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9 February 2005

The General Manager  
Adjudication  
Australian Competition & Consumer Commission  
470 Northbourne Avenue  
DICKSON ACT 2602

Attention: Mr Scott Gregson and Mr David Hatfield

**AWB Limited & GrainCorp Operations Limited  
Authorisation Nos. A30233, A30234 and A30235**

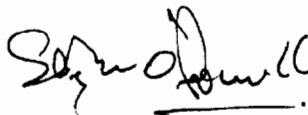
Pacific National expressed some significant concerns to the Commission prior to the issue by the Commission of the draft determination of 16 December 2004 about the potential for detriment to arise, as well as questioning the quantum of public benefits claimed to arise, from the Export Grain Logistics proposal.

Enclosed is a further submission by Pacific National which expresses in more detail those concerns and describes the safeguards which are required under the circumstances if authorisation is granted notwithstanding these issues.

Regrettably, as a result of conduct of Export Grain Logistics Pty Limited with respect to the supply of rail transport services by one or its shareholders following the grant of interim authorisation in October 2004, Pacific National's hypothetical concerns have now manifested in practice. Full details are contained in the enclosed submission.

Pacific National would be very willing to participate in further discussion with the Commission to expand further on any detail contained in the enclosed submission.

Yours sincerely



Stephen O'Donnell  
Chief Executive Officer



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**Pacific National**

**Submission**

**Responding to ACCC's Draft Determination of 16 December 2004 on the  
AWB/GrainCorp Joint Venture, Export Grain Logistics Pty Ltd**

**Authorisations A30233-5**

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# Pacific National - Submission Responding to ACCC Draft Determination on the AWB/GrainCorp Joint Venture

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## 1. Preliminary Remarks

In this paper Pacific National comments on the Australian Competition and Consumer Commission's ("ACCC") Draft Determination of 16 December 2004 ("**Draft Determination**") on the Applications for Authorisation lodged by GrainCorp Operations Ltd ("**GrainCorp**"), AWB Ltd ("**AWB**") and Export Grain Logistics Pty Ltd ("**EGL**") with respect to the proposed joint venture arrangements for export grain freight and logistics in the eastern states of Australia ("**Joint Venture**").

The purpose of this submission is to reiterate and expand on a number of issues Pacific National has raised with the ACCC during the course of its consideration of the Applications.

In particular, Pacific National reiterates that:

- (a) substantial inefficiencies exist in the grain supply chain; and
- (b) these inefficiencies should be addressed.

However, Pacific National has concerns arising from the Draft Determination which are set out below, particularly in the light of recent conduct by EGL since the grant of interim authorisation in October 2004.

If authorisation is granted, Pacific National believes that it is imperative that:

- (a) the safeguards described in section 5.3 of this submission be imposed to reduce detriment to the extent possible; and
- (b) that the period of the authorisation should extend only to November 2007 when a material change in circumstances in grain haulage in NSW will occur, and therefore when a reassessment of the detriments and benefits of the joint venture should be conducted if the proponents wish to extend the joint venture.

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## 2. Executive Summary

### 2.1 Basis of Authorisation

As the required by section 90 of the *Trade Practices Act 1974* ("**TPA**") and as ACCC sets out at paragraph 1.3 of the Draft Determination, the ACCC:

*may authorise anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.*

In making this submission, Pacific National seeks to:

- (a) draw the ACCC's attention to potential issues impacting the benefits claimed to arise from the proposed Joint Venture, which in Pacific National's view the Draft Determination does not fully canvass; and
- (b) reiterate and expand on Pacific National's previous comments on safeguards which are needed to contain conduct which will be facilitated directly as a result of the Joint Venture (and has already started to occur).

## 2.2 Potential Detriment

Pacific National has previously drawn the ACCC's attention to the extent to which the Joint Venture may be detrimental. In Pacific National's view, the possibility of anti-competitive conduct warrants further consideration in the light of recent conduct by EGL.

In both its Position Paper and at its meeting with the ACCC on 25 November 2004, Pacific National raised concerns that, if conditions were not placed on the authorisation of the Joint Venture, that EGL would be able to favour its shareholders, AWB and GrainCorp ("Applicants"), in its engagement of service providers.

While the Draft Determination does consider issues of the ring-fencing of third party information, it does not directly address the risk to competitive neutrality which might result from the Applicants themselves providing services to the Joint Venture.

Events which have taken place since the Interim Authorisation of the Joint Venture on 7 October 2004 demonstrate that the potential risks associated with the Joint Venture have in fact now come to pass. The full details of the event which has caused concern for Pacific National is set out as a confidential case study in this submission.

Pacific National reiterates its submission for the ACCC, if it is to authorise the Joint Venture, to make that Joint Venture conditional upon the implementation of appropriate ring-fencing and arrangements designed to:

- ensure objectivity and transparency in the Joint Venture's operations associated with both the award and ongoing management where either of EGL's shareholders are tendering for or providing haulage services to EGL, so that discrimination in favour of a shareholder does not occur; and
- protect third party confidential information provided to the Joint Venture to prevent EGL's shareholders obtaining an unfair advantage if they tender for rail haulage services to EGL;
- ensure that there is transparency of rail freight rates across the storage and handling network so that favouring a shareholder silo, and attracting grain to it by discriminatory rail freight rates from a shareholder to EGL, does not occur.

Pacific National is not satisfied that its confidential information can be sufficiently protected through the commercial negotiation of confidentiality arrangements with the Joint Venture as has been suggested by the Applicants.

Further, with EGL's ability to award haulage contracts to either shareholder (which has apparently occurred with respect to Graincorp in January 2005), EGL has the capacity, with its shareholders, to create a situation whereby the judicious setting of freight deductions at those shareholders' silos draws the grain into the storage and handling network of AWB or Graincorp to the detriment of other silo operators.

## 2.3 Public Benefit

The public benefits of the Joint Venture are said to arise from:<sup>1</sup>

- improvements in economic efficiency from reducing export grain supply chain costs by better coordination;

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<sup>1</sup> Paragraph 7.211, Draft Determination.

- increasing returns to grain exporters;
- avoidance of some additional costs such as demurrage; and
- greater transparency in pricing, which will provide more appropriate signals for investment.

As a result of these benefits, the ACCC is *"inclined to accept the applicant's estimate of \$10 to \$30 million as a reasonable estimate of the potential efficiency savings."*<sup>2</sup>

These figures are based on an estimated 5%-15% reduction in transport costs.

Pacific National questions:

- (a) the estimated cost savings which are claimed to arise where:
  - (i) Pacific National believes that only in the area of improved co-ordination of short term planning can EGL reduce transport costs. Since this represents only one of the five areas of improvement identified by Pacific National, representing approximately 2.5-5% of the total task, we believe that 5-15% is overstated;
  - (ii) existing contractual haulage arrangements between Pacific National and AWB do not expire until the end of 2006; and
  - (iii) a material change in circumstances will occur at the end of 2007 with the expiry of Pacific National's arrangements with respect to grain haulage in NSW with the NSW Government, which renders predictions beyond that date about relative detriment and benefit unsafe.
- (b) the appropriateness of making a comparison between the Joint Venture and the arrangements in place for the Hunter Valley Coal Chain when there is critical difference in the logistics chain operations in the Hunter Valley by comparison with grain logistics in Victoria and New South Wales.

