



**Response to Economic Regulatory Authority's Issues Paper on
The Review of the Western Australian Railways (Access) Code (2000)**

Prepared March 2005

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1. Executive Summary

WestNet hereby respectfully submits its comments on the Access Code Review – Issues Paper to the Economic Regulatory Authority (the “Authority”).

The Rail Freight System Act 2000 requires a review of the Access Code (the “Code”). The purpose of the review is to assess how effectively the provisions of the Code meet the objectives of the Competition Principles Agreement (the “CPA”).

The statutory purpose of the Review is not to redesign the Access Regime starting with a clean sheet of paper. It is limited to a review of the performance of the Code and to recommend changes where the Code has been ineffective in meeting the objectives of the CPA.

WestNet Rail (WestNet) is strongly of the view that any changes contemplated to the Code must be based on compelling evidence that the existing provisions are not effective in meeting the objectives of the CPA. It is not meant to be, and should not be, an opportunity for some proponents to materially redesign the Code to one that in their subjective view will be “more effective” than the existing Code. Significantly the NCC, as the Nation’s peak regulatory body for infrastructure access, has provided a letter of assurance to the Western Australian (WA) State Government that aside from issues concerning the interface with a national access regime, the existing Regime (and Code) is broadly “effective”¹.

The Westrail Freight business was sold on the basis of the Code as it stood at the time published, September 8, 2000. WestNet believes that to use the Review mechanism in the Code to materially alter the provisions of the existing Code without just cause², and in particular to put more stringent obligations on WestNet, is manifestly unfair and prejudicial to WestNet’s legitimate business interests.

WestNet contends that there is little demonstrable evidence that material changes to the Code are required at this point in time because:

- Determinations on the five key guidelines (costing principles, train management, train paths, revenue ceilings and, though not a Code matter, segregation) of the Code have been made late in the first five years of the Code’s operation and hence the Code has not been tested over a reasonable period of time;
- WestNet contends that based on the number of access enquires from end customers and their operators (other than AWR) that the threat of competition has ensured that rail freight pricing has remained competitive; and
- The data provided by WestNet shows increased efficiency in the Rail Network (the “Network”) and better access rates for Network users.

1 As cited in Authority, Issues Paper: Review of the Western Australian Railways (Access) Code (2000)

2 In this context we take without just cause to mean without demonstrable evidence that the existing arrangements are not effective in meeting the objectives of the CPA

WestNet has responded in detail to all 37 questions tabled by the Economic Regulatory Authority (the “Authority”) in its issues paper. WestNet’s position in relation to the key issues is that:

- Reference Tariffs will add little additional value to the negotiation process, will introduce inflexibility and will likely result in a loss of economic efficiency. (refer question 25)
- Gross Replacement Value (GRV) as a method for calculating the ceiling has not precluded any access seekers from obtaining access to the Network. (refer question 28).
- The Overpayment Rules in the current form are equitable. (refer question 29)
- The negotiation framework has not yet been tested extensively but when it has been tested it has been proven to be effective. (questions 14,15,16,17 and 18)
- Investment in the Network is driven by market forces and commercial drivers but requires regulatory certainty. (refer questions 32 and 33)
- WestNet believes that the Segregation Rules could be made more flexible whilst upholding the key principles of the Code. (refer question 13)
- WestNet believes that the Authority should not play a part in commercial business processes such as access applications, train management, dispute resolution (refer questions 34, 35 and 36) because:
 - The CPA establishes that a State or Territory access regime should incorporate the principle that wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access³. The negotiate/arbitrate model is now well established for third party access in Australia, consistent with the intent to develop a light-handed approach to regulation.
 - Instituting a more interventionist and heavy handed approach by the regulator is not only inconsistent with the general intent of the CPA but could have a visible and chilling effect for future investment in regulated infrastructure in this State. The CPA reflects that the public interest involves a complex balancing of interests of different groups. One of these groups is infrastructure owners. The owner of an infrastructure service has rights that are entitled to consideration⁴, must be protected and those interests may not be usurped by access seekers or the regulator under the banner of supporting an innominate public interest. The separation of roles and responsibilities between the infrastructure service provider and the regulator is unambiguous and must remain so.

