



**SUBMISSION  
TO THE  
OFFICE OF THE RAIL ACCESS REGULATOR,  
WESTERN AUSTRALIA  
IN RESPONSE TO THE DRAFT DETERMINATION RE  
SEGREGATION ARRANGEMENTS TO  
APPLY TO WESTNET**

**MAY, 2002**

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## **Abbreviations Used In This Submission**

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ARG	Australian Railroad Group
AWR	Australia Western Railroad
IPART	Independent Pricing and Regulatory Tribunal
ORAR	Office of the Rail Access Regulator (WA)
Pacific National	Pacific National Pty Ltd and its subsidiaries.
QCA	Queensland Competition Authority
QR	Queensland Rail
RIC	Rail Infrastructure Corporation
TPO	Third Party Operator
WA	Western Australia
WNR	WestNet Rail

## **Introduction**

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This submission to the Office of the Rail Access Regulator (ORAR) is in response to the invitation to comment by 15 May 2002 on the draft of the Determination on Segregation Arrangements to apply to WestNet Rail.

Pacific National has reviewed this draft determination and provided detailed comments on issues based on Pacific National's experience as an operator and access seeker in various regimes around Australia. These comments are to be read in conjunction with our previous submission in December 2001 (issued by FreightCorp).

### **INTEREST**

Pacific National is a new entity, created from the February 2002 purchase of the assets of Freight Rail Corporation (trading as FreightCorp) and National Rail Corporation by a Toll Holdings / Patrick Corporation joint venture. The amalgamation of the existing Toll Rail and Patrick Rail divisions with these two rail operators has created an integrated, national player in the Australian rail industry.

Pacific National has an interest as a rail access seeker on the WestNet Rail network, is committed to open competition in all market segments of the rail industry and welcomes the opportunity to provide this submission to the ORAR.

## **General Comments**

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Our response to the ORAR Draft Determination has been founded on a series of principles:

### **Efficient and unbiased access**

Pacific National's fundamental concern regarding train scheduling and train control is that we would receive those services on an efficient and unbiased basis. Given WestNet/ARG's integrated structure, we believe that it is WestNet's responsibility to put in place a system of management of the network and its day to day operations that demonstrates overwhelmingly that WestNet will not disadvantage competitor train operators. Pacific National believes this can be best achieved by following the example of Queensland where the provision of access and management of the network have been clearly separated and ring-fenced from the above-rail organisation. We note that Westnet rail is nominally a separate company but the close physical proximity leads to the concern that there is no effective separation in practice.

In addition, the manner in which the access provider interacts with operators in the lead up to providing access and the administration of the access agreement must be consistent between the various operators. However, this should not mean that a third party must accept the standards dictated or unduly influenced by the related above rail operator.

### **Information parity**

With the history of a vertically integrated structure of WestNet/ARG, the physical proximity of the organisations, the shared information systems and the potential sharing of personnel, ring-fencing of information is likely to be breached. Where Third Party Operator (TPO) commercial information is known to AWR then commensurate information about AWR should be available to TPOs. This could include information about AWR's schedules and operating characteristics for its individual services.

### **Competition on above rail performance not on below rail assets.**

As services provided by the infrastructure asset owner have natural monopoly characteristics, there cannot, by definition, be competition for the provision of those services. It therefore follows that competition between operators should be based on the price and quality provided by the service that results from the organisation of above rail assets. Accordingly below-rail service should be equal for all parties and decisions made with regard to allocation of those services, service reliability and pricing should be transparent to all users. Furthermore vigilance is required to ensure that a vertically integrated above and below rail access provider does not bias and mis-allocate costs to its below-rail operations so as to inflate access charges.

# Segregation

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## 1. General comments

Pacific National has reviewed the Draft Determination re Segregation Arrangements and welcomes most of the amendments required by the Office of the Rail Access Regulator (ORAR). There are still however areas of concern that in our view have not been fully addressed by the proposed amendments. Without wishing to repeat large sections of our previous submission on Segregation Pacific National has attempted to detail these concerns in our commentary below.

## 2. Segregation of access functions

Pacific National supports the wider definition of "Access Functions" and "Access Related Functions" that the Draft Determination proposes.

