be acquired by Babcock and Brown (WestNet assets) and Queensland Rail (above-rail assets). This change of ownership and dis-integration of the ex-WestRail system will likely have some major impacts on commercial and operational behaviour in future and may present new challenges to Western Australian government regulators and policy makers. This review, however, will not directly critique the submissions in regard to this development; rather it will assess submissions and comments in the context of conditions at the time at which they were made.

At the conclusion of the paper, however, some comment is made on the issues and risks arising from the proposed sale that may be relevant in future dealings under the Code.

The paper is structured to deal with each of the Instruments in turn. For each, general observations are made as to the tenor of comments, followed by discussion of specific comments made by each submission.

Of the four submissions, each represents a different perspective:

- Pacific National – rail operator, independent from, and in competition with, the Australian Railroad Group (ARG);
- ARTC – publicly owned track owner and manager of train control and pathing on the national network contiguous with the Midland to Kalgoorlie rail line (EGR);
- Great Southern Railway Ltd (GSR) – operator of long distance passenger rail services
- Alcoa World Alumina Australia (Alcoa) – major bulk customer of ARG (WestNet and AWR)

This range of submitters assists in assessing the impact of the Instruments on a variety of interested parties, if not the full potential range.

2 COSTING PRINCIPLES

2.1 General

The costing principles have not changed substantially since 2002 and there are few comments raised in relation to them in the submissions. The principles are well established and largely in line with those in place in other systems. It must be observed, though, that there is very little evidence by which to measure the success of the application of these principles in Australian rail systems. In Victoria and Western Australia, the two states where integrated operators of the privatised systems have access obligations, there have been no successful access applications by third party operators. The application of regime provisions by the track managers have tended to support the incumbent operator, or add to the barriers to entry faced by new operators, particularly in Victoria.

It is therefore difficult to assess whether there is any need for substantial change to the principles and the accounting treatments that underwrite them. The range of access prices available between floor and ceiling prices is typically very large, and for many traffics, ceiling prices are usually well over the price that can be passed on to customers; this is a feature of Australian regional rail traffic, and there are few exceptions. The ARTC and NSW regimes provide for access prices that do not attempt to meet full replacement track costs, since they have access to independent federal and state capital (and even operational) funding sources, which are unavailable (in any legislated sense) to WestNet and the Victorian and South Australian track managers.

Under these conditions, third party access to large sections of the WestNet network is unlikely to occur. There are only a few sections of track where ceiling prices could realistically be affordable to rail operators – principally the EGR and parts of the South West network, and even on these networks the absence of ‘common-user’ terminal facilities is a major inhibitor to competition.

In this context it is significant that the only submission from a freight operator, PN, is virtually silent on the detail of the costing principles, focussing only on the monitoring function performed by the Authority and the issue of price guidance. PN is in the position of track manager in Victoria, and may have some sympathy with WestNet in that regard.

2.2 Specific

a) ARTC

The thrust of the ARTC submission is to provide the Authority with information as to points of difference between the WestNet policies and those of ARTC. ARTC sees a benefit in the standardisation of principles and policies between the two track managers (and regimes), which is understandable in view of the importance of a seamless operational interface at Parkeston. ARTC has no particular interest in WestNet’s costing principles outside this broad concern and the ability of successful access seekers on ARTC’s network to have equal success on the EGR.

Consequently its thrust is more informative than critical. The major outcomes of the submission relate to issues of accountability to the train operator. ARTC favours

publication of indicative track access pricing and reporting on service quality Key Performance Indicators (KPI)s.

Discussion:

ARTC as a federal government owned corporation has a clear interest in facilitating competitive access conditions and in maximising train performance across its asset. A private sector track owner has a less well defined 'public interest' and is more concerned with commercial return on investment. There will be overlap between the two objectives, but it is inappropriate to expect private track owners to imitate the roles and practices of ARTC. The costing principles and the power of the Authority over their determination seem adequate to ensure that fair and reasonable prices will be made available to access seekers, even if these are higher than can be afforded. A private sector track manager does not necessarily have as an objective a desire for heavy above-rail competition as an end in itself. It will, however, wish to maximise traffic on its tracks, and so will usually tend to encourage reasonable levels of competition towards that end.

The issue of publishing indicative pricing is a matter of convenience for train operators and the commercial prerogative of the track manager. A track manager which is part of an integrated rail operation may have less incentive to publish indicative prices than a completely independent one. An independent track manager would have a greater interest in assisting access applicants in their applications. This is probably a reasonable commercial judgment by the track manager of the day and does not need to be imposed via this review process.

ARTC's restated recommendation in regard to KPI reporting and the publication of track standards in the Costing Principles seems out of place. WestNet is held to account in regard to track standard under state railway legislation and the periodic track audits under its lease agreements with the Public Transport Authority (PTA). It is not directly accountable to access seekers for the standards to which the network is maintained. The condition of a given track section from time to time is somewhat fluid in relation to sleeper wear, ballast depth, rail condition, temporary speed restrictions etc and it would be impractical to publish detail of this condition in a meaningful way in the Costing Principles. Again, the commercial interest of the track manager in maintaining track to a standard that maximises traffic can be relied upon here.

Section 2 Determination of capital costs

(i) ARTC suggests that independent assessment of the asset valuation is necessary.

Comments: The Authority commissions independent assessment of the valuation in the process of its floor and ceiling price determinations.

Section 3 Determination of Operating Costs

(i) ARTC does not believe there is a single best practice cost allocation method that can be recommended. It states that any method used should be independently assessed.

Comments: The Authority commissions independent assessment of the operating cost calculation in the process of its floor and ceiling price determinations.

Section 4 Overhead costs

(i) ARTC suggests that the overhead allocation should also be independently assessed.

Comments: The Authority deals with this methodology under its floor and ceiling price determinations.

Section 5 Other matters

ARTC outlines its methodology for annual escalation of floor and ceiling limits. It suggests WNR publicise its calculations on its website after confirmation by the regulator and independent assessment. ARTC also reiterates its position that indicative pricing for much of the network should be posted.

Comments: No comment.

b) Pacific National (PN)

PN is primarily concerned with the transparency of indicative access pricing to facilitate applications. It appears to recognise the unlikelihood of access being achieved over the majority of the WestNet network due to high ceiling prices, and does not seriously challenge the basic methodology.

Discussion:

PN has not to date shown any interest in competing on narrow gauge railway systems and its core focus is on inter-capital intermodal traffic and east coast heavy haulage coal tasks. The only traffic it might develop an interest in would be some of the bulk South West line tasks. Its predecessor, FreightCorp, was once involved in a bid for the Alcoa contracts, but was unsuccessful. For PN, there is little traffic likely to be of interest in Western Australia and its main objective would be to retain its standard gauge access prices and conditions on the EGR, in the face of a potential threat from ARG (particularly in its alliance with QR National that preceded the sale currently in process).