³ S6(4)(a) of the CPA

⁴ S6(4)(i)(i) of the CPA

2. General Comments

WestNet makes the following general comments in relation to the Issues Paper released by the Authority:

- WestNet concurs with the Authority's approach to deal with "lower-level" issues that are discovered during this process in the review of the five determinations when they are due.
- WestNet is concerned about the focus on the Australian Logistics Council's (ALC) five key principles of what makes an effective access regime. The ALC is not representative of the rail industry and does not consider the legitimate business interests of the Network Owner or investment in the Network in its five key principles. It is a lobby group for customers, and must be viewed as such.
- WestNet believes that the Authority's consultative approach and time frames are appropriate.
- WestNet believes that some of the questions in Section 6 are well beyond the scope of this Review. Therefore, their applicability in assessing the Code's effectiveness to give effect to the relevant clauses of the CPA is questionable.
- WestNet believes that the effectiveness of the Code should not be measured against individual elements of the CPA in isolation but against the CPA in its entirety.
- WestNet supports the Authority's comments in section 3.6 and 3.7 of the Issues Paper in relation to the number of above-rail operators not being a primary indicator of the Code's effectiveness in meeting the objectives of the CPA.

Costing principles

In relation to section 4.3.1 of the Issues Paper regarding Costing Principles:

- WestNet is concerned that the Authority approved the Costing Principles in December 2002 (which detailed an activity based costing methodology to cost track maintenance) but subsequently made its ceiling determination in September 2003 on a "top-down" maintenance cost per kilometre basis; and
- The Australian Railroad Group (ARG) opinion expressed in its submission on the Victorian Access Regime, regarding contributed assets and their treatment in respect of the ceiling reflects the Victorian situation and should not be applied in the Western Australian environment. The contributed assets in the Western Australian Network (in particular level crossings) would be required to be maintained by WestNet regardless of size or continuity of financial contributions of others. As the commercial risk of recovering these financial contributions sits with WestNet, it is inappropriate to discount the ceiling on the assumption that size and continuity of such a contribution from others would remain constant. It is more appropriate to treat the financial contribution as access revenue and add it to WestNet's access revenues for the purpose of testing WestNet's total access revenues against the ceiling annually, in accordance with the

Overpayment Rules. The Authority's determination in September 2003 reflected this principle.

Segregation rules

- With regards to the discussion on Segregation in Section 4.3.2 of the Issues Paper:
 - WestNet has complied with the Segregation Rules since their inception and has passed two independent audits.
 - WestNet believes that the Segregation Rules could be made more flexible whilst upholding the key principles of:
 - maintaining confidential information;
 - fair access pricing as required by the Code; and
 - fair train management and train path management as required by the Code.

However, WestNet believes that segregation issues are properly a matter arising under the Act and not the Code, and should not be considered within the Review process.

Overpayment Rules

- With regards to the discussion on the Overpayment Rules in Section 4.3.5:
 - WestNet has complied with the Overpayment Rules and has passed the first and only independent audit since their inception;
 - The Overpayment Rules correctly reflect that:
 - whilst WestNet charges a "flat rate" per gross tonne kilometre (GTK) for a train from its origin to destination for administrative ease;
 - the revenue of such trains when split across the multiple sections that those trains cross on the "flat rate" basis does not correctly reflect the contribution of those trains to recovering the cost of those multiple sections individually; and
 - hence WestNet can therefore reallocate the revenue of trains that cross multiple sections to those sections individually to correctly reflect the contribution to individual sections.

Scope of the Review

The legislation is not prescriptive about the scope of the review other than to say the "purpose of the review is to assess the suitability of the provisions of the Code to give effect to the Competition Principles Agreement in respect to railways to which the Code applies"⁵.

The Authority has suggested that the key issues to be covered by the review include, inter-alia, comparative benchmarking of the effectiveness of the Code against rail access codes applying elsewhere in Australia to take into account developments in regulatory policy and practice⁶.

WestNet believes the scope of the review is limited to assessing the effectiveness of the existing Code in meeting the objectives of the CPA and is not an opportunity to redesign the code to satisfy subjective views of other stakeholders around what might constitute a “more effective” Code. Many of the differences between the WA Code and the codes in other States were apparent at the time of the development of the WA Access Regime. The WA Code was deliberately crafted to reflect an assessment of the policy, commercial and economic objectives relevant to the WA situation. Subsequently the railway was sold on the basis of that assessment. Changes to the Code should only be considered if there is demonstrable evidence that the existing provisions do not meet the objectives of the CPA or if there is an overwhelming public interest benefit.

