

## **TRAIN PATH POLICY APPLY TO WESTNET RAIL ARTC SUBMISSION**

The Acting WA Independent Rail Access Regulator (“Regulator”) has requested submissions from interested parties with regard to the draft determination made in relation to WestNet’s (“WNR”) Train Path Policy (“TPP”) required under the Railways (Access) Code 2000 (“Code”).

A key issue for ARTC with respect to the WestNet’s TPP is that it covers activities occurring on the WA rail network and associated infrastructure currently leased from the WA Government by WNR, which includes part of the interstate rail network between West Kalgoorlie and Perth. Management of access in WA, for interstate operators, of services between the eastern states and WA will be undertaken according to the TPP, as well as under ARTC’s Access Undertaking (accepted by the Australian Competition and Consumer Council (ACCC) in May 2002) for any movement east of Kalgoorlie. A copy of ARTC’s Access Undertaking can be located at the ACCC’s website [www.accc.gov.au](http://www.accc.gov.au).

In accordance with an Inter-Governmental Agreement made in 1997 which brought about the incorporation of ARTC as the track manager of the interstate rail network, ARTC developed and executed with the Western Australian Government Railways Commission (Westrail) which was the owner of that part of the interstate rail network in WA, a wholesale agreement providing ARTC with the exclusive right to sell access for interstate train operations to that network. The agreement was developed in accordance with the principles for access now incorporated in ARTC’s Access Undertaking. The agreement provides for the purchaser of the Westrail rail freight network (Australian Railroad Group) to assume Westrail’s role following the sale.

ARTC has previously made a submission<sup>1</sup> to the Regulator in relation to the TPP in which it stated that its main concern is to ensure reasonable consistency between the relevant aspects of the TPP and the terms and conditions of the wholesale agreement and, therefore, the principles endorsed by the ACCC in ARTC’s Access Undertaking. Once again, ARTC seeks the Regulator’s consideration of the issue of consistency of conditions of access to the interstate rail network for interstate users in its deliberations.

Without diminishing the need for consistency, ARTC recognizes that the Regulator may see the need for greater prescription in some of the provisions of

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<sup>1</sup> Westnet Submissions to the Acting Rail Access Regulator, ARTC Submission, 24 Jan 2002

the TPP in order to address issues relating to WNR's vertical integration with an above rail operator.

ARTC has previously stated that, by and large, WestNet's approach to establishing and allocating train path entitlements, and managing the utilization and variation of those entitlements is largely consistent with ARTC's approach. ARTC approach is detailed in the provisions of ARTC's Indicative Access Agreement (IAA), forming part of ARTC's Access Undertaking, as well as the Undertaking itself.

ARTC notes from the Draft Determination that the Regulator now requires a number of amendments to be made to the TPP. These amendments have arisen based on the Regulators assessment of submissions made by interested parties. Rather than re-state its previous views on these aspects, ARTC will focus its comments on the required amendments and how this may impact on the consistency between the TPP and ARTC's own approach to managing network capacity.

The submission will follow the order of issues covered in the Draft Determination.

### **Application of the TPP to operators outside the regime**

The Regulator requires that the TPP incorporate confirmation that it is the intent that the TPP apply to all users regardless of whether applications are made inside or out of the Code. There is no doubt that certain aspects of the TPP, which primarily relate to how the interaction between user entitlements are handled, should be applied to all users from a pragmatic sense. These might include treatment of competing requests as an example.

In the case of a vertically separated access provider, it is ARTC's view that the access seeker and provider should be free to negotiate a wide range of issues outside of an access regime if it wishes to do so. For example, it may be that an access provider may want the ability to on-sell paths to other parties, and be prepared to pay for that right. The two parties could then negotiate any extra charge for that right. Of course, any other party seeking an agreement with the same terms and conditions would be free to do so. To assist, the negotiated terms and conditions would be made public.

Where the access provider is integrated, it would be difficult to prevent favourable treatment being given to a related entity where such elements of the TPP could be negotiated outside of the Code, unless there is complete

transparency surrounding the negotiation. As it is the case that WNR intends to apply the TPP to all access agreements negotiated outside of the case, the issue of transparency and flexibility (which would be ARTC approach) is mute. In this case, a statement to confirm the intent should be included in the TPP.