Section 1 Introduction

(i) PN suggests that WestNet should publish indicative average access prices for heavily trafficked routes, as a guide to access seekers.

Comment: Issues associated with pricing principles are outside the scope of this review.

Risk and Discrimination

(i) PN takes issue with the latitude granted to WestNet to differentiate between operators in its pricing on the basis of the different 'risk profiles' of different types of traffic or operators. PN suggests lack of clarity or transparency over the nature of the risk profiles could lead to 'abuse by a vertically integrated incumbent'. The comment does not appear to relate to any particular section of the Instrument.

Comment: Issues associated with pricing principles are outside the scope of this review.

c) Alcoa

Alcoa is in the position of being a rail customer, largely captive to the rail system and consequently with a strong interest in the pricing principles. Its business is not readily transferable to road transport and it has a long history of engagement with the rail system. Its documented concerns, however, are brief and limited to some of the more marginal aspects of the Costing Principles.

Section 3.4 Allocation of operating costs

(i) Alcoa's main concern is with the route cost allocation methodology, which is not actually specified in detail in the Principles. The allocation methodology for operating and overhead costs is outlined, but it is not clear on whether costs are allocated by route or route section. Alcoa does not accept the Regulator's view that train movements should be the units by which total costs are apportioned, without taking into account the different routes that each train in a route section may be traversing.

Comment: This issue has been raised in discussion between Alcoa and the Authority in relation to the relevant Determination. The mathematical details of the dispute are somewhat esoteric and a more detailed examination of the issue would be needed to make an authoritative ruling. Examples using actual costs and train movements for a range of real life route and route sections would need to be provided to support this argument. Assertions such as "branch or feeder... route sections are generally short route sections" would need to be supported by empirical data.

However, as a general comment, in a complex network environment supporting a mix of traffics ranging from profitable short haul bulk movements to more marginal longer haul traffics, there will always be questions over the 'fairness' of this type of methodology. It is tempting to seek mathematical prescriptions to safeguard this fairness, but there will always be some inequity in their application. Bulk haul customers who are locked in to use of rail will usually find themselves in the theoretical position of being charged more than customers whose business is less rail-oriented. The track manager should not be asked to go too far down these theoretical 'rabbit holes' in search of the perfect formula that will appease all operators without hurting its own commercial imperatives.

In so far as the issue for Alcoa only applies to very short track sections with relatively low economic impacts, this issue should not be actively addressed by the Authority. If the net impact is considered significant in relation to Alcoa's ability to pay, it should be dealt with as an exception under the Arbitration of Disputes provisions of the Code.

Section 5.1 Floor and Ceiling Variation

(i) Alcoa also suggests that the X factor to be used to temper annual CPI increases in the floor and ceiling prices should be set by the Regulator for years 2 and 3 rather than by WestNet.

Comment: This is of minimal significance, but the principle that a monopoly infrastructure should be obliged to pass on some cost reduction to reflect productivity gains is sound. The X factor is largely symbolic, rather than relating to any really measurable productivity improvement target. Leaving the Authority to determine a value to place on this productivity target at each triennial review will not necessarily result in a more reasonable result than the application of a standing percentage reduction of CPI.

The current arrangement whereby the Authority reviews the X factor during reviews of the Costing Principles is sufficient.

d) Great Southern Railway Ltd (GSR)

GSR is the operator of the Indian Pacific passenger service between Perth and Sydney. This iconic service is primarily a tourist train and is an important component of the Australian travel experience. It has a value that cannot be measured purely in economic terms. The Australian rail industry has always respected the need for long distance passenger trains to be awarded priority in relation to train pathing and resourcing, but the access costing issue is becoming more relevant as the networks become congested with freight services.

Discussion:

The GSR submission is a general argument seeking recognition from WestNet and the Authority of its economic status in relation to freight trains. It argues that passenger trains earn less than freight trains on long distance routes in revenue terms, when measured by kilometre, GTK and access dollar. The figures quoted, however, are not sourced, and are potentially misleading since they only report revenue rather than cost or profit. The true cost base of the Indian Pacific service would depend on the terms under which GSR operates the rolling stock and resources the train (with locomotives and crew). To support its argument, GSR would need to expose its books in greater detail.

These issues may need to be considered in future reviews of Pricing Principles but are outside the scope of this review.

Section 5.1 Floor and ceiling variation

(i) GSR suggests that ceiling prices should be adjusted downwards each year by a formula involving annual traffic growth (in GTKs) and a reduced CPI over each track section. This would reward rail operators for attracting extra business while ensuring marginal additional benefits from all new traffic to WestNet.

Comment: Issues associated with pricing principles are outside the scope of this report.

Section 2.3 Gross Replacement Values

(i) GSR suggests that DORC provides lower values than the GRV methodology.

Comment: Issues concerning pricing principles are outside the scope of this review.

Section 3 Determination of operating costs

(i) GSR suggests that WestNet's performance in annual estimation of the operational and maintenance tasks will need to be monitored closely by the Authority.

Comment: The Authority does this during its regular review of floor and ceiling prices.

3 OVER-PAYMENT RULES (O-P RULES)

3.1 General

The Over-payment Rules are intended to ensure that any access receipts by Westnet for use of a given track section which exceed in total the ceiling costs for that section are returned to operators (operating under the Code). This is a cap on charging that reduces the ability of the track manager to make unexpectedly high profits on the provision of services over the affected section. It also serves to limit the extent to which profitable sections can support unprofitable network sections, at the cost of operators on the profitable sections (and their customers).

The use of these rules is obviously generally accepted by the rail industry as a natural corollary with the open access environment. Provisions such as this, however, serve to weaken the overall network integrity of a complex regional rail system by limiting cross-subsidisation between track sections. These rules serve to keep costs fair and reasonable for users of the profitable sections, but potentially weaken the overall network and reduce rural services by hastening the closure of less profitable sections. While it is difficult to support cross-subsidisation arguments in the current era, the government should be aware of the risks to several lines within the network that may be exacerbated by these rules.

In view of this dilemma, it is argued here that over-payment rules should not become too prescriptive in favour of operators seeking windfall rebates. These rules should be kept simple and should generally err in favour of the track manager. Aggrieved operators have access to dispute resolution provisions if over-payment becomes a real issue for them, but there are few lines in the WestNet system where this might occur.

