



Western Australian rail access regime

Submission by Worsley Alumina in response to WestNet's proposed
Train Path Policy

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1 Introduction

The purpose of this submission is for Worsley Alumina (“Worsley”) to respond to the draft Train Path Policy prepared by WestNet Rail Pty Ltd (“WestNet”) pursuant to subsections 44(2)(a) and (b) of the Railways Access Code 2000 (the “Code”).

Worsley has examined international and Australian experience relating to rail access regimes, and considers that this experience suggests that documents such as the Train Path Policy (the Policy) and Train Management Guidelines are of critical importance to access seekers and third party operators.

They essentially define the rights of access seekers in a commercial sense prior to, during, and after the negotiation process for access to a track owner’s infrastructure. The documents are therefore critical for providing confidence to the market for the provision of above-rail services.

In turn, this requires that there be a high level of certainty, transparency and accountability in the documents outlining the manner in which rights of access are affected by the track owner’s policies regarding allocation of train paths and the real time management of services.

To the extent that there is ambiguity in the text of these documents, it must be expected that, in practice, a provider of track services with close affiliations (for example, through common ownership with an above-rail provider by a parent company) will be perceived as being able to exploit that ambiguity for the benefit of its above-rail associates. Accordingly, the efficacy of the documents will turn on a track owner establishing detailed, consistent and enforceable rules that are clear to all parties.

As Worsley has noted in its submission on WestNet’s Segregation Arrangements, while WestNet does not perform functions other than the provision of access to the rail infrastructure network in Western Australia, it belongs to a corporate group, the Australian Railroad Group (“ARG”), which does contain entities involved in the provision of above-rail services. In particular, Australian Western Railroad Holdings WA Pty Ltd (“AWR Holdings”), WestNet’s parent company, also owns Australian Western Railroad Pty Ltd (“AWR”), a company involved in freight operations in Western Australia. AWR Holdings is wholly owned by the Australian Railroad Group Pty Ltd (“ARG”). Furthermore, while there are no directors of WestNet who are also directors of AWR, one of WestNet’s directors is also a director of ARG. These management and ownership links create the potential for competition in the above-rail market to be compromised, either by anti-competitive conduct by firms in the ARG group, or because the market perceives that there is a risk of

anti-competitive conduct in the ARG group. The effectiveness of WestNet's proposed Train Path Policy needs to be assessed with a view to minimising these risks.

Note that Worsley regards itself as a potential operator and as such the term "operator" is used to include both operators and proponents.

Worsley's submission is structured as follows:

- section 2 responds to the proposals for allocation of train paths;
- section 3 responds to the proposals for temporary variation of train paths;
- section 4 responds to the proposals for permanent variation of train paths;
- section 5 responds to the proposals for repairs, maintenance and upgrading of WestNet's network;
- section 6 responds to the proposals for removal by WestNet of operators' train paths for under-utilisation;
- section 7 responds to the proposals for review Scheduled Train Paths allocated by WestNet;
- section 8 responds to the proposals for cancellation of services by operators allocated train paths;
- section 9 sets out Worsley's response to WestNet's proposed policy regarding information required for the allocation of train paths;
- section 10 responds to the proposal that operators should not be permitted to sell train paths allocated to them;
- section 11 sets out Worsley's response to WestNet's proposed method for resolving conflicts in the resolution of competing claims for train paths; and
- section 12 sets out a general comment in relation to the risk that the terms of access agreements could affect train paths.

2 Allocation of train paths

Clause 3.2 of WestNet's proposed Train Path Policy sets out the policy and procedure for allocation of train paths, including allocation of Scheduled and Unscheduled Train Paths

In Worsley's view, whilst clause 3.2 provides for the granting of Unscheduled Train Paths, the arrangements surrounding the allocation of these paths are unsatisfactory:

- for example, they appear to deal only with traffic of a seasonal nature, or in relation to locations to and from which services may operate on a variable, daily or less frequent basis. This suggests that the concept may be useful for grain traffics, but not for those required by major heavy haul operators such as Worsley. Accordingly:
 - it is critical that users of WestNet's track be able to maintain surge capacity, even though it is not used every day, providing they pay a cost reflective price for that capacity;
 - there must be provision for granting of Train Paths to provide sufficient certainty to access seekers and operators in their ability to gain an entitlement to the relevant capacity;
- furthermore, Worsley considers that if an operator is prepared to pay for additional capacity, it should not matter whether or not this capacity is consumed, provided that there is no hoarding of that capacity;
 - reduction in the risk of hoarding could be established through maintenance of a track record of raiing patterns, with clear probabilities being assigned to movements over the track;
- two categories of train path should be available to end users and operators:
 - steady state operations; and
 - surge capacity;
- the additional charge attributable to the provision for surge capacity should reflect the costs of providing it – the empirical work undertaken by the QCA suggests that the incremental cost of an additional path is likely to be in the vicinity of 5-10% of the stand alone cost of the access charge which would normally be attributable to the service;

- moreover, the concept of an “Unscheduled Train Path” is not terribly useful in any event, because they do not provide sufficient security. A proponent will not know or be able to predict how likely it is that path will become available - an Unscheduled Train Path may be displaced by a Scheduled Train Path. Moreover, WestNet should be obliged to ensure that Scheduled Train Paths do not displace Unscheduled Train Paths unless it is necessary to do so on account of capacity constraints.