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### **3. Potential Public Detriment - Overview and Case Study**

#### **3.1 Overview**

Pacific National has concerns that the arrangements for the Joint Venture may have adverse competition implications in two respects:

- (a) the possibility that the Joint Venture, in obtaining logistics services for export grain, will unfairly favour an Applicant as a train operator over third party operators; and
- (b) the possibility that confidential third party information provided to the Joint Venture will flow through to the Applicants and could be used for anti-competitive purposes.

While the Draft Determination does give some consideration to (b) above, it gives no consideration to (a) above.

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<sup>2</sup> Paragraph 7.212, Draft Determination.

Pacific National's principal concern with the Joint Venture is with the fact that there is nothing in the current arrangements which prevents the Joint Venture from favouring GrainCorp and/or AWB when awarding contracts for the provision of rail haulage services for export grain. The Case Study set out below demonstrates that this concern is no longer hypothetical.

### **3.2 Case Study**

It came to Pacific National's attention in January 2005 that EGL had awarded to GrainCorp a contract for the haulage by rail of export grain in NSW.

The way in which this contract was awarded highlights Pacific National's concerns that, without restrictions in place, EGL is able to favour the Applicants in the awarding of contracts for the provision of services to the Joint Venture.

Pacific National was informed by EGL in late January 2005 that the relevant contract had been awarded to GrainCorp. Pacific National was not invited to tender, and was given no opportunity to provide a price for the services to EGL for which GrainCorp was awarded the contract.

In response to Pacific National's inquiry as to why the contract was awarded to GrainCorp without seeking a competitive quote from Pacific National, EGL responded to Pacific National saying that GrainCorp's quoted prices were lower than Pacific National's contract prices with AWB (which pre-dated the interim authorisation of the Joint Venture) and therefore EGL elected to award the contract to GrainCorp.

CONFIDENTIALITY  
GRANTED

**CONFIDENTIALITY  
GRANTED**

### **3.3 Safeguards sought by Pacific National**

Given that prior to final authorisation, EGL appears to be unfairly favouring one of the Applicants, Pacific National believes it is appropriate that, if the ACCC is to authorise the Joint Venture, conditions must be put in place to ensure competitive neutrality as between third party services providers and the Applicants.

To do this, the ACCC needs to make any authorisation conditional upon compliance with three safeguards:

- additional ring-fencing so that third party service provider information provided to EGL does not flow through to the Applicants;
- competitive neutrality; and
- objectivity and transparency in the awarding of contracts by EGL to either of its shareholders or their related bodies corporate, and the ongoing management of those contracts.

These issues are dealt with in more detail in section 5.3 below.

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## **4. Protection of confidential information**

### **4.1 Overview**

The ring-fencing provisions currently proposed by the Applicants protect only their own confidential information as between each other. The confidential information of third party service providers to the Joint Venture is not currently protected in any way.

In part 4.4 of its earlier Position Paper, Pacific National indicated its view that authorisation of the Joint Venture should be conditional upon appropriate ring-fencing arrangement designed to protect the confidential information of third party service providers to the Joint Venture.

Pacific National's concern is that its confidential information may flow through the Joint Venture and back to the Applicants, in particular to GrainCorp who, as is apparent from the above Case Study, competes with Pacific National for the provision of rail freight services to the Joint Venture.

Paragraphs 7.200, 7.201 and 7.208 of the Draft Determination acknowledge the concern of third parties in this regard and indicate that third party information will not be protected through ring-fencing protocols but rather through contractual arrangements between the Joint Venture and third party service providers.

Pacific National has serious concerns about the efficacy of such arrangements in protecting third party information and submits that appropriate ring-fencing of third party information should be a safety-net condition of any authorisation of the Joint Venture so that any breach carries serious consequences thereby deterring conduct which is of its nature hard to detect.



## **4.2 Concerns with commercial negotiation of confidentiality agreements**

Pacific National doubts whether third parties will be in a position to negotiate contractual arrangements with the Joint Venture to sufficiently protect their confidential information.

Both AWB and GrainCorp have statutory monopolies over the marketing of grains. In the case of AWB, it is a statutory monopoly of export wheat in Australia. In the case of GrainCorp it is a statutory monopoly over the marketing of export barley (the second largest crop in Eastern Australia after wheat)<sup>3</sup>. In addition, AWB is a significant marketer of domestic wheat, and GrainCorp a significant marketer of other grains, both domestically and for export.

Together AWB and GrainCorp operate at a number of different levels of the grain supply chain. As demonstrated by the chart on page 5 of Pacific National's presentation to the ACCC on 25 November 2004, AWB and GrainCorp are involved in the following activities in the grain supply chain:

- market/trading (both export and domestic);
- silo/storage provision;
- ports;
- off farm trucking; and
- rail linehaul.

The Applicants and the Joint Venture are, therefore, effectively vertically and horizontally integrated with a statutory monopoly conferring market power over the activities which are their exclusive preserve by law. As such, they are in a position to impose on third party service providers the terms and conditions they see fit. This is particularly the case for third party grain storage providers and rail operators who have no choice but to deal with the Joint Venture or leave the business altogether.<sup>4</sup>

In light of the position of the Joint Venture, Pacific National doubts that, absent a condition imposed by the ACCC, even its historical position as a significant provider of rail services for grain in New South Wales and Victoria, would put it in a position to negotiate appropriate confidentiality arrangements with the Joint Venture such that an Applicant could not learn from EGL of commercially valuable bidding information submitted by Pacific National.

## **4.3 Comparison with Vertically Integrated owners of Essential Facilities**

Pacific National considers that the Joint Venture's position which arises from AWB and GrainCorp's statutory monopolies is not dissimilar to the position of an owner of an essential facility. The principal difference being that the Joint Venture's monopoly is a statutory, rather than a natural, monopoly.

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<sup>3</sup> Paragraph 7.9, Draft Determination.

<sup>4</sup> As previously noted, Pacific National does not even have the choice to leave the business prior to 2007 (when the customer service obligations imposed by the NSW government on the sale of FreightCorp expire).