3.2 Specific

a) ARTC

(i) ARTC highlights the vagueness of the O-P rules in its statements regarding the treatment of over-payment in its contractual relationship with WestNet. It seeks the Authority to take a role in resolving this uncertainty via the recognition of wholesale ARTC access revenue as revenue within the terms of the O-P Rules.

Comment: This issue should not be addressed in the Rules, but should be taken up directly between ARTC and WestNet. ARTC could then return to operators any additional rebate it received from WestNet according to its own O-P Rules.

Section 2.3 Non-Access revenue in the Ceiling Test

(i) ARTC highlights the issue associated with treatment of Non-Access revenue (ie annualised government contributions).

Comment: Government contributions towards the cost of upgrading a track section might on occasion have the capacity to generate over-payments on that section (for

instance in the funding of new EGR crossing loops, or level crossings). The terms of such support (ie whether a return of some description is required by government) will determine whether such contributions should be considered as revenue for the purposes of the ceiling test.

It is suggested here that this issue should be addressed on a case by case basis and stand-alone rulings should be made in relation to the treatment of the contribution for this purpose in each instance.

Section 2.5 Over-payments and under-recoveries

(i) ARTC makes the case in favour of an 'unders and overs' reconciliation which is unavailable under the current O-P Rules.

Comment: This would add a significant complication to the process of setting annual access prices and would effectively supersede the CPI-based escalation built into the Costing Principles. The arguments supporting this recommendation refer to the high risk profile of the track manager and are generally sound. The remedy proposed, however, may not be practicable as it would require substantial annual recalculation and administration with considerable potential for disputation between track manager and operators. There would also be many sections where under-recovery (defined as under-recovery of ceiling costs) was a permanent condition, leading to annual price increases that would be unaffordable to the operators using those sections.

ARTC also suggests that cross-subsidisation between track sections through failing to apply a rigorous 'unders and overs' system yields uneconomic results by artificially protecting non-commercial track sections from closure. ARTC has little direct experience with non-commercial branch line sections on its network, and here takes a theoretically pure view of the cross-subsidisation issue. In practice, the assessment of a branch or section as 'non-commercial' is complex and involves inter-related factors such as demand variability and growth, rollingstock age and standard, competitive pressure, new business opportunities as well as pure track-related issues.

WestNet, the Authority and the state government generally, have a major challenge in determining how to retain a desired track network where some portions are 'uneconomic', but contribute to the community value of the whole. The application of the kind of formulae proposed by ARTC to collected access revenue will not, in themselves, guarantee provision of a stable, sustainable network.

b) Pacific National

Section 3 The over-payment rules

(i) PN has a view that overpayment reimbursements should be distributed to all operators including those operating under access agreements which are outside the Code.

Comment: Without knowledge of the history of this provision, it can be seen that there is some merit in this suggestion. However, the OP Rules also provide for operators with agreements outside the Code to negotiate some form of over-payment reimbursement

within those agreements. Presumably this may also be some form of incentive to bring future access agreement negotiations under the Code.

Section 4 Application of over-payment rules

(i) PN suggests that ceiling rates are too high for realistic third party access applications to be successful. The use of GRV methodology plus use of under-recoveries to negate over-payments further effectively increases the ceiling rates that may be charged by WestNet.

Comment: The Authority has agreed with WestNet on the overall benefits of using GRV versus DORC valuation methodology. The concept of balancing over-payments for a route section in certain years with under-recoveries in other years seems quite reasonable. WestNet does not seek to be reimbursed by operators for net under-recoveries over the three year period – the majority of its track sections probably fall into this category, with only the heaviest trafficked lines likely to generate over-recovery. These lines carry fairly steady traffic levels, so the incidence of under-recovery would probably be minimal in any case (if there is over-recovery in some years).

PN's comment does not warrant any alteration to the methodology proposed.

c) Alcoa

Section 2.7 Allocation of non-access revenue

(i) Alcoa makes some minor corrections to wording and drafting, and raises some more substantial concerns over the methodologies for allocating over-payments over route sections. Inclusion of non-access revenue in these allocations is recommended.

Comment: Since there is some history of discussion on these issues between the Authority and the submitters, this paper is not equipped to add value on most of these issues. However, Alcoa also raises the issue of the 'triggering' of an over-payment, engendering a useful discussion. It makes the point that the concept of an over-payment having been triggered by a late-coming operator is not an appropriate means by which to discriminate between operators in the allocation of over-payments. There is no significance in the order in which operators introduce their traffic to a route section for the purposes of reimbursement. The decision to allocate over-payment rebates to the operators based on the 'triggering' operator's route characteristics seems arbitrary and overly complex.

The key paragraph in section 2.8 should be re-worded on the basis that no operator can be said to have triggered the over-payment under any scenario. Furthermore, overpayments should be made to all operators on the route section on the basis of their use of that route section, rather than the differing routes of each of the operators. Simplicity and clarity should be the aim of this exercise.

Section 3 Over-payment rules

In relation to the allocation formula in the over-payment rules, Alcoa raises the issue of changes to the access rates resulting from investment by WestNet in upgraded track or infrastructure, where Alcoa has also part-funded the improvement. Under the current

formula, any discount on access rates obtained by Alcoa as a result of its contribution would result in its earning a smaller percentage of any overpayment. Alcoa suggests that non-access revenue provided by an operator should also be included in the numerator of this formula.

Comment: There is some logic to the suggestion from the narrow perspective of this example. However, the amount of the contribution (if a capital contribution) for the purposes of the formula would have to be annualised over a reasonable period according to some agreed methodology.

d) Great Southern Railway Ltd

Section 2.3 Constitution of revenue under the ceiling price test

(i) GSR suggests that WestNet is obliged to reimburse all operators for over-payment under the Code.

Comment: GSR misreads the Code in its assertion that the Code negates the right of WestNet to withhold overpayment rebates from operators with access agreements negotiated outside the Code.

Section 2.5 Over-payments and under-recoveries

(i) GSR suggests that different operators will potentially receive over-payment benefits than those who might have been disadvantaged through offsetting at some point during a given three year period.

Comment: GNR (understandably) misinterprets the intent of Section 2.5 regarding the balancing of overpayments and under-recoveries due to the confusion between routes and route sections. The intention of the rules is that offsets are allocated at route section level and apply to all operators on a route section.

Section 2.8 Allocation of an over-payment

(i) GSR shares the concern of Alcoa as to the concept of a late-coming operator acting as the trigger for an over-payment rebate, and its route being used to allocate the rebated revenue.

Comment: The alteration to this proposed formula as outlined in the comments on the Alcoa submission would address the concern of GSR on this matter.