Worsley also considers that the transparency of WestNet’s Master Control Diagrams is crucial, given WestNet’s integrated status within the ARG group. There is a risk that WestNet’s associates will essentially gain a “free option” on all other paths not already allocated. Accordingly, Worsley submits that it is necessary for there to be complete transparency in relation to:

- the allocation of train paths on the Master Control Diagrams;
- the allocation of train paths on the daily train plan;
- real time information on the movements on the network; and
- whether or not trains were run, and if so were they unhealthy.

In order to achieve this transparency, WestNet should be obliged to provide this information to operators or other interested parties on request (see also section 7 (1) (c) and (d) of the Code).

It is also important there be no uncertainty surrounding the conditions attaching to Unscheduled Train Paths, so that WestNet is unable to impose additional constraints that could make access rights far less attractive to above rail operators in practice.

Similarly, whilst Conditional Train Paths may be a useful concept in theory, they do not allow sufficient certainty to be useful in practice.

There is great uncertainty surrounding the conditions that would be applied to a Conditional Train Path and, in practice, it may be an empty entitlement. Accordingly, some standard conditions should form part of the policy relating to grants of Conditional Train Paths. If this does not occur, there is a danger that additional constraints could be applied to make Conditional Train Paths far less attractive to above rail operators in practice.

3 Temporary variations of train paths

Clause 3.3 of WestNet's Train Path Policy deals with the circumstances in which WestNet may temporarily vary an operator's train path. Worsley makes a number of comments about WestNet's policy regarding temporary variations of train paths:

- generally, there should be some obligation on WestNet to act in a way that minimises the overall disruption to all operators when train paths are varied;
- it is not clear what is meant by "similar safety requirements" in clause 3.3 (i) and what additional requirements to WestNet's Network Rules these may impose:
 - Worsley considers that the Network Rules themselves should form part of this document (the Train Path Policy) or the Train Management Guidelines. If this does not occur, there is a danger that the rules may be unacceptable, and that operators will have no say in the way they are designed or amended;
- in clause 3.3 (v), the meaning of "material obligations" under an operator's access agreement should be defined; and
- generally, instructions resulting in temporary variations of train paths should bear some proportionality to the problem that has occurred. For example, it should not be possible for WestNet to make an order that trains cease operating unless this is a reasonably necessary response to the problem.

4 Permanent variations to scheduled train paths

Clause 3.4 of WestNet's proposed Train Path Policy outlines the circumstances in which WestNet may make permanent variations to an operator's Scheduled Train Path. In Worsley's view, this clause, as it currently stands, is totally unacceptable. There is no certainty whatsoever for an operator on which to base its operations where its contractual rights can be overridden in such a way.

Whilst there is a case for an operator to be able to vary its timetable where there is available capacity, there is no reason a rail provider should be able to do this. WestNet's integration with AWR within the ARG group only increases the importance of removing this clause.

5 Repairs, maintenance and upgrading of the network

Clause 3.5 details the arrangements that will apply with respect to repairs, maintenance and upgrading of WestNet's network. Worsley makes the following comments about clause 3.5:

- in general, it would be appropriate that transparent penalties apply where disruptions occur for maintenance that is not reasonably necessary in the circumstances (as determined by an independent expert appointed by the Regulator):
 - WestNet's obligation should be to consistently deliver an unimpeded path to ensure on time exit virtually without exception (after all, this should be what WestNet sells). This is not an unreasonable performance target – for example, Worsley is aware that the Australian Rail Track Corporation ("ARTC") offers around 97% on time exit for on time entry to the network. The fact that access to WestNet's network will be priced on a GRV basis (that is, if it were new), then an even higher performance target should be applied to it;
 - moreover, Worsley considers this a reasonable requirement because access seekers and operators will be paying a price based on a gross replacement value ("GRV"), which involves access seekers and operators paying for new track – hence, they should be able to expect very high track quality (commensurate with that new track condition);
- there needs to be considerably more accountability and transparency in the possession planning process and for it to be integrated into capacity management processes. In this way, possessions for scheduled maintenance would be transparently provided for in the Master Control Diagram and the Daily Train Plans;
- there needs to be formal notification of planned possessions for scheduled maintenance and these should be notified in advance at time of scheduling;
- it is not reasonable that WestNet only be obliged to provide notice to an operator (except in an emergency) where its repairs, maintenance or upgrading of the network is likely to "materially" affect operator's train paths. Notice should be required to be provided in all instances in which repairs, maintenance or upgrading of the network may affect an operator's train paths; and
- notification for unscheduled maintenance likely to affect an operator's train paths should be required to be provided within a defined time (say, within 30 minutes)

and not “as soon as reasonably practicable”. Even in the case of an emergency, as soon as reasonably practicable should be defined by an upper limit (say, 30 minutes).