3. Relevant Sections of the CPA

1. Are there other sections of the CPA which need to be considered?

WestNet does not believe so.

However, no single element of the CPA should be considered in isolation. It is the overall effectiveness of the Code in meeting the objectives of the CPA that is important. The CPA itself reflects a broad evaluation of the public interest in providing means of access to critical infrastructure by requiring a framework which reproduces the key elements of a competitive market. In particular it explicitly preserves features such as *bargaining* – one of the processes by which a scarce resource is allocated, *differential pricing* - by which those with the greatest business need (in time or service attributes) may pay more to secure “better” outcomes than those prepared to pay less, and *investment incentives* – by which an owner is properly rewarded for efficient investment. The key constraint is that the owner should not recover an amount in excess of the efficient economic value of the asset which it controls, and should not artificially constrain the supply of access where that supply can be made available economically. Those considerations provide the efficient allocation of resources contemplated by CPA clause 1(3)(j) and will ensure that the regulatory regime meets (as the Code now largely does) clause 6(4)(i)(i)-(iii), (vii) and (viii).

2. Has there been adequate time elapsed to fully assess the effectiveness of the Regime?

No. The implementation of the Code is driven by the five key policy determinations. The macro effectiveness of the code cannot be reviewed without having considered the micro effectiveness of these five key determinations.

⁶ Economic Regulatory Authority, op-cit, p2

If these five determinations had been in place from day one of the Code in December 2000, then each of these determinations would have been reviewed at least once prior to this Review of the Code. The output of the five determinations could then have fed into the Review.

The Code Review process should harvest the key issues from the reviews of these five determinations as one of its key inputs.

4. Public Interest Test

3. Is the Code effective in ensuring the consideration of the public interest?

WestNet believes the current Code is effective in ensuring the consideration of the public interest.

The public interest test must be considered in conjunction with the other elements of the CPA to form an overall assessment of the effectiveness of the Code in delivering on the objectives of the CPA.

Indeed, in its terms clause 1(3) only comes into play in considering which of two or more alternative means of effecting the balancing of interests required to give effect to a provision of the CPA should be adopted.

In the context of an access regime as contemplated by clause 6, the starting point is the (relatively prescriptive) provisions of clause 6(4).

Clause 1(3) is much more relevant and applicable to the undertaking by Government of the more complex evaluative exercises required in competitive neutrality implementation in Government service delivery and regulatory structures contemplated by clauses 2 to 5 of the CPA.

Clause 1(3) is less relevant to the operation of clause 6, where the “consumer” aspects of “public interest” are accommodated by the prescriptive elements of the regime and clause 6(4)(i)(viii).

WestNet agrees with the Authority’s assessment of the relevant aspects of the public interest test for this review, in particular, the support for an environment that encourages continued investment in the rail network. In this regard, WestNet believes the existing regime is largely untested but to the extent the Code affords WestNet the opportunity to maximise the recovery of its efficient costs, then WestNet believes the Code is satisfying this objective.

4. What changes could be made to the Code, if any, to improve the operation of the public interest test as defined in clause 1(3) of the CPA?

WestNet does not believe that any changes could be made to the Code to improve the Code’s effectiveness in supporting the public interest test.

5. Is the Code resulting in the efficient allocation of resources and adequate investment in the network? What changes to the Code, including to the public interest test, might be considered to an efficient allocation of resources and adequate investment in the network?

The Code is only able to promote investment through allowing the Railway Owner to recover the ceiling (assuming the ceiling is appropriately set) at which point the owner will be realising the value of the asset which it owns, together with the proper operating costs of that network. Unrecouped investment is (contrary to principles 1(3)(j) and 6(4)(e)(vii)) intrinsically inefficient and where recovery is precluded by the regulatory environment, contrary also to the broader public interest (1(3)(j) and 6(4)(g)). At this level of recovery the Code would support re-investment in the network. However, in most instances WestNet does not recover the ceiling. Investment in the network will only occur to the extent that satisfactory economic returns can be obtained and the legitimate business interests of the Railway Owner can be achieved.