4 TRAIN MANAGEMENT GUIDELINES

4.1 General

The Train Management Guidelines (TMG) represents an attempt to document and formalise the rules by which train controllers have traditionally managed trains operating on the Australian track networks. Train control is probably the most difficult activity to manage 'fairly' in a separated open access rail environment. Train control is the organic interface between track and train and in integrated rail systems it is a prestigious and important operational activity. In separated regimes it sits somewhat uncomfortably with the track manager, despite being primarily an operational activity.

In other national rail systems, the inability of an operator to control its own train movements would be a major hindrance to efficiency. In Australia, the open access model compels track managers to 'play traffic cop' with the competing mix of trains and operators on the network and to do so in a demonstrably fair manner. This is a great challenge to the track manager. Train controllers have always managed according to unwritten rules and priority protocols as well as by the legalistic provisions of their working timetables. Modifying and documenting these traditional rules to the satisfaction of all operators is a major challenge.

4.2 Specific

a) ARTC

ARTC notes the similarities between the WestNet approach and its own. There are some differences, however:

Section 2.1 Use of the Network in accordance with the train paths

The first of these is the failure of WestNet to directly acknowledge the objective of not deteriorating an 'unhealthy' train.

Comment: On the surface, this seems a reasonable requirement. There will, however, be occasions where it is necessary to further reduce an already unhealthy train's performance in order to minimise disruption to a whole range of other trains. In practice, this no doubt happens in certain busy sections. On balance, though, it would be wise to include this as an objective.

ARTC makes reference to price differentiation for different standards of path/service, but does not make suggestions as to its applicability to the WestNet system. ARTC notes that the quality of path purchased on its system does not entitle the operator to any relief from the standard train management practices (in regard to healthy and unhealthy trains).

Comment: ARTC suggests that, in general, an integrated rail operator may be tempted to favour its own trains via day to day train control decisions. Observed experience in NSW, however, is that the train controllers tend towards the opposite approach, even over-compensating in favour of competing trains, to refute any accusation of bias. This

is particularly noticeable where a competitor has a single train, little operational infrastructure, and minimal capacity to recover from operational problems or major delays. These operators often take a stronger management interest in the activity of train controllers with respect to their train, than does the larger incumbent operator. In these circumstances, overall network efficiency is often maximised if the smaller, competitor trains are in fact favoured to avoid inconvenience all round.

Contrary to ARTC's suggestion, it is not considered necessary to add to the detail of these provisions in order to protect against perceptions of bias by train controllers towards any operator. Train control is the art of keeping all trains on a complex network running with minimal overall disruption. Daily operational events are unpredictable and do not usually stand up well to retrospective analysis, while recording of train control decisions is usually minimal. The application of a small number of simple, accepted principles is the most reasonable approach for train controllers at the operational 'coal face'.

Section 4 Disputes and Performance Monitoring

ARTC refers to a previous indication that KPI reporting should be done separately for AWR and third party rail operators.

Comment: On track sections where there are multiple train operators, and one is affiliated in some way with the track manager, separable KPI reporting to the Authority would be a reasonable expectation. At this stage, this type of separable reporting would only be required for the EGR.

ARTC also offers a critique of the indicators (apparently outlined elsewhere by WestNet, though this is not clear from the submission) to be used in annual performance reporting.

Comment: The TMG document under review here does not stipulate these measures, rather it states a commitment to agree via provisions in Access Agreements to develop and report on KPIs. No doubt the PTA requires WestNet to report on certain measures such as Track Quality Index (TQI) under its lease conditions. Similarly, reporting on changes in the number, severity and duration of speed restrictions is not appropriate in respect of the TMG. These issues are best dealt with in the lease relationship between WestNet and government, since they pertain to maintenance of track condition over the longer term. Typically, track quality and condition for a particular section can deteriorate slowly over time, until they reach the point where a major periodic maintenance (MPM) event is required to return the section to an appropriate standard.

In the lead up to an MPM event, there may be temporary speed restrictions on certain curves, culverts etc. Annual reporting of such matters in the TMG might tend to indicate a fall in service levels, when in fact it would be a quite reasonable maintenance outcome so long as MPM events take place as scheduled.

Further, it seems reasonable to allow WestNet and its customers to mutually agree on relevant KPIs, rather than seek to determine an explicit KPI regime via the TMG.

Section 6 Annexures

ARTC suggests WestNet should include compliance with the draft ARA Code of Practice in its list of Operator's Obligations.

Comment: There may be legal reasons for this exclusion, or perhaps WestNet is withholding this obligation until the draft is formally accepted as per section 6.1.4. In any case, if the Operator has warranted compliance with the draft code at Section 6.1.4, it may not be necessary to restate compliance as an Obligation at Section 6.1.6.

b) Pacific National

PN's over-riding comment regards the likelihood of a national TMG arising from the pending submission by ARTC of and Undertaking to ACCC on train management. It states that the WestNet TMG should be reviewed again in two years, taking the opportunity to bring it into line with ARTC + national standards.

Comment: It may be prudent to review these Instruments again in that timeframe for a range of reasons (including change of control of WestNet), but this is not one of the stronger ones. The Authority would not presumably have a mission to encourage a transition towards a national TMG system as part of its ambit. PN's comment is probably made in the context of its competitive position in regard to ARG trains on the EGR in particular.

Section 3.3 General Principles for Train Management

The only other comment pertaining to the TMG is generally supportive of the WestNet train control decision matrix. It notes that, in an ideal world, train controllers would take into account a range of circumstances applying to each different train in making their decisions.

Comment: In practice, it is unreasonable to build these requirements into the matrix and job descriptions of the controllers. Astute train operators build relationships with train controllers and hope to educate them as to their general priorities for their own services in the event of disruptions. Good communication protocols also provide the capacity for operators to guide train controllers in managing their traffic.

There is no need to alter the matrix to accommodate the "real time" communication objective as suggested by PN. However, there may be a case to reword the matrix rules to allow greater decision-making flexibility within the overall objectives. It is noted that the General Principles do not grant great latitude to train controllers seeking to engineer the most equitable result with minimal consequential loss for all operators. In reality, it is not known whether WestNet precludes its train control staff from using their discretion in the application of the General Principles for the best overall result. If KPI reporting were to reach down to the level of individual train crossing decisions, there might be some reluctance to depart from the matrix for fear of attracting complaint or censure.

Section 3.3 (vi) provides for the Access Manager to determine a course of action where the matrix 'cannot be applied' for some reason. It may be more practical if the person with this power to authorise departure from the matrix rules (for the greater good) was a duty supervisor, rather than a member of the WestNet executive. The words 'cannot be applied' should also be altered to 'would not allow the overall on-time objective for all trains to be met'.

c) Alcoa

Alcoa's only comment pertains to a drafting error.

d) Great Southern Railway Ltd

Section 2.1 Use of the Network in accordance with the Train Paths

i) GSR takes issue with the wide range of rights granted by WestNet to itself to issue Instructions to rail operators. It suggests that these rights are excessive in view of the low likelihood of their being necessary. It recommends that these rights be curtailed such that WestNet may only incur them to avoid safety risks or breaches of Access Agreements.