6 Removal of train paths for under-utilisation

Clause 3.6 of WestNet’s proposed Train Path Policy deals with the procedures that will apply in respect of removal of train paths by WestNet for under-utilisation by an operator. Worsley makes the following comments about clause 3.6:

- the test for under-utilisation is exceedingly narrow. As clause 3.6 is currently drafted, any departure from an operator’s timetable would appear to trigger the test. This is not genuinely an under-utilisation issue. A more appropriate trigger may involve a failure to operate 7 (or more) out of 12 consecutive paths (which were not reserved for surge capacity), and WestNet is able to demonstrate capacity constraints and the existence of alternative demand for the affected paths;
- there should be appeal rights to an independent expert before resumption occurs. This is because the disruption may occur for reasons that are quite legitimate and do not suggest that operations will cease altogether (for example, a strike). The key aspect of the test should not be what has occurred in the past, but rather what is likely to occur in the future. In this regard, it is important to recognise ill defined capacity resumption arrangements will become a significant barrier to entry in practice on account of the risks involved in a third party operator’s investment in rollingstock being devalued on account of path resumption. This is likely to be a major concern for financiers;
- there is no reason for train paths to be resumed unless utilisation of the network is nearing capacity. In order to assess whether or not this is the case the Policy should indicate the basis upon which network capacity will be assessed; and
- Worsley’s comments regarding acquisition of train paths for surge capacity in section 2.1 apply equally to clause 3.6 of WestNet’s proposed Train Path Policy – it should also be made clear how the arrangements for removal of train paths for under-utilisation will apply when operators and access seekers have entitlements to maintain surge capacity, even though it is not used every day (providing, of course, they pay a cost reflective price for that capacity).

7 Review of Scheduled Train Paths

Clause 3.7 of WestNet's proposed Train Path Policy deals with review of Scheduled Train Paths by WestNet. Worsley makes the following comments in relation to clause 3.7:

- the meaning of "differ in material respects" should be defined, so that there is an objective threshold for determining whether the actual departure or arrival times for a train using a Scheduled Train Path differs sufficiently from those set out in the Scheduled Train Path;
- there should be a limit on the number of reviews per year;
- there should be provision for an independent party to conduct the review; and
- the outcomes of the review should be transparent.

8 Cancellation of services

Clause 3.8 sets out the cases in which WestNet will allow an operator to cancel services for Scheduled Train Paths. In Worsley's view:

- an operator should not be constrained as to the circumstances in which it chooses to cancel a service – it could be as simple as a lack of demand;
- moreover, an operator should be able to reserve capacity, for which it pays an appropriate price, even though it may not always and indeed may not expect to always require that capacity in the case of defined surge capacity. Failure to operate trains in those circumstances should involve no penalty (other than the ultimate risk of resumption of capacity for under-utilisation for paths not reserved for surge capacity);
- there would appear to be no reason for there to be adverse implications from cancellation where there is clarity as to the expected likelihood of path utilisation over time. This is because the charging arrangements should reflect the cost of a path based on the incremental cost of an additional path; and
- to the extent that provisions in the Access Agreement affect underlying rights, they should form part of the Train Path Policy so that operators are not subsequently disadvantaged.

9 Information required for the allocation of train paths

Clause 4.2 of WestNet's proposed Train Path Policy deals with the instances in which an operator may seek to vary an existing train path allocated to it by WestNet. Worsley considers that an operator should have sufficient information about capacity availability and utilisation in the Network to make its own assessment as to whether or not there is scope for either a new train path or a variation to an existing train path. The suggested availability of this information to operators and end users is set out in section 2 of this submission.

10 Right of an operator to sell a train path

Clause 6 of WestNet's proposed Train Path Policy specifies that sale of train paths will not be permitted. This is unacceptable. It is critical that end users have the capacity to change operators seamlessly where a notice is provided to WestNet. The details of the assignment and cancellation arrangements in the access agreement should be specified in the Train Path Policy to provide protection to operators of the provisions of the arrangements.

Furthermore, there is no reason why secondary trading and the voluntary relinquishment of capacity (at a price) should not be permitted under the arrangements. Under the ARTC access undertaking and the QCA Final Decision on QR's draft undertaking there is provision for the voluntary relinquishment of capacity (at a price) and provision for secondary trading under the latter.

11 Competition for the same train path

Clause 7 sets out the rules to apply if two operators and/or proponents request the same available train path. Worsley considers that there are significant problems that emerge in the application of this provision by virtue of WestNet's integration with AWR within the ARG group.

There is an important distinction between competition for mutually exclusive traffics and mutually exclusive paths. Under the former, the winning of the traffic by one operator would mean that the operator who wins the traffic should secure the path with the other operator being unable to pursue negotiations any further. Under the latter, the proponent still has a legitimate interest in securing a path and negotiations should continue on a revised basis taking account of the changed circumstances.

12 Dispute Resolution

The Policy should refer to section 25 of the Code instead of section 3.2.

13 Terms of access agreements

To the extent that any term of an access agreement has a material effect on train path policy issues, those terms should be reflected in the train path policy to provide all interested parties an opportunity to comment on them. The regulatory processes under the Code provide no other opportunity for stakeholder input into such matters.