That being the case, Pacific National believes that similar restrictions should be imposed on the Joint Venture as are imposed under access arrangements on vertically integrated owners of essential facilities.<sup>5</sup>

A starting point for consideration of these issues is the ACCC's 1999 publication entitled "Access Undertakings - A guide to Part IIIA of the Trade Practices Act". Starting at page 55 of this guide is a section entitled "Vertically integrated service providers: additional requirements." That sections begins as follows:

*Some undertakings may deal with essential services provided by a vertically integrated organisation which uses its own services as inputs to compete in upstream and/or downstream markets. The Commission has concerns about such arrangements since they involve an organisation providing access to upstream and downstream competitors. In this context the Commission notes the Hilmer Report's recommendation for a mechanism to 'facilitate the pro-competitive structural reform of public monopolies' as part of a national competition policy...*

Relevantly to the currently vertically integrated Joint Venture:

*In practice, structural separation may not always be appropriate - in particular where there are significant economies of scope between the vertical layers concerned. In these cases, the Commission would require conduct safeguards as part of an undertaking rather than structural safeguards. These should cover...*

(a) *information sharing between upstream and downstream operations...*

[emphasis added]

Pacific National submits that given that the risks involved are the same, the same principles should apply and mechanisms need to be put in place, as a condition of any authorisation, to prevent the sharing by EGL with the Applicants of third party commercial information.

#### **4.4 Pacific National's Specific Concerns**

GrainCorp and Pacific National are actual and potential competitors for the provision of rail haulage services to EGL. It is clearly possible for GrainCorp to expand its haulage business, and that course of action is not prohibited by the Shareholders Agreement (and indeed the agreement seems to foreshadow that development).<sup>6</sup>

In the absence of safeguards to protect confidential information, Pacific National has concerns that confidential information it provides to EGL for the purposes of tendering for the rail haulage task may flow through to one of the Applicants (AWB, or more importantly GrainCorp), and could potentially be used to ensure that GrainCorp is always in a position to obtain the business and squeeze out Pacific National.

In Pacific National's view, if the Joint Venture is to be authorised, it is appropriate to put in place ring-fencing arrangements to protect confidential information similar to those imposed on vertically integrated owners of essential rail infrastructure.

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<sup>5</sup> The ACCC has recently accepted Undertakings containing similar safeguards, such as the Alinta Gas Undertaking dated 22 October 2004 (ring fencing of confidential information [para 5.4], non-discrimination [para 5.8] and audit requirements [para 5.9]) and ABB Grain Ltd's Undertaking dated 20 September 2004 (non-discrimination [paras 4.1 and 4.2], and transparency through publication of access charges [para 4.3]).

<sup>6</sup> Shareholders Agreement, paragraph 11.7.

## 4.5 Track Access Regimes

Pacific National has experience both as an access seeker and, more recently, as an owner of rail track infrastructure. Pacific National believes that the ACCC should look to the regimes in place to deal with track access in Australia in cases where track is owned by a vertically integrated rail organisation (being Queensland, Northern Territory/South Australia, Western Australia and Victoria).

It is Pacific National's submission that similar ring-fencing arrangements be put in place for the Joint Venture in order to protect third parties from the potentially anti-competitive use of their confidential information. This applies not just to rail operators, but also to other third parties contracting with the joint venture (such as independent grain storage providers).

A summary of the relevant elements of track access regimes are set out below.

### (a) *QR Access Undertaking*

The Queensland Rail Access Undertaking 2001 was approved by the Queensland Competition Authority under the *Queensland Competition Authority Act 1997*.

Part 3 of the Undertaking sets out the ring-fencing arrangements Queensland Rail has adopted. For present purposes, Part 3.3 of the QR Undertaking is most relevant. It contains provisions requiring Network Access (a ring-fenced business group of Queensland Rail set up to deal with access applications) to keep all confidential information from third parties confidential and specifies the occasions on which third party access seekers' confidential information can be disclosed by Network Access to other groups within QR for the purposes of responding to an access application.

The text of Part 3.3 is set out in **Schedule 1**.

### (b) *NT/SA Regime*

The Regime comprises the AustralAsia Railway (Third Party Access) Act 1999 (NT), the AustralAsia Railway (Third Party Access) Act 1999 (SA), and the AustralAsia Railway (Third Party Access) Code which is attached as a schedule to each Act. This regime was certified by the relevant Minister after a recommendation from the National Competition Council in March 2000.

Section 12A of the *Australasia Railway (Third Party Access) Code* prohibits the misuse of confidential information. The text of s.12A is set out in **Schedule 2**.

### (c) *Western Australia*

The *Railway (Access) Act 2000* (WA) contains ring-fencing obligations that apply to WestNet. The obligations relevant to the protection of confidential access seeker information are:

#### **Protection of confidential information (Section 31)**

There must be an effective regime to protect the confidential information of access seekers or rail operators from improper use and disclosure by officers of the railway owner. Confidential information is defined as information which has not been made public and by its nature is confidential; was specified as confidential by the person who supplied it; or it is known by a person using or disclosing it to be confidential.

The details of WestNet's implementation of this obligation are in its Final Submission, Dated 29 October 2002. The details of this regime are set out in **Schedule 3**.

(d) **Victoria**

Pacific National, as a result of its recent acquisition of Freight Australia, has become the owner of rail track infrastructure. The Victorian Department of Infrastructure is currently undertaking a review of the access regime in Victoria. Pacific National has been and continues to be involved in this review. The Victorian Department of Infrastructure's report of July 2004 "The Options for Reform of the Victorian Rail Access Regime" notes in part 8.5 that:

*An additional issue is the protection of confidential Access Seeker information. The ACCC has stated that ringfencing arrangements should protect against the misuse of information by Access Providers:*

*"In particular the Commission notes that potential for the upstream natural monopoly arm and the downstream contestable arm of a vertically integrated provider to share information which might emerge in the context of access negotiations with access seekers. Such information could unfairly advantage the integrated firm and disadvantage competitors in the downstream market."*

That paper has two options. The first is to have all access applications initially dealt with by an independent economic regulator, so that information does not flow to the vertically integrated entity.

The second alternative (8.7) would be to put in place a regime which "prevents the misuse of information provided by an Access Seeker by an Access Provider." That regime, it is said, would:

- (i) limit who has access to the information;
- (ii) limit the uses to which the information could be put;
- (iii) place obligations on the secure storage of information;
- (iv) place prohibitions on disclosure of the information to persons who are engaged in the business of rail freight operations; and
- (v) place obligations on the Access Provider to implement compliance regimes and report breaches of the regime to the regulator.

#### **4.6 Pacific National's Proposals**

Pacific National is of the view that if the Joint Venture is to be authorised, the authorisation should be conditional upon the setting up of appropriate ring-fencing arrangements designed to protect third party information.

Pacific National believes it is appropriate to draw upon the ring-fencing arrangements used for vertically integrated owners of essential rail infrastructure, such as those set out in section 4.5 above (and in Schedules 1-3) for vertically integrated owners of rail track infrastructure.

A summary of the arrangements which Pacific National believes should be imposed are set out in its earlier Position Paper.

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## 5. Objectivity and Transparency

Safeguards are needed to ensure that EGL deals with third parties and shareholders on a fair and non-discriminatory basis.

As the earlier case study demonstrates, a lack of transparency and apparent objectivity has led to questions as to whether or not third parties are being dealt with on this basis.

