GENERAL COMMENTS IN RESPONSE TO THE WA RAIL REGULATOR'S REQUEST FOR SUBMISSIONS

This document has been prepared for Freight Australia as an assessment of what are seen as weaknesses in the Western Australian rail access regime with particular reference to the papers recently published and the request by the Acting Rail Access Regulator for submissions.

The brief has also been to take a global approach and not to concentrate on either the specific detail in those papers nor those issues that are likely to be covered by other submissions from (known) other parties having an immediate and specific interest in obtaining access.

Comments have been made under the following headings.

1. Substitution versus additional tonnage
2. Competition for the same tonnage
3. Path retention - use or lose
4. Pricing and costing take or pay commitments
5. Balance between flagfall and gtk components
6. Use of the ARTC Undertaking as a reference
7. Is discretion open to abuse?

It would appear that the above are not fully nor equitably addressed under the WA regime and the papers put forward by WestNet.

1. Substitution versus additional tonnage

It is most probable that competition will be for the higher-volume traffic. And, in fact, competition would not be significant and meaningful unless it did cover such tonnage.

It should be noted that in actual negotiations for access, it is not always clear as to whether any access sought is for the carriage of tonnage already on the track or whether it is for additional (or growth) tonnage.

For example, it could be that a mine presently produces 2 million tonnes pa, all of which is carried by a single rail operator. If the mine were planning to expand to 2.5 million tonnes pa and to then have the rail task split 50:50 between the original rail operator and its own rail operations, then it might seek access for 1.25 million tonnes pa. How would the access supplier address this? Would the 1.25 million tonnes pa access be treated as a request for capacity in excess of the present 2.5 million tonnes pa?

In a simplified example such as the above, the mere definition of the situation makes it clear. However, it is generally not as clear in practice. The incumbent operator may well retain claim to the full 2.5 million tonnes capacity entitlement – either on the

basis of "we have a contract" or on the basis of a possible continuing need.

Three components are required within a regime and/or undertakings to address the above. These are :-

(a) the recognition of an applicant for access if such access request is based on a cartage contract conditional only on obtaining the necessary access;

(b) a see-through provision that allows the "owner" of the freight to determine the allocation of "its" track capacity (commencing at the path allocation stage); and

(c) the right of the "owner" of the freight or a (competing) third party operator to trigger a reduction in the pathing entitlements of an incumbent provider of above-rail services.

Both the Queensland and NSW regimes have needed to address this issue for their relatively-heavily trafficked coal lines. Western Australia similarly has some heavily trafficked lines.

It appears that the Western Australian regime and the undertakings do not adequately address this issue.

2. Competition for the same tonnage

A similar situation arises when two or more operators are competing for the same tonnage. This becomes even more critical where an incumbent operator is one of the competitors. In such a situation, the present WA "rules" would appear to make it difficult (if not impossible) for a potential new competitor to obtain the access needed should it be successful – thus creating the circular position that it cannot be awarded the freight contract because it has not got the certainty of access and it cannot get access because it has not got the certainty of the contract.

The management of a transition from one operator to a replacement one is at best a difficult task. Yet it is critical for most operations that success is "guaranteed". It is not sufficient for a contract-of-affreightment to be awarded conditionally to a (new) competitor and then the process of negotiation for access to start. In itself, the time taken for such negotiations disadvantages a non-incumbent and if the timing of the replacement of a carrier is dependent on the timing of the expiry of the original contract, then it exposes the principal to a risk that would be unacceptable.

Accordingly, the present regime and undertaking actively work against the introduction of above-rail competition (or even an attempt at it). Unless there is some reasonable chance of success, potential competitors are unlikely to commit the time and energy necessary to put forward alternatives.

As with the previous point, there are three points that need to be covered in the Western Australian regime and Undertakings. These are :-

(a) the recognition of an applicant for access if such access request is based on a cartage contract conditional only on obtaining the necessary access;

(b) a see-through provision that allows the "owner" of the freight to determine the allocation of "its" track capacity (commencing at the path allocation stage); and

(c) the right of the "owner" of the freight or a (competing) third-party operator to trigger a reduction in the pathing entitlements of an incumbent provider of above-rail services.