Comment: WestNet has drafted these rights as if for a legal document, although the guidelines do not have legal (as in contractual) effect. In this sense, the rights appear to be heavy-handed from the perspective of an operator. It is quite reasonable, however, for WestNet to make it clear that it reserves the ability to direct the train activity across its assets in an unrestricted fashion in pursuit of both overall industry benefit and its own commercial interests. GSR notes that WestNet has rarely, if ever, invoked many of these rights, and presumably has not therefore misused them.

WestNet must have a clear right to issue Instructions to operators in regard to train path variation, cancellation etc. It is impractical for an operator to have any right to question or defy an instruction from the train controller. WestNet's rights in this regard should not be constrained to situations where safety and breach of access agreement – this would arguably eliminate the vast majority of situations in which it is necessary to issue instructions ie to manage track possessions, incidents, speed restrictions etc.

The risk that WestNet would apply Instructions unnecessarily or with the effect of damaging an operator's commercial interest is low, but must lie with the operator. Presumably each operator will seek to extract undertakings in their access agreements in regard to minimising these risks, measuring performance and settling disputes.

GSR possibly is foreseeing a future where there may be less respect for passenger train paths in the face of a growing freight task and its concern is understandable. Its concerns may be addressed through a rewording of the definition of Instructions, particularly to strengthen the obligation at (e) in that definition, not to issue an Instruction to "prevent the Operator from running a Service of the nature of the Services contemplated at the Commencement Date..."

The definitions of Instructions and Train Control Directions are somewhat circular, self-referential and highly qualified. They leave some doubt as to interpretation and could be made more rigorous without unduly reducing WestNet's powers to operate its network fairly and efficiently.

There is no reason for any attempt by the regulator to reduce the authority of WestNet over the use of its asset, in addition to powers already available under the Act, the Code and (presumably) the lease agreement.

(ii) GSR notes the apparent problem in relation to the undertakings in regard to temporary effect of Instructions. The use of a temporary Instruction appears to be a

means of introducing a permanent change to paths without going through the usual timetable change procedures that would normally precede a permanent change to a path (in the Train Path Policy at Section 2.4). GSR suggests temporary variations should only be made to avoid a safety risk of breach of an Access Agreement.

Comment: This complaint appears to have some validity. WestNet should not have the right to introduce a permanent change to a path provided under an Access Agreement by way of the introduction of a temporary change for an indeterminate time. Both the TMG and TPP are unclear as to the circumstances in which a temporary change can be made. These circumstances should be limited to temporary events such as maintenance events, incidents involving track or train or other major disruptions to normal running. It is hard to see any circumstance in which a temporary change should be allowed to become permanent without application of the procedures laid out in the TPP Section 2.4.

Implementing GSR's suggested change to these provisions may not be sufficient to address the problem. At the very least, the definition of a 'safety risk' would have to be laid out to cover access delays caused by track repairs or train defects and incidents.

This issue is best resolved through tightening of the provisions in the TPP at Section 2.3 for temporary variations to a train path. The overlap between the TMG and TPP on this issue should also be addressed and clarified.

(iii) The issue of passenger priority is key to GSR. It recommends a more explicit statement from WestNet in the TMG. It also seeks clarification of the intent of the statement that train controllers will take account of the fixed intervals required for passenger stops in relation to train priority.

Comment: Passenger priority is a tradition which is continued by ARTC and other public sector track managers. WestNet may have reducing commitment to this principle as time goes by and freight activity increases. It would be prudent for the state government to seek similar commitments from WestNet to those given by ARTC in regard to the EGR in relation to passenger priority. It is not considered necessary or appropriate to duplicate the PTA wording in relation to urban passenger services.

In relation to the second, specific issue, the call for clarity of intent of the phrase "take account of" is supported. Presumably the intention is to respect the needs of passenger trains to make stops even if they are late at the entry point, but it is certainly unclear. WestNet should be asked to clarify this point.

Section 3.3 General Principles for Train Management

(i) GSR seeks a rewording of Rule 3 in the decision matrix

Comment: The rewording request is reasonable, as it clarifies the full intent of the rule to avoid confusion.

3.5 Repairs, Maintenance and Upgrading of the Network

(i) GSR notes some inconsistency in the requirement of WestNet to consult with operators in relation to maintenance and repair possessions. WestNet should be able to consult with Operators in all cases.

Comment: It is a reasonable suggestion that WestNet should be able to advise (a better word than 'consult') operators in regard to emergency Force Majeure events in a timely manner. Email contact at the very least to a duty officer for each operator on a section advising of a problem is quite a reasonable expectation. The word 'consult' however, has a connotation of discussion and negotiation, which is not always appropriate in these circumstances and should not be mandated.

(ii) GSR notes that time periods for advice prior to possessions are very short in some circumstances. The two day advice period should be structured as a minimum rather than standard period. Major possessions should be planned on 12 months rather than 6 months notice.

Comment: This section of the TMG is again drafted as if a legal document. It would be improved through including an undertaking to provide as much notice as possible for minor possessions, above a minimum 2 days.

The NSW major possessions approval process is highly structured and includes the involvement of senior executives of freight, passenger and track organisations. This is a reflection of traffic density and the high impact of major possessions on passenger services and political significance of these. There is far less complexity on the WestNet system and fewer problems of interaction between freight and passenger services, so there is less time required to negotiate fair or acceptable outcomes. The six month period is considered reasonable.

Section 6.1.6 Operator's Obligations

(i) GSR suggests some tests on the commercial justification for WestNet to impose new communications systems on operators, in view of the cost imposts they might involve.

Comment: This is a complex area and the concern over cost is valid to a degree. There are some sections of the WestNet network where improved communication systems would have a beneficial impact on operators' costs, but the capital costs involved might be prohibitive to WestNet. Similarly, introduction of new systems by WestNet might involve disproportionately high cost impacts on operators.

The TMG provides for WestNet to give reasonable notice and consult with operators on replacement or upgrade of communications equipment. It would be impractical to go much further than this in the TMG, given the range of future technological outcomes. The GSR suggestion, however, is not supported, as operators should not have any right to view commercial business cases developed by an independent track manager in support of its business.