### 5.1 Commentary on the need for objectivity and transparency

In the ACCC's publication "Access Undertakings – A guide to Part IIIA of the Trade Practices Act" (referred to above) is section entitled "Additional constraints on negotiations" which reads as follows<sup>7</sup>:

*Vertically integrated services providers may have an incentive to discriminate against upstream or downstream competitors. They could, for example, provide access to their own integrated operations on more favourable terms than their competitors. Under these circumstances the Commission would normally expect an additional constraint on negotiations.*

*An undertaking must provide that any new entrant be offered no more adverse terms and conditions of access than the service provider provides to itself unless the service provider can demonstrate that the differences would not harm competition.*

The risks to competition are also neatly set out in a submission made by AWB to the Victorian Department of Infrastructure in the course of its review into access of the Victorian Rail Access Regime where AWB states that:

*With vertical integration there is an incentive to keep other operators away...*

*... there is an incentive for a vertically integrated access provider to shift costs from its rail operations, which potentially face competition, to its natural-monopoly infrastructure...*

GrainCorp also makes some interesting comments in its submission to the Victorian Department of Infrastructure in the course of its review into access of the Victorian Rail Access Regime. While at page 16 it indicates that it prefers the complete separation of access provider and access seeker, it says that as a minimum:

*separation should include staff, operational entities, financial records and systems to ensure complete transparency of transfer pricing.*

### 5.2 Mechanisms used in access regimes

Again, it is useful to review the way in which these issues are dealt with under the various Australian rail access regimes. The following are examples.

(a) **QR Access Undertaking**

Paragraph 6.1.4 states that:

*In developing Internal Access Agreements... QR will not establish Access Charges for QR Train Services for the purpose of preventing or*

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<sup>7</sup> Pages 55-56.

*hindering Access by a Third Party Access Seeker into any market in competition with the QR Operation Business Group providing those QR Train Services.*

(b) **Western Australia**

The *Railway (Access) Act 2000* (WA) provides as follows:

**Avoidance of conflict of interest (Section 32)**

The segregation arrangements must ensure that the relevant officers have no conflict in duties between the performance of access-related functions and other business of the railway owner.

**Duty of fairness (Section 33)**

In performing their functions relevant officers must not have regard to the interests of the railway owner in a way that is unfair to access seekers or other rail operators.

The provisions of the WestNet Segregation Arrangements which give effect to this legislation are set out in Schedule 3.

### **5.3 Restrictions required**

As set out in Pacific National's Position Paper, if the Joint Venture is to be authorised, conditions of the authorisation should impose ring-fencing and other arrangements which require that:

- (b) the Joint Venture will not make any decision or act in any manner that unfairly discriminates in favour of one or both of the Applicants, or unfairly discriminates against any third party competitor of the Applicants in relation to the terms or conditions on which services are provided to the Joint Venture;
- (c) in performing their functions, the relevant officers of the Joint Venture must not have regard to the interests of their shareholders in such a way that is unfair to the interests of third party service providers;
- (d) criteria must be established by the Joint Venture on which it will choose service providers. These criteria must be publicly available and all decisions as to choice of service providers must be made by the Joint Venture based on these stated criteria and no other criteria. Pacific National submits that:
  - (i) tender procedures of the kind commonly used in arms length competitive tenders processes should be established so that due process is observed in letting haulage contracts;
  - (ii) the terms of the haulage agreement should competitively neutral between all tenderers including EGL shareholders; and
  - (iii) the tender should clearly articulate the location of services and proportion of total task, priority of ranking of trains and operational arrangements for the ongoing management of haulage providers;
- (e) so that confidence can be maintained in the competitive tender process and the objective basis of ongoing dealings with shareholders, EGL should appoint a third party probity auditor to certify that competitively neutral procedures have been

adhered to by EGL in the tender awards and in the ongoing management of haulage contracts.

- (f) safeguards should exist to ensure these criteria are drafted objectively and not in such a way as to prevent or hinder a third party from competing with one of the Applicants; and
- (g) the Joint Venture must deal with third parties in the same way as it deals with the Applicants and if the Applicants have access to any relevant information, then that information must also be provided to third parties.

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## 6. Comment on Public Benefits

### 6.1 Overview

The public benefits claimed to arise from the proposed joint venture are said to arise from both a reduction in supply chain costs and increased investment in grain storage to service exports of grain by rail.<sup>8</sup>

Pacific National does not dispute the ACCC's findings in paragraphs 7.54 to 7.56 of the Draft Determination that the Joint Venture will potentially result in some efficiency savings and a possible lowering of grain freight rates for the applicants and that this would constitute a public benefit.

Pacific National agrees with the comment at 7.57 of the Draft Determination that"

*[i]n addition, should the joint venture result in a more efficient use of existing rail stock and infrastructure that increases overall availability of and timeliness for all users, that will be a public benefit. Likewise, should the realignment of operations and service pricing encourage additional investment and improvements in the rail system and its interaction with storage and handling and ports, that would also create lasting benefit.*

Pacific National disputes the claimed *quantum* of these benefits without an integrated grain logistics chain which the rail operators participate. Furthermore, cost reductions may arise from non-rail components of the supply chain, depending on the decisions made by in an integrated supply chain, which will not be realised under the current proposal. The EGL proposal cannot achieve these integrated savings since EGL deals only with one component of the grain logistics chain and cannot coordinate all of the components of that chain necessary to do so.

### 6.2 Estimated quantum of efficiency savings

Paragraph 7.60 of the Draft Determination states:

*Based upon discussions with Pacific National and Queensland Rail, the applicants estimate that the coordination of export grain movement activities between AWB, GrainCorp and the rail freight provider will reduce rail freight supply chain costs in the order of 5-15%. Based on an average export task of 7.5 million tonnes, costing in excess of \$200 million per annum, these efficiencies equate to approximately \$10 - 30 million pa, or an estimated \$1.33 to \$4 per tonne of export grain moved.*

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<sup>8</sup> Draft Determination, paragraph 7.35.

These estimated cost savings are accepted by the ACCC at paragraph 7.80 of the Draft Determination.

### **6.3 Discussions between Pacific National and the applicants on quantum**

Pacific National has engaged in discussion with the applicants in relation to the proposed Joint Venture. However, in none of these discussions has Pacific National made a suggestion that the coordination which might result from the Joint Venture would result itself in a reduction of rail freight supply costs in the order of 5-15%.

Pacific National believes (and has communicated to the applicants where it believes) significant costs reductions can be achieved in the order of those claimed by the applicants. However, EGL in its current form cannot achieve those savings.