5. Coverage of Access Code

6. Whilst coverage is mainly defined in the Act rather than the Code, the Authority seeks views on the adequacy of the coverage of the Regime and views of potential refinement of merit. Is the coverage of service adequate?

The coverage of the Code is adequate, as it does not exist to provide lowest cost access to rail infrastructure (and in particular, at a cost that would not be available in the notional “competitive market” contemplated by the CPA) but to rather to provide efficient access to assets that can't be easily economically duplicated, recognising that to do so requires incentives to ensure that such assets are in fact provided.

7. What if any additional infrastructure could be included in the coverage to improve effectiveness of the Regime?

In WestNet's opinion there is no additional infrastructure that should be subject to the Code.

6. Expansion / Extension of the Network

8. Is there a need to change the Act and/or the Code to provide greater certainty on the processes for obtaining coverage by the Regime of new routes and/or for extensions to existing routes?

- In WestNet's opinion the code provides appropriate mechanisms for dealing with extensions and expansions. These mechanisms are yet to be tested so it is premature to assess their effectiveness. Changes to the Act are beyond the scope of this review, and WestNet makes no submissions in relation to that question.
- Two areas for consideration for potential changes to the Code are that:
 - The Railway Owner will always consider the credit risk of any Access Seeker in considering the commercial terms for extending or expanding the network. In many instances the Railway Owner will require security from the Access Seeker for this credit risk; and

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- The Railway Owner must be able to recover the investment and a return on that investment over the period in which the additional business will be generated, which in many cases will be shorter than the useful life of the expansion / extension assets.

7. Interstate Issues

9. Is the Code and the wholesale agreement an effective framework for interstate access seekers? How could it be improved?

- The ARTC wholesale access agreement has not been tested.

10. Are there any inconsistencies between the ARTC Undertaking and the Regime which result in a loss of efficiency or make obtaining third Party access more difficult?

- No, the ARTC undertaking hasn't been tested and therefore there is no demonstrable evidence of loss of efficiency or difficulty in third parties seeking access.
- It should also be noted that there is no barrier to third parties in directly seeking access with WestNet created by the ARTC Undertaking.

8. Segregation

11. Is the maximum penalty for breaches of the regulatory framework (\$100,000) adequate for providing railway owners with incentive to ensure full compliance?

- This is a question essentially arising under the Act.
- WestNet believes that the penalty is a significant financial disincentive.
- WestNet has complied with the Segregation Rules since their inception and has passed two independent audits.

12. Whilst there are not multiple intra-state operators visibly competing and operating in the WA market, is the threat of competition realistic enough to ensure that freight rates are efficient?

- WestNet contends that based on the number of access enquires from end customers and their operators (other than AWR) that the threat of competition has ensured that rail freight pricing has remained competitive.

13. Are the segregation arrangements adequate and what changes might improve confidence of access seekers, whilst avoiding significant administration costs?

- Though outside the scope of the Review, WestNet observes in passing that the arrangements are, in its view, adequate. Two separate audits have been conducted by the Authority and passed by WestNet.

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- WestNet believes that the Segregation Rules should be made more flexible whilst upholding the key principles of:
 - maintaining confidential information;
 - fair access pricing as required by the Code; and
 - fair train movement and train path management as required by the Code.

14. Is the negotiation framework effective?

- There have been limited instances where Access Seekers have officially used the negotiation framework during access inquiries or negotiations.
- In all cases WestNet has been able to provide the required information in the Code's time frames.
- The Authority (and market) should always be aware that service delivery is not free of cost. Shorter time frames mean less ability to prioritise available resources to task, and therefore at least a potential need to dedicate greater resource specifically to this area, despite the infrequent calls upon this service, which is inefficient. The timeframes for meaningful entry of an Access Seeker are not, in WestNet's experience, short.
- It is important to note that whilst WestNet is required to provide indicative access pricing and conditions for access within 14 days that WestNet does require full details of what is intended operationally and commercially before it can offer a firmer access price.

15. What if any reforms to the negotiation framework would enhance the ability to meet the CPA objectives?

In WestNet's opinion there are no changes required to the negotiation framework that would enhance the ability of the Code to meet the CPA objectives. The present framework well represents that contemplated by clause 6(4) of the CPA.