Operators will also have the ability under their access agreements to negotiate improvements to communications capability on certain lines, particularly where they are in a position to contribute to the capital cost (for instance, as the dominant, or sole, user of such a track section). In this circumstance, however, the Authority may seek the power to review any proposed change to such a system to the extent that it might hinder competition by requiring other potential operators to upgrade loco cab equipment in order to use that section at a future time.

5 TRAIN PATH POLICY

5.1 General

Most submissions reflect a pre-occupation with the potential for an integrated rail track manager to use train path allocation and variation powers against the interests of third party access seekers. Train paths are a unique form of asset in that they are intangible, consisting of an access or usage right to a length or series of lengths of track from one to another in a window of time. As such, there is a plenty of room for debate over the 'ownership' of a path, and the rights that such ownership entails for all parties - track manager, train controller and operator. These issues are particularly important where one operator has a perceived special relationship with the track manager and train controller, but also have some importance where the track manager is independent.

5.2 Specific

a) ARTC

ARTC generally supports WestNet's undertakings and approach in the TPP and its overall consistency with the ARTC approach. It notes that some greater prescription might be warranted in view of the integration between WestNet and AWR. It makes, however, some specific suggestions for alteration.

Section 2.1 Master Train Plan

(i) ARTC suggests that WestNet post its Master Control Diagram and other capacity information on a website to assist access seekers in making applications.

Comment: Where WestNet is part of an integrated rail company it might need some encouragement to make its access application processes as welcoming as possible. If it were an independent track manager, it would presumably make its own decisions on how to publicise its activities and attract new business. The Authority has apparently required WestNet to include capacity information in its Information Pack, which would appear to meet the overall ARTC objective. The publication of the Master Control Diagram and other information on the website is not considered essential.

Section 2.2 Allocation of Train paths

(i) ARTC is concerned about the potential for an integrated WestNet to discriminate between operators in the allocation, removal and review of train paths. It recommends avoiding this by developing a highly prescriptive and transparent set of procedures for dealing with competing interests, and extensive use of KPI reporting.

Comment: The Authority should resist the temptation to request WestNet to develop a more prescriptive set of principles and procedures in regard to train path allocation. The issue goes to the heart of the original decision by government to sell WestRail to an integrated rail company. It was implicitly recognised that there was value in this integration, despite the establishment of an access regime that would welcome other

operators. It is unreasonable to require that detailed operational activity such as train pathing and allocation processes should be scrutinised to eliminate the theoretical possibility that the aligned operator is granted some unfair advantage over an access seeker.

WestNet has a clear obligation to provide fair access to all parties, enshrined in a range of statutory, legal, contractual and policy documents. It is unlikely that any more prescriptive documents on day to day operational activity would be useful or productive. Train pathing is very complex and equity between different types of train service under different types of circumstances is potentially endlessly debatable. The net result of any comprehensively prescriptive procedures would probably be a result which favoured third parties against the integrated party, which was surely not the intent of either the sellers or the buyers in the original sale process.

Section 2.6 Removal of a train path

(i) ARTC suggests WestNet should be definitive as to its processes for removing an under-utilised non-fixed schedule train path. ARTC handles these issues by exception through negotiation.

Comment: This comment presumably refers to Conditional Train Paths. WestNet intends its policy under Section 2.6 to pertain to all Train Paths the same way (the definition of Train Path includes Conditional Paths). There does not appear to be a case to specify a different process for Conditional Paths to that in place for fixed schedule paths.

(ii) ARTC wonders whether the application of Sections 2.5 and 2.6 together might corrupt the process for review of a train path.

Comment: The concern is presumably that there might be some overlap between the two processes that could be exploited by WestNet in support of some intention to discriminate between operators. ARTC appears to be taking a 'Devil's Advocate' role here. There is no doubt that if WestNet was determined to take action against one operator in favour of another, it could do so by exploiting gaps in these policy documents. To avoid this, they would all need to be tightly drafted by independent lawyers. They are, however, intended to be policy statements rather than contractually binding undertakings covering all possible circumstances.

It is considered that the ARTC's concern need not be acted upon in this instance.

Section 4 Rights of an operator to sell a train path

(i) ARTC believes operators should not be prevented from on-selling the rights to use paths. It argues that this might reduce barriers to entry and maximum network utilisation.

Comment: The ARTC position reflects its role as a publicly owned track provider. In most cases WestNet will share its objective of maximising traffic and reducing barriers to entry. However WestNet should have the power to decide whether it wants to allow on-selling, particularly if it feels that it is missing revenue-generating opportunities by allowing operators to trade in paths. WestNet also has a legitimate right to determine and know the party using its 'assets'.

WestNet may in future choose to make it easier for paths to be traded as competition increases, but it will presumably do so in such a way as to ensure that any access value that becomes available through the inability of an operator to use a path, comes to it rather than that operator.

In summary, the decision re on-selling paths is considered to be a legitimate business decision to be made from time to time by WestNet.

Section 5 Competition for the same train path

(i) ARTC raises some complex issues regarding the risks of 'capacity reservation' and the overall 'value' offered by competing path applications. It notes that it has not yet found or identified the provisions that would adequately protect against these risks. It suggests that the 'first come, first served' undertaking in Section 5 is inadequate to address the complexities of the situation.

Comment: The most obvious response to these issues is that they should be left largely to the discretion of the access provider. In the absence of evidence to the contrary, WestNet must be given the benefit of any doubt as to its ability not to allow capacity to be unfairly reserved by one operator, without using it, at the expense of another which would otherwise be using it.

WestNet should be allowed to make its own decisions as to which potential users of a path offer the best commercial return to it, and the best overall utilisation of the network. The constraints of the Code and the individual access agreements should ensure that blatantly unfair dealings in respect of existing paths by WestNet would come to the attention of the Authority and would be subject to dispute settling procedures.

Where two parties seek access to a train path for the purpose of seeking new business (ie a new mining product) it will be reasonable for WestNet to allocate the path (or two very similar paths) theoretically to each applicant, on the explicit assumption that only one applicant will actually win the customer's business. In this case, WestNet should not discriminate between the two applicants through the offering of different access charges (unless this can be justified on the basis of the terms of the access applications). In other words, WestNet's path approval or access price should not become a factor in the customer's choice between two or more operators seeking to win his freight contracts.

It may be deemed necessary to amend the Code so as to accommodate dispute settling in relation to discrimination between applicants in this particular circumstance.

In relation to the 'first come, first served' principle, it is agreed that this is too simplistic to be a comprehensive means of distinguishing between multiple applications for a single path. It does, however, reflect an intention to be non-discriminatory, but still provides WestNet with the room to select the most commercially appropriate operator for a path in relation to the 'establishment of a requirement' for the path.