### **6.4 Comparison with the Hunter Valley Coal Chain**

In support of its agreement with the Applicants' claimed efficiency saving of 5-15%, the ACCC in the Draft Determination relies on:

*... the experience of the Hunter Valley coal export supply chain, where the establishment of a logistics planning team in similar circumstances resulted in initial efficiency savings at the top end of this range. These savings were achieved primarily by improved coordination of the rail freight task in moving coal from the mines to the port.<sup>9</sup>*

While there are similarities between the proposed AWB/GrainCorp Joint Venture and the Hunter Valley logistics planning team, it is important to recognise that there are fundamental differences between the two which mean that a comparison of cost savings may exaggerate the potential for grain logistics costs savings.

As the ACCC has set out in its Draft Determination of the application by Port Waratah Coal Services Ltd for authorisation of a medium term Capacity Distribution System in the Hunter Valley Coal Chain<sup>10</sup>, the Hunter Valley logistics planning team comprises:

*one manager who has the responsibility to act in the interest of the entire coal chain and one representative from each of the following organisations: Pacific National; PWCS; Rail Corp; Queensland Rail; Australian Rail Track Corporation (ARTC); and the Newcastle Port Corporation.<sup>11</sup>*

The make-up of this logistics team shows the fundamental difference between the Joint Venture and that Logistics Team: the Hunter Valley Logistics Team includes rail operators (Pacific National and Queensland Rail) and below rail organisations (ARTC); by contrast, the Joint Venture excludes rail operators and below rail organisations.

Given that the alleged efficiency gains are said to arise from improved coordination of rail movements, Pacific National believes that the coordination which can be achieved by the Joint Venture can in no way match the coordination achieved by the Hunter Valley Logistics Team where all parties in the supply chain work together in the coordination effort.

Pacific National notes the ACCC's comment that:

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<sup>9</sup> Draft Determination, paragraph 7.80.

<sup>10</sup> Authorisation no's A30236, A 30237, A 30238; Public Register no. C2004/1474.

<sup>11</sup> Paragraph 2.9.



*the joint venture has been structured to minimise competition concerns which may also have the effect of limiting the potential efficiency gains that a more interventionist model could have provided. It could be argued that for the joint venture to be fully effective in achieving desired savings and benefits there would need to be greater intervention and integration, on the one hand, between AWB and GrainCorp operations as storage and handlers and traders and, on the other hand, between the joint venture, the storage and handling system and the rail providers.<sup>12</sup>*

This would appear to be a recognition by the ACCC that the Joint Venture does fall short of the more fulsome model which exists for the Hunter Valley Logistics Team, and a recognition that the efficiency gains of the Joint Venture will be more limited.

## **6.5 Potential to achieve efficiencies and encourage investment**

In its meeting with the ACCC on 25 November 2004, Pacific National indicated its belief that efficiency savings of around \$15 million could be achieved by addressing:

- (a) the sub-optimal trade-off between rail efficiencies and storage capacity;
- (b) the sub-optimal trade-off between storage operating hours/times and rail assets and resources;
- (c) surplus labour as between Pacific National and (usually) GrainCorp at all interfaces;
- (d) the lack of consideration of the cost of intra-seasonal variability; and
- (e) the lack of co-ordinated short term planning of grain accumulation and delivery.

While Pacific National believes the Joint Venture may go some way towards addressing (d) and (e) above, it does not believe that the Joint Venture is any more capable of achieving these efficiencies than under the previous arrangements.

CONFIDENTIALITY  
GRANTED

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## **7. Concluding Remarks**

If, in light of this submission and having had the opportunity to test the submissions put by Pacific National, and in the light of EGL's recent conduct in awarding haulage to GrainCorp in the manner outlined in this submission, the ACCC remains of the view that it is in the public interest to authorise the Joint Venture, Pacific National would urge the ACCC to make that

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<sup>12</sup> Draft Determination, paragraph 7.218.

authorisation conditional upon ring-fencing arrangements, objectivity, transparency and neutrality obligations set out in section 5.3.

Such arrangements should be similar to those used for vertically integrated owners of essential rail infrastructure, such as rail track in several jurisdictions in Australia, including those urged by the Applicants in respect of Pacific National itself in Victoria where the rail access regime is currently under full review by the government of Victoria.

Furthermore, the authorisation should not extend beyond the material change in circumstances which will occur in late 2007 with the expiry of the grain haulage arrangements between Pacific National and the NSW State Government when a reassessment of the detriments and benefits of the joint venture should be conducted if the proponents wish to extend the joint venture. Because of that material change in circumstances, any assessment conducted now of the relative detriment and benefits of the joint venture cannot be relied upon after that date.

## **Schedule 1 - QR Access Undertaking 2001 - Part 3.3**

### ***3.3 MANAGEMENT OF CONFIDENTIAL INFORMATION***

- (a) For the purpose of Clause 3.3:
- (i) "Confidential Information", in addition to the meaning as defined, includes information or data collected by Network Access or an Access Holder in the performance of an Access Agreement where the disclosure of the information by the collector might reasonably be expected to affect the commercial affairs of the other party to the Access Agreement; and
  - (ii) that other party shall be deemed to be the owner of such Confidential Information.
- (b) The provisions in this Clause 3.3 apply in relation to the handling of Confidential Information:
- (i) disclosed by Third Party Access Seekers or Third Party Access Holders to Network Access, or disclosed by Network Access to Third Party Access Seekers or Third Party Access Holders, both as part of negotiations for Access and, unless otherwise agreed, as provided under, in accordance with or for the purpose of, an Access Agreement; or
  - (ii) collected by an Access Holder or Network Access in the performance of an Access Agreement.
- (c) At any time during the negotiation process, including prior to the submission of an Access Application by a Third Party Access Seeker in accordance with Clause 4.1, a Third Party Access Seeker may require QR to enter into a confidentiality deed with the Third Party Access Seeker. Similarly, at any time during the negotiation process, QR may require a Third Party Access Seeker to enter into a confidentiality deed with QR. The confidentiality deed will be in the form specified in Schedule B, unless otherwise agreed between QR and the Third Party Access Seeker.
- (d) QR, Third Party Access Seekers, and Third Party Access Holders undertake at all times to keep confidential and not disclose any Confidential Information of the other party or permit any person employed or engaged by it to disclose any such Confidential Information to any person (including other individuals employed by or engaged by a party) except in accordance with this Undertaking or a confidentiality deed entered into between the parties, and to use Confidential Information of the other party only for the purpose for which it is disclosed or collected, unless:
- (i) the owner of the Confidential Information provides its prior written approval, with such approval not to be unreasonably withheld; or
  - (ii) disclosure and/or use is:
    - required or compelled by any law;
    - required or compelled by any order of a court;
    - required or compelled by notice validly issued by any Authority;
    - necessary for the conduct of any legal proceedings, including any dispute resolution process under this Undertaking or the Act;
    - required under any stock exchange listing requirement or rule;
    - to the Safety Regulator;
    - to the recipient's solicitors, barristers, or accountants under a duty of confidentiality;

- to the recipient's banker or other financial institution, to the extent required for the purpose of raising funds or maintaining compliance with credit arrangements, if such banker or financial institution has executed a legally enforceable confidentiality deed in favour of the owner of the Confidential Information; or
- requested by QR's shareholding ministers.