### **Terms and definitions.**

ARTC notes that, following original submissions calling for clarity and consistency, WNR has redefined types of paths from:

- Conditional – entitlement to use the network between agreed locations at times not in conflict with scheduled paths; can be seasonal or variable.
- Scheduled – agreed network entry/exit locations and times, may be published and varied in accordance with an access agreement.
- Unscheduled – provided for, in the master train plan, to provide for a future entitlement within 6 months, or to provide for seasonal or intermittent usage.

to:

#### Customer types

- Passenger trains – fixed entry/exit times/locations and fixed intervals en-route for passenger pickup.
- Fixed freight services – fixed entry/exit time on a regular basis.
- Bulk operator fixed services – fixed entry/exit on a regular basis.
- Bulk operator flexible services – fixed entitlement to a number of train paths representing desired capacity, but high flexibility subject to other rights

#### Train Path Types

- Scheduled (Passenger) – fixed entry/exit, fixed intervals in between
- Scheduled (Freight) – fixed entry/exit
- Flexible Scheduled (Freight) – fixed entry/exit, able to be changed at short notice provided Scheduled (Passenger or Freight) are not effected
- Conditional – included on master train plan, available to operator to whom they are reserved if required, otherwise can be re-allocated on a temporary basis, caters for optional destinations, reserves/surges, seasonal/intermittent requirements
- Reserved – will become a path in one of the defined categories and should only be reserved based on reasonable contractual commitments.

The Regulator has indicated that access seekers were provided with a copy of the revised definitions by WNR, and generally agreed to the new definitions. ARTC notes that a letter from WNR to the Regulator in April 2002 detailed the re-definition. ARTC was not aware of the letter at the time or of any agreement being expected from access seekers or other participants. As such, ARTC makes its initial comments on these definitions in this submission.

ARTC's comments are as follows:

- ARTC would expect most of the paths that might eventuate under its wholesale agreement to fall into the "passenger" and "fixed freight services" customer types, and "scheduled (passenger)" and "scheduled (freight)" train path types.
- ARTC is not sure as to why there is a need to 'compartmentalize' customer and path types to such a level of detail. Whilst ARTC understands that the traffic mix on WNR's territory can be more varied than that on ARTC's network, ARTC would see no reason why passenger trains couldn't operate using a scheduled (freight) path type, or a freight service mightn't require a scheduled (passenger) path type. Certainly, ARTC would not wish to preclude such possibilities on its own network.
- ARTC finds it difficult to identify the difference between a scheduled path type and a flexible scheduled path type. ARTC would consider it reasonable that an operator using a scheduled path may want to seek variation at reasonably short notice (eg requested alteration to scheduled departure). Normally, ARTC would meet this requirement wherever possible. Even a permanent variation to such a path could be effected at relatively short notice.
- Given the detail prescribed, ARTC would suggest that even further detail might be required to determine how interactions between paths type might occur. (eg even given a first come – first serve approach to dealing with competing requirements, would a request for a fixed scheduled path have the same standing as a conditional or reserved path?) ARTC would be concerned if the capacity available to it under the wholesale agreement significant diminished as a result of the appearance of a number of conditional or reserved paths on the interstate mainline.

### **Allocation and Cancellation of Train Paths.**

WNR indicates in the TPP that it will manage the TPP in such a way as to maximize use of the network. ARTC's notes the Regulator's requirement that, in doing so, WNR will need to ensure that its allocation of train paths are undertaken in a manner that does not unfairly discriminate between operators.

Where the access provider is vertically integrated, the process involved with allocation and management of capacity, as well as the day-to-day management of services provides the owner with the most significant opportunity to hinder third party access in the least detectable way. ARTC is of the view that the most effective means of limiting undesirable activities in this area is:

- Prescriptive process for dealing with competing interests
- A high degree of transparency
- Extensive use of comparative performance measurement.

ARTC notes that the Regulator has taken steps to make processes more prescriptive and has reserved the right to develop performance indicators with WNR. ARTC still considers that the policy amendments proposed by the Regulator do not go far enough in the areas of providing capacity information to seekers, or in providing for consultation with seekers in the allocation process.