3. Path retention - use or lose

The regime and its Undertakings need to give third parties the right to initiate removal of paths for non-use. It is not sufficient for the infrastructure provider solely to have that initiating right.

Also, the trigger should include consideration of whether pathing entitlements are being used effectively. One way for an incumbent to minimise the risks of losing path entitlements for non-use is to operate inefficiently to the points where all the paths are used. The cost is the same as for efficient operations plus take-or-pay for non-used paths. Thus this "spreading" of the task over all the available or contracted paths is one way in which the present use-or-lose provisions can be circumvented.

The Train Paths Policy needs to be amended to adequately address this issue.

4. Pricing and costing take or pay commitments

The Regulator proposes to consider ceiling prices on a number of routes.

This consideration should include consideration of the role and impact of take-or-pay obligations for paths.

In looking forward, estimates can reasonably readily be made of the number of trains required for a particular task. However, when this becomes translated into the required paths and contractual arrangements developed for access to those paths, there are going to be a number of paths that are not used for a variety of reasons.

In the regimes and contractual arrangements with which Freight Australia is familiar, there is generally a 10% allowance for cancelled paths and the observed behaviour is that the 10% somewhat matches the actual outcomes.

The likely impact of take-or-pay obligations for paths needs to be included in the assessment of the ceiling prices for each of the routes.

5. Balance between flagfall and gtk components

It is expected that actual access arrangements will be based on the so-called "two part" tariff where the charge for access is the sum of a flagfall rate ($/km) plus a volume rate (c/gtk). The former component is a fixed charge; the latter is a variable charge.

An overall average rate for access (whether expressed as $/tonne for a particular rate or c/ntk or c/gtk) does not adequately determine ceilings for rail operations. Competition can then be encouraged or inhibited by the translation of this average into each of the two-part tariffs.

Some operators may prefer to operate smaller trains (and would thus be favoured by a low flagfall charge). Others may prefer larger trains (and would thus be favoured by a high flagfall).

The principal requirement for equitable competition is that each of the flagfall and gtk rates are determined and given identically to all (competing) operators. Operators then seek to obtain competitive advantage by working within those parameters. A determination of average ceiling prices by the Regulator will not freeze each of the two parameters and leave WestNet free to, perhaps unwittingly, favour one type of operation over another at its discretion.

Accordingly, one of the outcomes of the ceiling prices determination should be the determination of the fixed and variable components of a two-part tariff.

6. Use of the ARTC Undertaking as a reference

It should be noted that the ARTC has recently submitted an Undertaking to the ACCC under Part IIIA of the Trade Practices Act and the ACCC has formally advised that it intends to accept this Undertaking (subject to some relatively minor amendments being incorporated.

This Undertaking should be commended to the Regulator on three scores.

Firstly, it is the outcome of a long negotiation process with interested stakeholders and thus is an excellent reference as an approach that balances the interests of both access seekers and access providers.

Secondly, it embodies what is seen by an independent (of above-rail operations) track authority as being the appropriate basis for offering access and for treating all applicants for access equitably.

Thirdly, there are national benefits in moving towards a common approach for track access.

In addition (for Western Australia) the ring-fencing requirements need to be addressed.

7. Is discretion open to abuse?

There should be some concern that the WestNet documents provide too much discretion to WestNet and make it difficult for an access seeker to challenge any exercise of that discretion.

As a minimum, any exercise of discretion should be open to challenge as to its reasonableness and "fairness" with WestNet being accountable for any exercise of its discretions.

Even better would be to eliminate the need for discretion by the inclusion of certainty wherever this might be possible.

Peter Mason
Managing Director
PTM Strategies Pty Ltd
2503/83 Queensbridge St
Southbank VIC 3006

12 December 2001