16. What options are there to try to ensure railway owners use all reasonable endeavours to accommodate the requirements of access seekers?

- The Code requires that within 14 days of initial contact and without a proposal from the Access Seeker that WestNet respond with technical track information and indicative pricing and conditions of access.
- Following that the time frames required by the Code for negotiation are reasonable
- WestNet recommends there would be no further changes required to the Code.

17. Is there merit in introducing a capacity register?

- WestNet believes that there is no merit in introducing a capacity register.

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- Capacity is difficult to measure as it is based on current operations remaining constant and measuring remaining capacity in a common unit of measure.
 - Capacity can often be increased through additional crossing loops or extensions of crossing loops. Exactly what is required to increase capacity or meet a new Access Seekers requirements needs to be considered on a case by case basis and at a particular point in time.

18. Should a shorter time limit be placed on the railway owner to respond to existing business access requests?

- WestNet believes not. The Code requires that within 14 days of initial contact and without a proposal from the Access Seeker that WestNet respond with technical track information, indicative pricing and conditions of access.
- WestNet does require full details of what is intended operationally and commercially before it can offer a firmer access price.

9. Dispute Resolution

19. Are the dispute resolution provisions in the Code appropriate and effective?

- WestNet notes that the dispute resolution processes in the Code are yet to be tested and that at this point they appear to be appropriate.

20. Are any refinements required?

- WestNet recommends that refinements should not be considered until if and when all parties can learn any lessons from their application.

21. Should the settlement of access disputes be subject to time limits, which would be subject to interim determinations by the Authority?

- WestNet believes that there should not be a time limit and that any arbitration process should be allowed to run its course.
- There should not be interim determinations by the Authority because:
 - Interim decisions would not provide certainty to the parties;
 - Interim determinations can create harm to either party's business that may not be capable of being undone by the final arbitration decision;
 - Interim determinations could be a disincentive for the parties to resolve the matter promptly; and
 - The Arbitration process should be allowed to run its course.

22. Should "class" arbitrations (involving more than one access seeker) be introduced, where the Authority could, if appropriate, disseminate information in one dispute to the parties in another?

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- WestNet believes that arbitration processes should run independent of one another because of the complexity and expense of a “class” arbitration process.
 - It is highly likely that information tabled by parties to the arbitration would need to remain confidential to those parties.
 - WestNet believes that the Authority has no role to play during the arbitration process, until it’s finding is complete as this process is clearly governed by the Western Australian Commercial Arbitration Act (1985).

23. Should access seekers be given the right to seek damages and other remedies in the case of a breach of an access agreement by the railway owner which causes significant damage or loss?

- This issue appears to demonstrate a fundamental misconception of the nature of access – it is not a statutory right per se, but a means of securing a contract under which each party makes promises to the other as to what they would do, the most essential terms of which are:
 1. the owner will provide the carriage service, with certain paths;
 2. the user will pay the access fee, run on time and run safely.
- Except to the extent limited by the commercial terms negotiated between the parties, each has a well established right to sue for damages for the breach of that contract.
- WestNet believes that these sorts of rights should be dealt with in the commercial terms of access agreements between the users and the Railway Owner. The terms, including remedies, represent the parties’ evaluation of their economic interests and the more or less complex series of trade-offs which they are prepared to make.
- The Standard Access Agreement that has been tabled by WestNet and approved by the Authority has considered these commercial rights for both parties to the access agreement.
- It should be noted that Access Seekers would not lose any rights to take legal action to recover damages through entering an access agreement with the WestNet based on this template.

10. Key Performance Indicators

24. Is the hybrid model the most appropriate model for use in the Regime?

WestNet contends that there is little demonstrable evidence requiring material changes to the Code at this point in time.

As documented in section five of the Issues Paper other jurisdictions are using or moving to a hybrid model.

25. In this hybrid model, is there merit in introducing reference tariffs, which are firm prices for a defined services and route that the railway owners would offer access seekers? Would reference tariffs negate the effectiveness of the negotiate-arbitrate model?

An efficient access regime may adopt a number of different mechanisms to ensure commercial negotiations on terms and conditions of access are reasonably balanced, including:

- Mandating detailed cost disclosure by the infrastructure provider;
- The application of reference tariffs for a reference service; or
- Mandating a pricing formula.