### **3.3.1 External Flows of Confidential Information**

- (a) Network Access will not, where reasonably practicable, appoint an external consultant or independent advisor to provide advice in relation to Confidential Information, where that same external consultant or independent advisor is also advising a QR Operational Business Group in relation to the same or a related matter.
- (b) In the context of Subparagraph 3.3(d)(i), it would be unreasonable for QR to refuse to approve the disclosure of its Confidential Information by a Third Party Access Seeker or Third Party Access Holder to that Third Party Access Seeker's or Third Party Access Holder's external consultant/s, independent adviser/s or Customer/s where the Third Party Access Seeker or Third Party Access Holder enters into a contract with the recipient of the Confidential Information on the following terms:
  - (i) specifying the individual/s employed by the recipient who may have access to any QR Confidential Information provided under the contract;
  - (ii) specifying that those individual/s must not disclose any QR Confidential Information provided under the contract to any other person unless otherwise agreed by QR; and
  - (iii) if required by QR, requiring the recipient to execute a confidentiality deed in favour of QR on terms and conditions reasonably satisfactory to QR.
- (c) Also in the context of Subparagraph 3.3(d)(i), it would be unreasonable for a Third Party Access Seeker or Third Party Access Holder to refuse to approve the disclosure of its Confidential Information by QR to QR's external consultant/s or independent adviser/s where QR enters into a contract with the recipient of the Confidential Information on the following terms:
  - (i) advising the recipient that the duty of confidentiality under the contract is owed not just to QR but to Network Access within QR, and that a conflict of interest may exist with respect to the recipient providing services on a related matter to a QR Operational Business Group;
  - (ii) specifying the individual/s employed by the recipient who may have access to any Third Party Access Seeker's or Third Party Access Holder's Confidential Information provided under the contract and, where QR has not been able to reasonably avoid appointing an external consultant or independent advisor to review and provide advice in relation to such Confidential Information and that same external consultant or independent advisor is also advising a QR Operational Business Group in relation to the same or a related matter in accordance with Paragraph 3.3.1(a), after receiving the recipient's assurance that those individuals are not, and will not for as long as the information remains Confidential Information, be working for a QR Operational Business Group on the same or a related matter;
  - (iii) specifying that those individual/s must not disclose any Third Party Access Seeker's or Third Party Access Holder's Confidential Information provided under the contract to:
    - any person outside of QR; or
    - any QR staff other than those within Network Access; and

- (iv) if required by the Third Party Access Seeker or Third Party Access Holder in question, requiring the recipient to execute a confidentiality deed in favour of the Third Party Access Seeker or Third Party Access Holder on terms and conditions reasonably satisfactory to that Third Party Access Seeker or Third Party Access Holder.
- (d) For the purposes of this Undertaking, a person who has been a consultant or contractor to either QR or a Third Party Access Seeker or Third Party Access Holder for a continuous period of at least three (3) months, who works at least an average of thirty (30) hours per week for that party, and who is subject to confidentiality obligations in favour of that party, shall be treated as if they were an employee of that party rather than an external consultant or independent adviser of that party.

### **3.3.2 Internal Flows of Confidential Information**

- (a) QR may disclose a Third Party Access Seeker's or Third Party Access Holder's Confidential Information to:
  - (i) individuals within Network Access; and
  - (ii) the QR Chief Executive, QR Board and their respective Support Staff.
- (b) Subject to Paragraph 3.3.2(c), QR may disclose a Third Party Access Seeker's or Third Party Access Holder's Confidential Information to those groups within QR specified in this Paragraph 3.3.2(b), provided that disclosure to each recipient is limited to the extent necessary for the purpose of responding to an Access Application, negotiating an Access Agreement or administering an Access Agreement:
  - (i) Civil Engineering Division within Technical Services Group in relation to Rail Infrastructure issues;
  - (ii) Rollingstock Engineering Division within Technical Services Group in relation to Rollingstock or Rollingstock interface issues;
  - (iii) Electrical Engineering Division within Technical Services Group in relation to Rail Infrastructure electrification or electric energy issues;
  - (iv) Telecommunications Division within Technical Services Group in relation to communications issues;
  - (v) Signal and Operational Systems Division within Technical Services Group in relation to signalling and operational systems issues;
  - (vi) Property Division within Corporate Services Group in relation to real property issues;
  - (vii) Infrastructure Services Group employees in management level 2, 3 and 4 in relation to Rail Infrastructure issues.
- (c) A Third Party Access Seeker may, in an Access Application, give notice to QR that it does not wish QR to disclose its Confidential Information to any one or more of the groups listed in paragraph 3.3.2(b). If a Third Party Access Seeker gives such a notice to QR, then:
  - (i) upon receipt of such notice QR may not disclose Confidential Information to the groups so noted;
  - (ii) QR will make reasonable efforts to suggest a reasonable alternate mechanism whereby QR can obtain the information it requires to respond to the Access Application and the Third Party Access Seeker will not unreasonably withhold its agreement to this alternate mechanism. If the parties fail to agree on an alternate mechanism, either party may seek to resolve the Dispute in accordance with the Dispute resolution process outlined in Clause 4.7;

(iii) all reasonable costs incurred by QR in obtaining information by means of an alternate mechanism agreed in accordance with Subparagraph 3.3.2(c)(ii) may be recovered by QR from the Third Party Access Seeker as a debt due and owing. All relevant timeframes applicable to QR under this Undertaking will be extended by the same number of days as equals the number of days from QR's receipt of the Access Application to QR's receipt of the information it requires to respond to the Access Application; and

(iv) if:

- the Dispute resolution process determines that no reasonable alternate mechanism exists whereby QR can obtain the information it requires to respond to the Access Application; or
- the parties fail to agree on an alternate mechanism but do not seek resolution by the Dispute resolution process;

QR may give a Negotiation Cessation Notice to the Access Seeker, in accordance with Paragraph 4.6(a).

- (d) QR may disclose a Third Party Access Seeker's or Third Party Access Holder's Confidential Information to a QR Operational Business Group where:
- (i) the Third Party Access Seeker or Third Party Access Holder approves such disclosure;
  - (ii) such disclosure is required for the purpose of responding to an Access Application, negotiating an Access Agreement or administering an Access Agreement in respect of Access to a station or platform, provided that any disclosure is limited to the extent required for this purpose;
  - (iii) such disclosure is required for the purpose of facilitating the performance of Field Incident Management and Yard Control services, provided that any disclosure is limited to the extent required for this purpose; or
  - (iv) such disclosure is required for the purpose of facilitating the performance of scheduling and Train Control Services in the Metropolitan Region, provided that any disclosure is limited to the extent required for this purpose.
- (e) If, for the purpose of responding to an Access Application, negotiating an Access Agreement or administering an Access Agreement, QR wishes to disclose a Third Party Access Seeker's or Third Party Access Holder's Confidential Information to a QR group not specified in Paragraphs 3.3.2(a), (b) or (d), or to a group specified in Paragraph 3.3.2(b) on an issue not specified in that Paragraph, Network Access must:
- (i) obtain the consent of the owner of the Confidential Information prior to making the disclosure; and
  - (ii) only disclose the Confidential Information to that QR group to the extent necessary for the purpose of responding to an Access Application, negotiating an Access Agreement or administering an Access Agreement.
- (f) Network Access will not, where reasonably practicable, disclose a Third Party Access Seeker's or Third Party Access Holder's Confidential Information to a QR employee where that person is advising one of the QR Operational Business Groups in relation to the same or a related matter. Where such a situation is not reasonably avoidable, notwithstanding the provisions of Paragraph 3.3.2(b), Network Access must obtain the consent of the owner of the Confidential Information prior to making the disclosure.

