

SEGREGATION ARRANGEMENTS TO APPLY TO WESTNET RAIL DRAFT DETERMINATION ARTC COMMENTS

The Acting Rail Access Regulator in Western Australia (Regulator) has requested comments from interested parties with regard to its draft determination on segregation arrangements to apply to WestNet Rail (WNR) issued in April 2002.

A key issue to ARTC with respect to the WestNet's submissions is that they cover activities occurring on the WA rail network and associated infrastructure currently leased from the WA Government by WestNet, which includes part of the interstate rail network between West Kalgoorlie and Perth. Interstate operators, or access seekers, of services between the eastern states and Western Australia will be required to operate under the conditions of access described in the Code, as well as under ARTC's Access Undertaking (which has recently been accepted by the Australian Competition and Consumer Council (ACCC)) for any movement east of Kalgoorlie. A copy of ARTC's Access Undertaking can be located at the ARTC's website www.artc.com.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 before the ACCC. The agreement also provided for the purchaser of the Westrail rail freight network (WestNet) to assume Westrail's role following the sale. As such, ARTC's main interest in the submissions made by WestNet to the Acting Rail Access Regulator, and this draft determination, is to ensure consistency between the relevant aspects of the submissions and the terms and conditions of the wholesale agreement and, therefore, ARTC's Access Undertaking. ARTC seeks the Acting Rail Access Regulator's consideration of the issue of consistency of conditions of access to the interstate rail network for interstate users in its deliberations.

As ARTC is a vertically separated access provider (unlike WNR), the issue of segregation arrangements is not a necessary consideration in ARTC's Access Undertaking, as ARTC has no commercial incentive to engage in any undesirable practice which might be contemplated by an integrated provider, and which is designed to be prevented by regulation. As such, the issue of consistency of segregation arrangements with the access provisions of ARTC's Access Undertaking is somewhat mute.

Nevertheless, ARTC has an interest in these arrangements to the extent that WNR is in a wholesale arrangement with ARTC for interstate services between Kalgoorlie and Kwinana which provides for WNR to undertake certain access related activities with respect to this part of the network, outside of the development and negotiation of access and billing for that access. WNR's conduct in carrying out these activities is to a large extent governed by requirements provided for in the wholesale agreement, which give ARTC limited control over network and service performance.

ARTC considers that it is important in the context of a vertically separated access provider that a segregation framework be put in place that instills confidence in potential third parties that treatment by the provider will be equitable and will not compromise their commercial interests, sufficient to encourage their efficient use of the network and encourage growth.

With regard to the draft determination, ARTC is generally supportive of the amendments to WNR's initial submission, as proposed by the Regulator. ARTC finds that most of the Regulator's requirements are consistent with those suggestions made by ARTC in its previous submission to the Regulator, and would enhance access seeker confidence. ARTC indicated in its previous submission that it had a general impression that WNR's submission was largely 'motherhood' in nature, and welcomes a number of the Regulator's requirements for stronger, more explicit commitments on WNR's part, and for greater detail and definition to be provided by WNR. Specific comments are as follows:

Part 1 - Legislative Context

ARTC supports the Regulator's required amendments. In its previous submission, ARTC indicated that, in order to promote greater confidence in third party seekers, WNR should clearly demonstrate how, despite its corporate structure, there are mechanisms in place to ensure its independence. The Regulator's requirement to provide 'over-arching' principles on how WNR will segregate its access-related functions from its other functions.' addresses this concern, and should act as a context in which detailed strategies should be

developed at the functional level. ARTC considers these principles to be critical to the overall effectiveness of the segregation arrangements. ARTC is of the view that the principles should provide for the use of market based performance indicators that can be made available to act as a regular test of that independence.

Part 2 – Segregation of Access Functions

ARTC supports the Regulator's required amendments, which essentially further refine WestNet's proposals.

Part 3 – Confidential Information

In its previous submission, ARTC indicated that it considered that, as a minimum, all WNR stated processes and systems should be regularly and independently audited, and that all staff undertaking access related functions should be physically and functionally separated.

ARTC notes that the Regulator has required several amendments including:

- Inclusion for further detail on systems for safeguarding confidential information, including the physical location of staff
- More specific definition of confidential information
- Tighter control and storage of 'hard-copy' confidential information
- Greater detail on system security of electronic confidential information
- Australian Railroad Group (ARG) financial and accounting staff solely dedication to WNR should become WNR employees
- Greater detail of reporting to ARG management and directors
- Annual independent audit of compliance with arrangements for treatment of confidential information.

ARTC considers that the Regulator's requirements go a long way towards satisfying ARTC's concerns in this area.

Part 4 – Conflicts of Interest

ARTC considers it unlikely that third party operators will be convinced by the WNR assertion that, because of the separation of access related functions, there are no existing conflicts of interest. ARTC supports the Regulator's requirement that WNR be required to make a commitment that no conflicts of interest exist.

ARTC strongly supports the Regulator's requirement that all train control and scheduling functions is carried out with WNR or via a non-ARG entity for WNR. The industry made it quite clear during the regulatory assessment of QR's access undertaking that this was a minimum requirement for a satisfactory access regime.

Part 5 – Duty of Fairness

The Regulator has required WNR to make a commitment to treat all access seekers equitably in relation to prices, service quality, paths and priorities. Whilst ARTC supports a need for a vertically integrated provider not to discriminate between third party and associated party seekers, ARTC does not see a need to require that WNR treat all users equally with regard to each aspect of the product offered (if this is what is intended by the Regulator). Different operators have different needs with regard to each of these aspects of the product. The important issue is that any price differentiation between operators only reflects a fair assessment of the different costs and risks borne by the provider, and the value the market places on the path. ARTC will not discriminate between users that operate like services and are competing in like end markets.

ARTC supports the requirement that WNR develop, with the regulator, key performance indicators relating to service quality and cost efficiency. ARTC has committed to periodically publish on its website, key performance indicators relating to service reliability, service transit time, infrastructure condition and unit costs. WNR could publish similar indicators in such a way as to separate performance between third parties and associated parties so as to enable equity in treatment to be assessed.

ARTC considers that requiring greater open-ness is the best approach to ensuring equitable treatment (and more importantly, demonstrating this to the market). As well as publishing KPI's, ARTC considers that indicative pricing (eg pricing for the most common service) should be published. The Queensland Competition Authority required QR to publish reference pricing with respect to common coal hauls in Queensland for this purpose.

Part 6 – Separation of Accounts and Records

ARTC supports the Regulator's requirements, relating to WNR's commitment to being broadly self-sufficient with regards to financial functions, the identification of non-financial data which needs to be held separately and protected, and the need to comply with approved costing principles.

ARTC considers that, at a minimum, all billing information needs to be protected. Train path planning documentation would be considered confidential during negotiation and subject to separate treatment. Following execution of an agreement, master train plan information should be separated to the extent that user identity is protected.

As stated in ARTC's previous submission, physical separation of personnel and systems is the best means to ensure adequate separation of accounts and records.

Part 7 – Compliance with these principles

ARTC supports the requirement for annual independent audit of compliance with the segregation arrangements.