The WA Rail Access regime has established detailed costing principles, a process for determining floor and ceiling prices and a set of overpayment rules for testing revenues against those ceilings. In WestNet's view, this information collectively is sufficient for balanced commercial negotiations on access to take place. To date there has been no record of disputation under the Regime because of a breakdown in the negotiation process.

The development of reference tariffs in the WA Railway Access Regime will likely add little additional value to the negotiation process but will certainly introduce inflexibility and cost to the administration of the regime. Because of changing traffic patterns and the non-homogeneous traffic mix of the WA rail freight task an optimal access-pricing framework will need continual recalibration and flexibility to accommodate changing circumstances. Any reference tariff process by its nature introduces inflexibility and can drive a more uniform and static tariff structure than might otherwise be optimal. Therefore a loss of economic efficiency and a dilution of below rail financial performance can result with a consequential reduction in incentives for investment.

26. Is there merit in introducing a statutory obligation on railway owners to periodically publish greater information about access (Access Information) to allow potential access seekers to develop business cases for freight operations?

- WestNet believes that the current negotiation framework and timing is sufficient for freight operators to develop business cases for new or existing freight tasks.
- Technical track information and an indicative access agreement can be obtained from the Railway Owner within 14 days of the access seeker first having made contact with the Railway Owner.

27. Do the railway owners standard access agreements provide a fair and reasonable contract template?

- The WestNet Standard Access Agreement embodies the principles specified in the Authority's determinations on the five key guidelines (costing principles, train management, train paths, revenue ceilings and segregation).

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- The Authority has reviewed and approved this Standard Access Agreement.
 - Several customers have migrated to this standard access agreement and several others are looking to do the same.

28. Does WA's GRV annuity approach for setting the upper bound (ceiling) access revenue alter the prospect of access seekers entering an access agreement with the railway owner?

No, there has not been any evidence that any seeker has not been able to obtain access because of the GRV annuity approach. This is because market conditions do not mean that the Railway Owner can automatically charge the ceiling. Access seekers also have the right to seek arbitration.

Indeed, almost nowhere in the network does WestNet revenues approach the ceiling. GRV, while producing a different recovery profile to DORC, produces over the long term essentially the same long term outcomes and does so in a way which promotes long term investment and continuity of operations based on a common cost base for both owner and user.

29. Do the railway owner's Overpayment Rules provide a fair and equitable approach to address any breaches of ceiling costs/revenues?

- Yes. Railway Owners tend to have flat rates that are applied across the entire length of a train journey for administration ease.
- Under that approach revenue lands as it falls on a section of line basis.
- On that basis, where a train crosses multiple sections the "as it falls" allocation of revenue may not necessarily accurately reflect the recovery of costs and capital from each of those multiple sections.
- As such the Railway Owner will need to reallocate revenues to those multiple sections to reflect cost and capital recovery.
- The Overpayment Rules clearly show this methodology and were approved by the Authority. An independent auditor has verified that the WestNet has applied the Overpayment Rules correctly in the 2003/04 financial year.

30. Are the Key Performance Indicators sufficiently meaningful? Can these be made more useful and relevant?

- The KPI's have been in place for 18 months following a significant consultation process between WestNet, Network users and the Authority.
- WestNet believes that the KPI's are meaningful and will become more useful and relevant after they have been in place long enough to use the data to develop trends.
- WestNet therefore believes that it is premature to revisit the KPI's.

31. Should users have some right to seek Authority involvement in contracts which have been established ‘outside the Code’? How might this be achieved, what risks might this create and what are the implications of these risks?