- (g) If, during the process of responding to an Access Application or negotiating an Access Agreement, Network Access seeks the consent of an Access Seeker for the disclosure of Confidential Information pursuant to Paragraph 3.3.2 (e) or (f) and:
  - (i) where such consent has been sought during the Negotiation Period and the owner of the Confidential Information refuses its consent to the disclosure of that Confidential Information, or fails to respond to QR's request for consent within thirty (30) days of its receipt of QR's written request, then QR may give a Negotiation Cessation Notice to the Access Seeker, in accordance with Paragraph 4.6(a); or
  - (ii) where such consent has been sought at any time during the negotiation process (including during the Negotiation Period) and the owner of the Confidential Information fails to respond to QR's request for consent within five (5) days of its receipt of QR's written request (referred to as the "Consent Response Date"), then all relevant timeframes applicable to QR will be extended by the same number of days as the day on which a response is given exceeds the Consent Response Date.

This Paragraph does not apply where Network Access has requested consent to disclose the information to a QR Operational Business Group.

- (h) If, during the process of administering an Access Agreement, Network Access seeks the consent of an Access Holder for the disclosure of Confidential Information pursuant to Paragraph 3.3.2(e) or (f), such consent shall not be unreasonably withheld. If the owner of the Confidential Information fails to respond to QR's request for consent within thirty (30) days of its receipt of QR's written request, consent shall be deemed to have been given. This Paragraph does not apply where Network Access has requested consent to disclose the information to a QR Operational Business Group.
- (i) The Ringfencing Compliance Officer, and QR employees in Internal Audit, Chief Management Accounting Division, Signal and Operational Systems Division and Information Services Division will from time to time, in the course of performing their duties, have access to a Third Party Access Seeker's or Third Party Access Holder's Confidential Information. QR is permitted to disclose Confidential Information to these employees, to the extent necessary for these employees to perform their duties, without obtaining the consent of the Third Party Access Seeker or Third Party Access Holder.
- (j) QR will establish a ring fencing register, to be maintained by Network Access, for the purpose of recording the names of those persons, within QR but outside of Network Access (excluding those persons gaining access to Confidential Information in accordance with Paragraph 3.3.2(i)) to whom Network Access discloses Confidential Information belonging to a Third Party Access Seeker or Third Party Access Holder. This register will record the acknowledgement of receipt of the Confidential Information by the recipient. Such acknowledgement will be by way of facsimile, hard copy of an electronic message, or the original signature of the recipient. A Third Party Access Seeker or Third Party Access Holder may, upon request, view the register relating to its Confidential Information.
- (k) QR will establish separate registers, to be maintained by each group within QR specified in Paragraph 3.3.2(b), for the purpose of recording the positions of those persons within that group (excluding those persons gaining access to Confidential Information in accordance with paragraph (i)) to whom Confidential Information belonging to a Third Party Access Seeker or Third Party Access Holder is disclosed. A Third Party Access Seeker or Third Party Access Holder may, upon request, view these registers relating to its Confidential Information.
- (l) QR will ensure that all QR employees receiving, or having access to in the course of performing their duties, a Third Party Access Seeker's or Third Party Access Holder's Confidential

Information, are aware of QR's obligations relating to the management of Confidential Information as set out in this Clause 3.3, and have undergone a ring fencing training and awareness session.

- (m) Where QR employees leave Network Access to work elsewhere in QR, they will undergo a debriefing process to remind them of QR's obligations relating to the management of Confidential Information as set out in this Clause 3.3 and will be asked to sign an acknowledgement of having undergone such a debriefing process.
- (n) Where Network Access employees in management levels 2, 3 and 4, leave Network Access to work:
  - (i) in a QR Operational Business Group, they will not, for a period of three (3) months, work on a matter in respect of which they have had access to Confidential Information belonging to a Third Party Access Seeker or Third Party Access Holder in their position in Network Access; or
  - (ii) elsewhere in QR, they will not, for a period of three (3) months, work for a QR Operational Business Group on a matter in respect of which they have had access to Confidential Information belonging to a Third Party Access Seeker or Third Party Access Holder in their position in Network Access.



## **Schedule 2 - Australasia Railway (Third Party Access) Code**

### **12A. Protection of confidential information**

- (1) Information obtained under this Division that—
  - (a) could affect the competitive position of an access seeker or a respondent; or
  - (b) is commercially valuable or sensitive for some other reason,is to be regarded as confidential information.
- (2) A person who obtains confidential information under this Division must not disclose that information unless—
  - (a) the disclosure is reasonably required for the purposes of this Code;
  - (b) the disclosure is made with the consent of the person who supplied the information;
  - (c) the disclosure is required or allowed by law;
  - (d) the disclosure is required by a court or tribunal constituted by law; or
  - (e) the disclosure is in prescribed circumstances.

Penalty:\$10 000.

- (3) A person who obtains confidential information under this Division must not (unless authorised by the person who supplied the information)—
  - (a) disclose the information to an unauthorised person; or
  - (b) use (or attempt to use) the information for a purpose which is not authorised or contemplated by this Code.

Penalty:\$10 000.

- (4) Subclauses (1), (2) and (3) do not prevent or restrict the disclosure of information to the regulator and the regulator may in any event disclose confidential information if the regulator is of the opinion that the public benefit in making the disclosure outweighs any detriment that might be suffered by a person in consequence of the disclosure.
- (5) A person who obtains confidential information under this Division must not use the information for the purpose of securing an advantage for himself or herself or for some other person in competition to the person who provided the information.

Penalty:\$100 000.

- (6) The access provider must, in connection with the operation of this clause, develop and maintain policies to ensure that confidential information obtained by the access provider under this Division is not—
  - (a) used in any unauthorised way or for an unauthorised purpose; or
  - (b) provided to an unauthorised person.
- (7) The access provider must provide a copy of a policy that applies under subclause (6) to the regulator, and to any other person who requests a copy from the access provider.

(8) In this clause—

**"unauthorised person"** means a person who is directly involved, on behalf of the access provider, in the promotion or marketing of freight services or passenger services but does not include a person whose involvement is limited to—

- (a) strategic decision making;
- (b) performing general supervisory or executive functions; or
- (c) providing technical, administrative, accounting, service or other support functions.