Specific comments are:

- ARTC supports the Regulator's requirement that greater detail is required as to how the allocation of train paths is to occur.
- With the introduction of a wider array of train paths, it would be appropriate in the TPP to specify how it intends to deal with the issue of under-utilisation with respect to non-fixed schedule paths. Applicable provisions in ARTC's Indicative Access Agreement deal with scheduled train paths only, and so leave the treatment of adhoc services for individual negotiation. However, ARTC would publish the outcome of such negotiations and the negotiated terms would be available for other parties.
- In relation to the 'three month history' for assessing whether a train path is being under-utilised, ARTC is not under the impression that WNR proposes to apply this in assessing under-utilisation. ARTC considers that the 'three month history' requirement only relates to a review of paths where actual train performance is measured against the schedule, as is the case in ARTC's Indicative Access Agreement.

- Regarding resumption of train paths, ARTC agrees with the Regulator requirement that WNR's entitlement to cancel a path should only apply if there is a reasonable indication that the train path is sought and will be allocated to another operator. In a vertically separated environment, the provider would have no commercial incentive to resume a path unless there was another demand. A vertically integrated provider would have other incentives.
- With regard to the treatment of competing claims to a path, where neither party has executed an agreement, ARTC has previously stated that its approach is to advise parties concerned. ARTC would have the right to finalise an agreement with the applicant with whom ARTC can agree terms and conditions most favourable to it. Such a decision would ordinarily be based on a 'highest NPV' test, but it should be noted that the test is not limited to price alone. The test would incorporate the relative risk and opportunity profile of the respective proposals. ARTC's approach has been accepted by the ACCC.

ARTC considers the 'first come – first serve' approach as proposed, whilst offering a degree of inherent transparency and fairness, does not adequately recognize the reasonable commercial interests of the access provider, nor does it represent what might occur in normal competitive business circumstances. As long as adequate controls are in place to ensure that a vertically integrated provider cannot unreasonably delay negotiations, the provider should have the opportunity to accept a more favourable opportunity, if such an opportunity presents before agreement with the original, less favourable proposal occurs. ARTC would consider this to be normal commercial practice. Given the wide array of proposals (path types) that have been specified, it would appear unreasonable that the access provider might have to accept a proposal of a 6 month, conditional path instead of a ten year fixed path commitment merely because the conditional path proposal might have been received (but not agreed) say one week earlier.

On the other hand, where the access provider is vertically integrated, the evaluation process will need adequate prescription and transparency and non-discriminatory.

### **Temporary and permanent variations.**

ARTC largely supports the Regulator's position with regard to issues relating to temporary and permanent variations to paths. ARTC has addressed issues relating to the treatment of paths around maintenance activities in its submission relating to the Train Management Guidelines.

### **Approach to be taken in the event of capacity constraint.**

ARTC notes that the key issue relates to the requirement, under s10 of the Code, for the access provider to have Regulator approval, prior to negotiating, where a request for a train path may preclude other entities from gaining access to that infrastructure.

ARTC has previously commented on this requirement in its submission to the Regulator relating to the s10 Determination covering the Kalgoorlie – Esperance rail line (February 2002).

### **On-selling of train paths.**

ARTC has previously indicated that it saw no reason why WNR could not provide for the selling or trading of paths. ARTC's Indicative Access Agreement forming part of the Access Undertaking specifically provides for a path to be on-sold providing the related 'trade agreement' satisfies certain criteria.

The Regulator has taken a position that any on selling of train paths would not be permitted on the basis that it would compromise WNR's ability to price discriminate as permitted under Clause 13, Schedule 4 of the Code. ARTC takes this to mean that access pricing may be discriminated where users are operating in different end markets.

The Regulator prescribes one exception to this being the arrangement between WNR and ARTC as set out under the WAGR/ ARTC Infrastructure Owners Agreement. ARTC takes this exception to represent the on selling of train paths to interstate operators made available to it by WNR under the agreement.

ARTC finds the position taken by the Regulator on the issue of on selling of train paths very disappointing. As an interstate train path is essentially a singular product between origin and destination (and possibly even beyond), an operator with an interstate path which happens to originate or terminate on the interstate

mainline in WA appears to be effectively precluded from on-selling that path as provided for under ARTC's Access Undertaking as well as access regimes in NSW and Queensland, because a relatively minor portion of the journey is thought to be subject to the WA access regime.