While this is considered a reasonable position for WestNet to take, some alteration to the wording of Section 2.2.1 (Guidelines for assessing whether a request is warranted for Train Path) is warranted. This section currently places the onus on an Operator to demonstrate a contractual commitment to operate trains. This should be replaced with some words regarding 'contractual evidence'; since it would be difficult for an operator to provide signed contracts before train paths have been obtained.

b) Pacific National

Section 2.1 Allocation of Train Paths

(i) PN suggests that applicants should not be required to demonstrate contractual evidence of need in their access applications. It states that WestNet should not need to review Operator's freight contracts, as there is sufficient protection against under-utilisation of paths in other areas of the TPP.

Comment: PN suggests that WestNet is protected from 'spurious or non-genuine requests for train paths' by other provisions in the TPP. However, this is not the core reason for the requirement for contractual evidence. The most likely need for this requirement is where two operators are seeking the path to serve the same new business need. It is reasonable for WestNet to ensure that it offers the path to the operator who wins the business, rather than the one who asks first and then takes the path provided to its prospective customer as a means of winning the contract.

As per the comment in the previous section, the use of the term 'contractual evidence' should alleviate concerns over this provision.

Section 2.2.1 – Conditional Paths

(i) PN uses its review of this section to introduce the concept of a new path category, "Traffic Specific Capacity". In this category, conditional paths are reserved for a particular type of service, usually bulk traffic, and allocated between particular operators according to network efficiency on a daily basis. PN has been operating under such a system in its NSW coal networks since competitors began winning coal haulage contracts. The system allows operators with a small percentage of a large bulk haulage task, involving several different loading points, eg mines, to gain access to reasonable paths which would otherwise be unavailable to them.

The system was negotiated with strong support from RIC, the then track manager, which had an interest in maximising overall track capacity, to avoid expensive track capacity enhancement projects.

Comment: Introduction of this path classification would remove one potential barrier for competitors seeking access to the grain and some minerals tasks in Western Australia. Where conditional paths are currently allocated to AWR for these traffics, a new operator, seeking a small percentage of a customer's business, would have difficulty gaining efficient access to these or similar paths under the current proposed TPP provisions. A Traffic Specific path as proposed by PN would be made available to any new operator entering the market with, for instance a single train. This path might be different on each day, according to the best operational fit between the new train and the existing trains serving the customer or sector.

For instance, in the export grain business, there may be 6 daily paths in and out of a regional port that are generally used by AWR trains when demand arises. Currently, four AWR trains may be operating in a port zone and they would use the paths most suited to their cycle times to the branchline loading points and back to the main line. Loading points and cycle times may differ each day, but all paths are available each day to be used if required.

The new operator has a single train and only required one path per day. However, the train will be serving different loading points each day and will likely require a different path on each occasion. There will often be a conflict between the new operator and the incumbent operating the majority of the trains for the most suitable paths on a given day. If a Traffic Specific path category existed, the train controller could arbitrate on path allocation issues unless the operators themselves can agree on protocols for co-ordinating their activities in favour of overall efficiency and customer service. Either way, the paths would be understood as 'belonging' to the export grain sector as a whole, rather than to any single operator.

Section 2.2.1 does not appear to contemplate the eventuality of a bulk freight customer deciding to divide an existing task between two or more operators to stimulate price or service improvements. Use of a Traffic Specific Capacity classification would certainly be an improvement and would definitely reduce current barriers to entry into these markets. The growth in demand for minerals haulage over the next few years provides some impetus for this classification to be provided for in the TPP.

It is considered that WestNet should be asked to reorganise the TPP to display a willingness to reclassify existing Conditional Paths for certain bulk traffics according to the Traffic Specific Capacity classification (or similar). Ideally some differentiation between different path types should be made throughout the TPP, to recognise the differences between the pathing needs of operators hauling different products on different parts of the network.

Section 2.4 Permanent variations to scheduled train paths by agreement

(i) PN suggests that sections 2.4 and 2.9 cover similar provisions. It also notes that the reasonable grounds quoted as examples for withholding consent to variation requests pertain to WestNet rather than an operator.

Comment: In drafting the TPP, the two sections have perhaps been inadvertently retained, when one should have been deleted. The provisions of 2.9 would appear to make sense as an introduction to 2.4, subject to an edit for duplication.

Contrary to PN's suggestion, Section 2.4 appears to cover the circumstance where either party can initiate a request for permanent variation. Unavoidably, however, ultimate authority on these issues will rest with WestNet rather than the operator.

Section 2.6 Removal of a train path

(i) PN is concerned at the statement in the last paragraph that a path may be removed from an operator if the underlying business is lost. PN makes the point that this cannot be applied to trains which serve multiple customers.

Comment: PN is correct. The section should be reorganised to separately deal with path removal arising from different situations (see comments in the GSR submission from page 24). The provision should only apply to paths where the train is wholly dedicated to the carriage of business which has been, or is to be, lost to another operator. The use of the word 'wholly' here is significant. If the incumbent operator also uses that train service to carry a small amount of other traffic across a section, it should be able to retain the path until it can make alternative arrangements for that traffic. This could cause some difficulty for the new operator and the customer, but use of a slightly different path in the interim would usually be available.

Section 7 Priority of documents

(i) PN wonders whether there should be any overlap between TPP, TMG and Access Agreements. Documents should be drafted to minimise overlap and that Access Agreements should reference policy documents rather than seek to duplicate their provisions.

Comment: Legally it is reasonable and practical for WestNet to state an order of preference between documents. PN is also reasonable in suggesting that overlap be minimised and that access agreements should refer to provisions of policy documents (although policy documents are currently still in evolution). It should be noted that PN does not question the priority hierarchy provided by WestNet which places the policy documents above the Access Agreements.

The TPP is the more explicit of the two Instruments and should not be limited or constrained by an interpretation of a broader undertaking or intention as outlined in the TMG. It should therefore take precedence over the TMG as is indicated in Section 7. Access Agreements should be negotiated within the framework of the regulatory regime and these Instruments. It is therefore appropriate that any conflict between the documents should be resolved in the way provided by Section 7. No change to the section is recommended.

c) Alcoa

Definitions

(i) Alcoa states that the definition of a Train Path should include reference to a Flexible Scheduled Train Path (Freight).

Comment: This is probably correct, although the context for the use of the term in the Alcoa Access Agreement(s) is unknown. WestNet should be asked to confirm the intent of the definition of Train Path.

d) Great Southern Railway

Section 2.2.1 Guidelines for assessing whether a request is warranted for a train path

(i) GSR shares the concern of other submitters over the 'first in first served' principle and the simplicity of the train path allocation process.