- The Authority currently makes determinations on the five key policy mechanisms (costing principles, train management, train paths, revenue ceilings and segregation) following which it monitors and audits WestNet’s compliance with those rules.
- WestNet is complying with those rules and has passed all audits undertaken by the Authority.
- All Access Seekers whether they have negotiated their access agreement inside the code or not are treated the same in relation to WestNet’s application of these rules.
- With regards to increased involvement by the Authority:
 - The CPA establishes that a State or Territory access regime should incorporate the principle that wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access⁷. The negotiate/arbitrate model is now well established for third party access in Australia, consistent with the intent to develop a light-handed approach to regulation.
 - Under this model, the Regulator has no role in “private” arrangements, which represent the outcome of commercial negotiations and emulate the operation of the market which is the object of the CPA. Only if the access seeker cannot obtain access on terms better (in its evaluation) than those secured by the mechanism produced by the Code, does the Code come in to play and the Regulator acquire a (limited) role. General regulatory intervention in private contracts is not a feature of the Australian economy, absent a manifest competition or safety impact.
 - Instituting a more interventionist and heavy handed approach by the regulator is not only inconsistent with the general intent of the CPA but would have a visible and chilling effect for future investment in regulated infrastructure in this State. The owner of an infrastructure service has rights that must be protected and that must not be usurped by access seekers or the regulator under the banner of supporting the public interest. The separation of roles and responsibilities between the infrastructure service provider and the regulator are unambiguous and must remain so.

11. Roles of Institutions

32. Does the Regime encourage investment and are the information flows, that provide the signals for where investment in the system is required, efficient?

⁷ S6(4)(a) of the CPA

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- The Code is only able to effect investment through allowing the Railway Owner to recover the ceiling. At this level of recovery the Code would support re-investment in the network. However, in most instances WestNet does not recover the ceiling. Investment in the network will only occur to the extent that satisfactory economic returns can be obtained and the legitimate business interests of the Railway Owner can be achieved.
 - In most cases today WestNet is not recovering the ceiling, which is the level that must be recovered to encourage re-investment.
 - This is resulting from:
 - traffic levels not being at optimum levels;
 - increased competition putting pressure on prices; and
 - uncommercial access agreements of considerable duration that were novated from Westrail to WestNet, that must continue to be honoured.
 - The Code is not significant in signaling where and when investment is required because of these commercial drivers.
 - The Railway Owner makes future investment decisions based on:
 - Historical and future usage;
 - Historical maintenance;
 - Useful lives of assets vs. economic lives of access agreements;
 - Future commercial obligations; and
 - Future economic returns.

33. What reforms to the Code could improve investment incentive efficiency?

- WestNet believes that there are no changes to the Code that could be currently implemented to improve investment incentive efficiency.

34. Is there merit in introducing a greater role for the Authority? (for example as the conciliator in train path issues, review fairness of track downtime schedules and evaluating progress towards MEA).

- With regards to increased involvement by the Authority:
 - The CPA establishes that a State or Territory access regime should incorporate the principle that wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access⁸. The negotiate/arbitrate model is now well

established for third party access in Australia, consistent with the intent to develop a light-handed approach to regulation.

- Instituting a more interventionist and heavy handed approach by the regulator is not only inconsistent with the general intent of the CPA but would have a visible and chilling effect for future investment in regulated infrastructure in this State. The owner of an infrastructure service has rights that must be protected and that must not be usurped by access seekers or the regulator under the banner of supporting the public interest. The separation of roles and responsibilities between the infrastructure service provider and the regulator are unambiguous and must remain so.

35. Would the benefits of having the Authority making and processing access applications, outweigh the costs of such a system?

- The negotiate/arbitrate model between an Access Seeker and an Infrastructure Owner is now well established for third party access in Australia, consistent with the intent to develop a light-handed approach to regulation.
- On this basis, it would not be appropriate for the Authority, who should be independent of (and indeed not part of) such negotiations to process access applications.
- The Railway Owner must determine the commercial terms and conditions upon which user can access the network, which would be consistent with the Authority's determinations on the five key guidelines (costing principles, train management, train paths, revenue ceilings and segregation).
- There is no evidence that Access Seekers wanting to gain access or renew their access rights have not been able to do so.

36. Should the railway owner be subject to licensing and what benefits would this bring? If licensing was to be established how might it best be implemented?

- This is a question under the Act, not the Code, but as a general proposition: any exposure to increased regulation or intervention of government increases business risk for the Railway Owner, and would need to be reflected in an uplifted Weighted Average Cost of Capital (WACC).
- The Westrail Freight business was sold on the basis of the Code as it stood at the time published September 8 2000. WestNet believes that to use the Review mechanism in the Code to materially alter the provisions of the existing Code without just cause⁹ and in particular to put more stringent obligations on WestNet, is manifestly unfair and prejudicial to our legitimate business interests.

⁹ In this context we take without just cause to mean without demonstrable evidence that the existing arrangements are not effective in meeting the objectives of the CPA