## **Schedule 3 - WestNet Segregation Arrangements**

### **4. CONFIDENTIAL INFORMATION**

WestNet believes the definition of Confidential Information in the Act would mean that the following are examples of the types of information that would be deemed to be confidential:

- (i) Applications and preliminary information from an access seeker who is seeking access.
- (ii) Correspondence related to the negotiation of the Access Agreement.
- (iii) The Access Agreement itself and information exchanged in the management of the Access Agreement over time.
- (iv) Any data related to the recording of usage of the Access Agreement including the data held in RAMS.
- (v) Master Train Control Diagrams (to the extent they identify specific operations).
- (vi) Completed Train Control Diagrams and voice logging tapes from train control.

Where an employee of WestNet has prescribed duties which are managing or conducting access related functions, WestNet will, at the time of their permanent or temporary appointment, require the employee to sign a Compliance Statement that they are aware of their responsibilities and obligations under the Code and specifically as it relates to confidential information as defined in the Code and in these Arrangements.

WestNet has established a regime for protecting Confidential Information as defined in the Code including:

- (i) A system of written record keeping that only allows appropriate WestNet staff to access the records.

This information will be located in a secured compactus within the Access Management area of WestNet's premises. A system of recording who has accessed the information will be put in place and access will only be available to staff who have signed a Compliance Statement and who are approved by the General Manager WestNet. The access management area is locked when not attended by WestNet staff.

WestNet will control access to its office areas and the staff involved in access management will be in a separately secured area that will be locked when not attended. Train control centres are secured and entry is controlled by WestNet.

- (ii) A security system on electronic records that allows only appropriate WestNet staff to access the records.

Access to electronic records that are confidential can only be given by the General Manager and will only be given to persons who have signed a Compliance Statement.

When a user logs on to the ARG computer network their access to shared files, information systems, e-mail and the ability to generate reports is automatically restricted to their company and section.

WestNet has physically separate computer file servers from others in the ARG Group.

User Ids and passwords are set up and managed by the Computer Services Section within the Finance Group. Authority to allocate passwords within an entity resides with the General Manager of that entity.

There are further restrictions applying to the following primary stand-alone systems.

When a user logs on to a specific information system the functions they have and the company related information they can access and report on is restricted according to their user ID and the approval of the General Manager.

- (iii) Appropriate controls on data, including information in the Rail Access Management System (RAMS) and costing and pricing information to protect confidential information.

The General Manager WestNet must authorise all access to confidential data held in RAMS and will only grant access to persons who have signed Compliance Statements.

This process of granting access and usage is capable of being, and is, audited.

- (iv) Specific provisions in each Access Agreement providing contractual obligations on WestNet to protect confidential information.

WestNet will, as part of its Segregation Arrangements Management Manual, maintain a list of all positions which have or need access to Confidential Information.

WestNet is required to provide management reports to both its own Board of Directors and to ARG Management and members of the Board of its parent company, ARG.

These management reports provide financial details at aggregate company level for WestNet and do not identify individual access customers, and reports on other operational and strategic issues. They also include statistics on overall network usage, and safety performance.

Typical reports would include:

- operational matters related to the performance of the network and the maintenance work being carried out;
- seeking approval for or reporting progress on capital works;
- issues related to the management of the leases under which WestNet operates;
- reports on significant incidents;
- contracts, including access agreements, that have been entered into but only at broad detail level without disclosure of full terms and conditions;
- monthly financial reports and commentary at aggregate levels.

With respect to such management information:

- (i) Reports to ARG management are dealt with only in meetings where WestNet and ARG Management are present and no representatives of related entities operating train services, such as AWR, are present.
- (ii) Members of the WestNet Board are not members of the AWR Board.
- (iii) Where confidential information is provided from WestNet to either ARG Management or the ARG Board it will be clearly identified.

When WestNet is presenting reports to ARG Management and directors it will, if confidential information is to be presented, have in place a procedure which ensures that:

- (i) The confidential information presented is clearly identified.
- (ii) Recipients of the information have signed a Compliance Statement.

Where there is a need for WestNet to brief the CEO of ARG or other senior management of ARG outside of structured meetings and those briefings are likely to result in the disclosure of confidential information, particularly related to the identity of the access seeker or their train operator, WestNet will have in place a procedure that ensures that:

- (i) The confidential information presented is clearly identified.
- (ii) ARG Management members have signed Compliance Statements.

## **5. CONFLICTS OF INTEREST**

WestNet will manage its access related functions so that, for relevant officers, no conflicts of interest exist.

In the case of train scheduling and train control, these functions will be undertaken by WestNet staff who are subject to Compliance Statements.

Staff will not be rotated between WestNet and related entities into positions that have been identified in the Segregation Arrangements Management Manual as requiring Compliance Operators (including AWR) may prepare amendments to daily or weekly plans for services which experience variable demand or variable destinations providing they do not interfere with any other operators' rights and subject to WestNet having ultimate approval of such changes. This process will be covered by a procedure in the Segregation Arrangements Management Manual.

No person can be shared by WestNet and AWR if the duties being undertaken for WestNet are duties that would require the person to sign a Compliance Statement.

If WestNet believes there is an emergency and cannot obtain staff other than from AWR then it may use AWR staff in these positions after it advises the Regulator of:

- (i) The circumstances giving rise to the emergency.
- (ii) The expected duration of the emergency.
- (iii) The steps WestNet will take to protect against a conflict of interest in these circumstances including those people who are proposed to be used signing a Compliance Statement.

## **6. DUTY OF FAIRNESS**

WestNet will treat all access seekers and train operators (associate and third parties) fairly in relation to prices, service quality, and paths and priority.

In addition, WestNet will ensure that the key terms and conditions of internal access arrangements will be broadly comparable to those provided or offered to third parties.

The mechanism for ensuring WestNet's duty of fairness is two-fold:

- (i) Access seekers can determine the fairness of prices negotiated under provisions of Section 21(1) of the Code.
- (ii) Provisions of WestNet's standard Access Agreement provide for specific consultation mechanisms, the provision of information, and dispute resolution mechanisms which would allow access seekers to test the duty of fairness related to other than price issues in the provision of access.

WestNet acknowledges that its duty of fairness applies to the application of the determinations made by the Regulator under Part 5 of the Code and particularly:

- (i) The Segregation Arrangements.
- (ii) The Train Management Guidelines.
- (iii) The Train Path Policy.
- (iv) The Costing Principles.
- (v) The Overpayment Rules.

WestNet will also inform access seekers at the onset of negotiations (whether inside or outside of the Code) of their rights to confidentiality.

If negotiations have commenced outside the Code and an access seeker subsequently makes an access application under the Code, WestNet and the access seeker will agree on what information previously supplied by the access seeker is subject to the confidentiality provisions of these arrangements.