

Comments on the draft of the determination of the Independent Rail Access Regulator regarding: Segregation Arrangements to apply to WestNet Rail

Worsley thanks the Regulator for the opportunity to comment on the draft determination regarding Segregation Arrangements for WestNet Rail (WNR).

Worsley endorses the Regulator's draft determination and wishes to comment only on the following points: segregation/ring-fencing; train management; confidential information; and compliance audit.

Segregation/ring-fencing

There are currently three major deregulated access regimes in Western Australia: gas pipeline, electricity transmission and rail. In the case of gas, the synergies between transport and marketing are such that complete segregation was put in place at the commencement of deregulated access. In the case of electricity, the networks access function was ring-fenced from Western Power's generation and marketing functions. The Electricity Reform Task Force's discussion paper on Reform of the Electricity Supply Industry in Western Australia proposes vertical disaggregation of Western Power so that the networks access function is segregated from the potentially competitive areas of generation and marketing. This proposal, reflecting industry consensus, tacitly recognises that ring-fencing has been inadequate to achieve the desired goals for the industry as a whole.

Worsley's view is that while ring-fencing can work, it is only ever a second-best solution; its justification lies in its economy relative to complete segregation. In the case of the electricity industry, the perceived inadequacy of ring-fencing is seen as a barrier to entry for potential competitors in the competitive segments of the industry. The challenge for any proposed ring-fencing arrangement is to banish any perceptions of inadequacy. If the perceptions of inadequacy, irrespective of substance, constitute a barrier to entry for potential competitors then the 'ring-fencing' has not achieved the objective of the WA Railways (Access) Act 1998 ("the Act") by "... facilitating a contestable market for rail operations". Worsley believes that a ring-fencing arrangement should be structured so that, if complete segregation ultimately proves necessary, it can be achieved readily.

Worsley notes that WNR contends that its segregation arrangements meet or exceed Australian best practice for ring-fencing. Worsley also notes that there is no requirement under the Act nor under the Railway (Access) Code 2000 ("the Code") for there to be any particular degree of segregation of WNR from other activities of the Australian Railroad Group Pty Ltd ("ARG"), specifically, Australian Western Railroad Pty Ltd ("AWR"). Worsley's comment is that ring-fencing, even Australian best practice ring-fencing, may prove to be inadequate in practice.

Train management

Worsley notes that WNR includes in its definition of Access Related Functions: train scheduling; train path allocation; train control; and real time management of trains. Worsley refers to these functions collectively as ‘train management’ and agrees that train management is very much an Access Related Function.

Worsley strongly endorses the Regulators determination that train management be carried out directly by WNR itself and not contracted to AWR. As WNR notes, “... In the event of a network emergency, WNR itself resumes control of scheduling and makes all decisions relevant to the rescheduling of train services. ...” [Draft determination, p18]. As WNR has the capability to conduct train scheduling in emergencies Worsley can see no reason why it should not do so at all times. Furthermore, Worsley cannot see how satisfactory ring-fencing, let alone Australian best practice, can be achieved by having AWR perform any part of train management on behalf of WNR.

Worsley accepts that WNR may engage contractors or other parties to provide part of the Access Related Functions but does not believe that satisfactory ring-fencing can be achieved by allowing any related entity, for example, AWR, to provide any Access Related Function and, specifically, train management functions.

Confidential Information

Worsley endorses the Regulators determination that the definition of Confidential Information be revised along the lines of the QR Undertaking. Furthermore, Worsley requests that WNR provide a list of documents and other information as an aid to defining how it distinguishes Confidential Information from information that is not specifically protected. This is probably best contained in a ‘Ring-fencing Compliance Manual’ as has been prepared by operators in analogous access regimes.

Worsley believes that the storage of all Confidential Information, both hard copy and electronic, should be physically separate from other information held by ARG and accessible only to named, appropriate WNR employees who are covered by confidentiality deeds. Where access is necessary by other parties, for example, contractors, this access should be granted through a nominated WNR employee and the contractors made aware of their obligations and be covered by confidentiality deeds. Contractors must not permit a conflict of interest to arise; the integrity of the management of Confidential Information must be assured.

Worsley recognises that ARG management and directors cannot discharge their responsibilities without knowledge of WNR activities. The task is to define a procedure that allows WNR to function within ARG but respects the detail of confidential commercial information gained by WNR in undertaking Access Related Functions. Worsley requests that the procedures and pro-forma reports by which WNR briefs ARG management and directors be publicly available. Worsley also requests that the responsible persons within ARG/WNR expressly acknowledge that the Act’s recognition

of a duty of fairness explicitly overrides any corporate objective or fiduciary duty to maximise the value of the ARG group as a whole.

Compliance audit

Worsley believes that the compliance audit is like justice: it must not only be done but be seen to be done. As such, Worsley believes that the Regulator should appoint the auditor, define the scope of the audit and that the scope and audit report should be made public. The auditor should have access not only to WNR but also to the ARG group as a whole.

Worsley does not have a fixed view on the frequency of audit save that, consistent with the sentiment above, it should be regular rather than ad hoc.

Worsley specifically requests that the compliance audit include an audit of the Compliance Report for accuracy and completeness and an audit of the calculation and reporting of the Key Performance Indicators which indicate the effectiveness of the segregation arrangements in place. In particular, the audit should verify that the Train Management Guidelines and Train Path Policy have been applied in a non-discriminatory manner.