During the regulatory assessment of ARTC's Access Undertaking, ARTC was not aware of any significant concerns raised by participants to the proposal to allow trading of capacity between network users. As such, ARTC's proposed approach was accepted without alteration by the ACCC. Further, whilst there is no circumstance of price discrimination in ARTC's current business environment (users with similar service characteristics are charged the same access price regardless of end market served), nor does ARTC intend to seek to price discriminate, ARTC's Access Undertaking provides for ARTC to differentiate between applicants where services characteristics are different, or the applicants are operating in different end markets<sup>2</sup>. Apart from perhaps a slightly wider variation in types of traffic on the WA network (which is muted on the interstate mainline), ARTC does not see the situation with regard to the network in WA as being significantly different.

ARTC also does not recall any significant objection to the concept of capacity transfer during the regulatory assessments of rail access regimes in NSW or Queensland. As such, to ARTC's knowledge, both regimes incorporate provisions (or separate policy) relating to the selling of access rights between operators. Specifically, the Queensland Competition Authority ("QCA") made the following comments in its draft decision on QR's Access Undertaking<sup>3</sup> regarding a secondary market in access rights, in response to QR raising a number of practical difficulties, one of which related to the limiting of differential pricing.

'The QCA considers that the establishment of a market in access rights is important to facilitate entry into the above-rail market because it enables access seeker's potential future liability to be reduced.'

'The QCA accepts the difficulties that QR has raised in relation to capacity transfer. However, the promotion of secondary trading of capacity entitlements should have beneficial implications for the efficient allocation of capacity.<sup>4</sup> It

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<sup>2</sup> Refer clause 4.3(b) of ARTC's Access Undertaking.

<sup>3</sup> Queensland Competition Authority, Draft Decision on QR's Draft Undertaking (December 2000), Volume 2, p296-298.

<sup>4</sup> Klein, M and Gray, Philip (1997) 'Competition in Network Industries – Where and How to Introduce It', in *Public Policy for the Private Sector*, argue that if rights to use railway tracks are defined and allocated to multiple parties, secondary trading should yield the optimal set of paths through the network (ie the set that maximizes welfare given producers and consumers valuations of the service).



could complement the proposed ‘unbundling’<sup>5</sup> of new access agreements into access rights and haulage components where an end-user chooses, which also provides scope for more flexible management of rail capacity from the perspective both of QR and its customers.’

Finally, ARTC is not convinced that the establishment of secondary trading will compromise WNR’s ability to price discriminate. The existence of a secondary market will not prevent WNR from being able to price discriminate; it can only impact on the outcome of market transactions, by allowing true market forces to determine the price paid for a path and would reflect the value that the party places on that path. ARTC is of the view that this reflects an efficient competitive market outcome (as described by the QCA). ARTC has always interpreted the relevant part of Clause 13, Schedule 4 of the Code,

‘(c) prices should reflect as far as is reasonable practicable –

(ii) the relevant market conditions;’

as intending to achieve this outcome.

### **Effectiveness of train paths and the TPP.**

This issue relates to the discretion of WNR to review the effectiveness of a train path on the basis of a ‘three month history’ of actual performance. If the review shows a material difference between actual and scheduled transit then the parties would enter good faith negotiations to amend the scheduled path, without any binding obligations on either party.

ARTC has indicated in previous submissions that this provision is similar to that which is provided for in ARTC’s Indicative Access Agreement.

In undertaking such a review, it is ARTC’s intention to establish, as best as possible, what the root cause of the difference in actual performance was, and whether it resulted from the operator’s inability to achieve the running times it had contracted for (eg by reducing above rail assets allocated to the task to minimize cost) or whether the track condition (eg excessive speed restrictions) rendered the correctly configured incapable of maintain its schedule.

In the circumstance where track condition causes the difference, ARTC would not seek to amend the scheduled path to the extent that this was the case.

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<sup>5</sup> ‘Unbundling’ is discussed in Chapter 4 of the QCA Draft Decision.

Further, ARTC has committed in its undertaking that it will maintain the network 'in a condition which is fit for an operator's purpose to use the network to provide rail transport services having regard to the terms of the access agreements.'<sup>6</sup>

Accepting the above, ARTC clearly supports the ability of the access provider to review scheduled paths in order to maximize efficient utilization of the network. Where the access provider is vertically integrated, however, ARTC can envisage opportunities from such a review for the provider to favour related parties over third parties. As such, ARTC would support the Regulator's requirement, that the review process be more prescriptive and detailed in the TPP.

ARTC comments in relation to the issue of a review of the TPP have been provided in ARTC's submission relating to the Train Management Guidelines.

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<sup>6</sup> ARTC Access Undertaking, Clause 8.1.