## 3. Confidential information

Pacific National welcomes many of the changes required to WestNet Rail's (WNR's) segregation arrangements regarding confidential information. We do not however believe that these changes fully cover the concern that we raised of the premature disclosure to our potential competitor (ie AWR) of an access request and disclosure of information that would identify a potential customer. The Draft Determination indicates that "there should be no need for separate premises"<sup>1</sup> but suggests that this arrangement may be reconsidered if it is demonstrated that it is not working.

Pacific National believes that by the time this arrangement may be demonstrated as not working that the damage would have been done and an attempt to win new business by Pacific National may have been thwarted in a manner indicated in our previous submission<sup>2</sup>. This possibility has a severe negative impact on the likelihood of above-rail competition in WA.

Pacific National welcomes the changes regarding auditing of compliance and the ability of the Regulator to commission special audits if and when required. We also welcome the requirement of a Compliance Report and Plan and Manual.

Pacific National supports the ORAR determination that "ARG financial and accounting staff solely dedicated to WNR should become WNR employees"<sup>3</sup>. This is good as far as it goes but it does not address the issue of ARG employees who spend part of their time working on WNR tasks. These staff will remain conflicted in contradiction to Section 32 of the Railways (Access) Act

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<sup>1</sup>Draft of the Determination of the Independent Rail Access Regulator - Segregation Arrangements to Apply to WestNet Rail 24 April 2002, p9

<sup>2</sup> Submission to the Office of the Rail Access Regulator, Western Australia in response to the request for Submissions re:- Train Management Guidelines; Statement of Train Paths Policy; Costing Principles; Segregation, FreightCorp, December 2001, Attachment A

<sup>3</sup> Draft Determination ibid p 29

1998 and this situation should not be allowed to arise. All WNR financial and accounting work should be performed by WNR staff.

#### **4. Conflict of interest**

Pacific National supports the draft determination that requires WNR to complete internally (or via a non-ARG entity) all train control and scheduling functions<sup>4</sup>. We are however concerned that if WNR were to have these functions via a non-ARG entity that this entity be appropriately ring-fenced from ARG with similar safeguards in place as if it they were being performed by WNR. If this is not done then ARG could have a nominally-non-ARG entity which does not safeguard confidential information and subverts the aims of the regime and of the ORAR.

On the issue of avoiding conflict of interest when it comes to the ARG board the draft determination decision to brief the CEO of ARG (outside of Board meetings) in relation to the access proposals of third parties<sup>5</sup> only highlights the near impossibility of avoiding conflicts of interest. It is the duty of the CEO of ARG to make decisions in the interest of ARG. If a third party operator (TPO) is attempting to win business from AWR and he becomes aware of this through a briefing re a TPO application for access then he has two choices. He can either fulfil his duty as the CEO and inform AWR while breaching confidentiality or fail in his responsibility as CEO and keep the information confidential. This type of conflict of course exists at all levels of the two organisations.

#### **5. Duty of fairness**

Pacific National welcomes the changes required by the draft determination regarding the Duty of Fairness.

#### **6. Separation of accounts and records**

As stated above under Confidential Information Pacific National is concerned that while there will be a WNR designated accountant there may also be ARG accountants which work part-time on WNR accounts.

We also wish to reinforce the need for the ORAR to examine carefully any allocation of shared costs between ARG and WNR and confirm that it complies with methodology defined in the Costing Principles. It has been the experience of the businesses in Pacific National that an infrastructure provider can subvert the intent if not the rule of access regimes by allocating more costs to one section of its business over another and therefore artificially inflate access charges.

#### **7. Compliance and segregation arrangements**

Pacific National supports the changes required by the draft determination regarding Compliance with these Principles and hopes that these will be sufficient to result in behaviours by WNR that are consistent with the intent of

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<sup>4</sup> Draft Determination ibid, p29

<sup>5</sup> Draft Determination ibid, p29

the regime. In particular the engagement by the ORAR of an external auditor instead of by WNR is in Pacific National's view a key feature in achieving compliance. Recent highly publicised failures by auditors paid by the entity which they were auditing underlines the need for a separation of the entity engaging the auditors and the body being audited.