Comment: As per previous comments, the approach is simplistic. However, there is no benefit to be derived from imposing more prescriptive processes on WestNet in this area. WestNet should have the discretion to offer its paths to the operator which can provide the greatest overall benefit and commercial return, subject to its other undertakings and obligations under the Code.

(ii) GSR does not agree that WestNet should have the right to seek supporting information from access applicants seeking *new or amended paths*. Passenger train operators in particular may not be able to provide this information.

Comment: In general it reasonable for WestNet to seek supporting information from applicants seeking new paths. However the provision in Section 2.2.1 refers to “new or amended” train paths. It would seem inappropriate to require this information from access applicants merely seeking to ‘amend’ a path, particularly as this is catered for under Section 2.9, without the need for supporting documentation.

The section would be more acceptable if the words “or amended” were removed. Deletion of the criteria as recommended by GSR is not supported.

Section 2.2.2 Process for negotiating new train paths prior to an access agreement

(i) GSR notes that WestNet proposes removing paths from an operator under another agreement where that agreement will be superseded.

Comment: The section is unclear on intent, and on the type of ‘agreement’ referred to. Clearly it is not another Access Agreement. This may be a reference to the principle espoused in Section 2.6 Removal of a Train Path. WestNet should be asked to clarify the intent of the section. The ability of WestNet to remove a path despite an access agreement being on foot is also interesting. This is provided for by the hierarchy of documents, with policy documents taking precedence over access agreements.

Again, WestNet should not be seen to have the power to assist an operator in winning business contracts through the allocation or removal of train paths.

There is some confusion engendered in relation to transfer of paths where a freight haulage contract is to be transferred from one operator to another. The issue is touched on in Section 2.2.1, (i), Section 2.2.2 (iv) and Section 2.6 (para 5) and needs to be clarified and expanded:

- The provision in Section 2.2.1 should be clarified to ensure that this section pertains to the nature of evidence that operators can be asked provide to support for new train path applications, rather than circumstances where customer freight contracts are being switched between operators.
- Section 2.2.2 (iv) should be deleted
- Section 2.6 should be separated into two parts, the first dealing with removal of train paths due to under-utilisation, and the second dealing with removal of train paths due to transfer of a contract between operators. In this second part, WestNet should differentiate between
 - train paths used by single-customer trains,
 - those where a mixed use train loses a dominant or substantial customer to a new operator, who then applies for a path;
 - those where a mixed train loses a small customer or volume

Section 2.5 Repairs, maintenance and upgrading of the network

(i) GSR notes the duplication of this section with the TMG and restates its comments.

Section 2.6 Removal of a train path

(i) GSR suggests that an operator who loses a contract underpinning a path may be seeking to replace that with another contract for the same service. It also notes that the operator owns the path, rather than the customer.

Comment: The term 'loses a contract' should be understood to mean 'ceases operating trains for a customer' or similar. It is possible for a contract to expire and not be renewed for a period while negotiations continue. This should not be the trigger for WestNet to transfer paths to another operator. This is an important issue.

GSR also raises the suggestion that the path belongs to the operator rather than the operator's customer. The path actually 'belongs' to the track manager, and it is that entity which should have the prerogative of determining whether it is used in the service of an operator or his customer. In the context of this paragraph, where the train is serving a single customer, WestNet should have the right to transfer the path between operators, subject to the limits outlined in the comments on the other submissions in this section.

Section 2.8 Cancellation of services using train paths

(i) GSR highlights a drafting error.

Comment: Agreed – "or" should replace "and".

Section 2.9 Variations to existing train paths or additional paths

(i) GSR is reinforcing the statement by WestNet in support of paths granted under an access agreement.

Comment: The intent of GSR's point is to highlight that WestNet elsewhere gives itself considerable power to remove or vary paths granted under access agreements. No change to this section is recommended.

Section 5 Competition for the same train path

GSR makes the point here that it made earlier regarding the inadequacy of the 'first in, first served' principle.

Comment: This issue has been addressed earlier in the report.

6 OBSERVATIONS – ARG SALE ANNOUNCEMENT

Since the commencement of the Review, and the commissioning of this paper, an announcement regarding the proposed sale and break-up of ARG has been made. Queensland Rail is to acquire the 'above-rail' assets, while Babcock & Brown will purchase the track and infrastructure (subject to competition approvals etc). This change of ownership has several dimensions that could have impacts of interest to regulators and government policy setters as well as freight customers and other rail operators. These comments are speculative only and have no status, but may be useful for the Authority's assessment of whether the scope and content of the Instruments as drafted by an integrated ARG/WestNet will still be relevant and complete in respect of a newly dis-integrated rail system for Western Australia.

The sale would result in the first independent private sector ownership (or long term lease) of a state rail network in Australia. While WestNet was a private company, it was jointly owned with an incumbent train operator and retained many of the synergies and joint interests of its predecessor, WestRail. As an independent company, perhaps run as a subsidiary of a major international infrastructure manager, it could exhibit a different set of behaviours over time, particularly when it faces capital upgrade needs, and in its relationships with government and its customers.

While WestNet followed commercial imperatives, it ultimately reported to a Chief Executive and Board which also had control over the 'above-rail' arm of the business. This meant, for instance, that major capital decisions could be made in the knowledge of business cases involving both arms. Costs accruing to one arm could be balanced in some ways through benefits accruing to the other. The only link between the two businesses now will be via an access agreement, struck at a point of time (probably late 2005 or earlier this year) and subject to renegotiation from time to time.

There are many circumstances where conflict between the two parties over capital projects, access pricing, operational practices etc can be foreseen. Conversely, the concerns of most of the submission reviewed in this paper will largely be allayed by the new independence of the track manager, unless the access agreement struck between the two parties were to somehow enshrine some sort of preferential relationship (entered into for the purposes of facilitating the sale), which is theoretically possible, particularly if it is negotiated outside the Code.

From the perspective of government, the outcome of the sale will be different to that expected when WestRail was first privatised as an integrated whole. The role of government in providing special contributions for certain projects may well be more complex since the track manager is now one step removed from the original party to the sale, and is a specialist international infrastructure company with assets in many different jurisdictions. Government will also be constrained in its relationship with the new owner of above-rail assets, a state-owned corporation from another state.

Rail operators will also be interested in the new track manager's attitude towards existing access agreements and other contracts or understandings on foot with WestNet. Any uncertainty in these arrangements may well be subject to re-interpretation by the new entity inheriting them. Future access prices might also be subject to increase, within the scope allowable under the regime, in order to generate a return on the purchase price of the business.

Overall, the impacts of the sale and break-up of ARG are likely to be first felt in the policy departments of the state government and by access-seeking rail operators and their customers. Impacts for the regulators will probably emerge more slowly over time.