

Arc Infrastructure

Decision in accordance with the requirements of
Section 10 of the *Railways (Access) Code 2000*

23 March 2021

Economic Regulation Authority

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1. ERA decision

The ERA has made a decision pursuant to section 10(1) of the *Railways (Access) Code 2000*. On 20 January 2021, the ERA received notification from Arc Infrastructure that Arc was of the opinion that an access proposal dated 13 January 2021 received from Australian Western Railroad Pty Ltd (AWR) would involve the provision of access to railway infrastructure to an extent that may preclude other entities from access to that infrastructure.

On 29 January 2021, the ERA published a notice, as required under section 10(2) of the Code, calling for submissions relating to the proposal.

For the reasons set out below, and in accordance with section 10(1) of the Code, the Authority approves Arc entering into negotiations on the access proposal.

2. The routes subject to AWR's proposal

The access proposal relates to the track between Kalgoorlie and Kwinana. The specific routes comprising this track are listed in Schedule 1 to the Code and are:

- Route 1 – the track between Avon and Kalgoorlie
- Route 7 – the track between Cockburn North and Robb Jetty
- Route 44 – the track between Midland and Avon
- Route 45 – the track between Midland and Kwinana
- Route 47 – the track between Cockburn North and Cockburn South.

3. Legislative requirements

Under section 10(1)(b) of the Code, the ERA's approval is required before a railway operator can enter negotiations on a proposal that the railway owner considers would involve the provision of access to railway infrastructure to an extent that may in effect preclude other entities from access to that infrastructure.

In making this decision, section 10(4)(a) of the Code says the ERA may be informed in such manner as the ERA thinks fit. Section 10(4)(b) of the Code sets out the matters to which the ERA must have regard:

10. Regulator's approval required in certain cases

- (1) Where —
 - (a) a proposal has been made; and
 - (b) the railway owner considers that it would involve the provision of access to railway infrastructure to an extent that may in effect preclude other entities from access to that infrastructure,

negotiations on the proposal must not be entered into by the railway owner without the approval of the Regulator.
- (2) Before the Regulator gives an approval under subsection (1) he or she is to —
 - (a) cause a notice giving a general description of the proposal and referring to the railway owner's opinion under subsection (1)(b) to be published in an issue of —
 - (i) a daily newspaper circulating throughout the Commonwealth; and
 - (ii) a daily newspaper circulating throughout the State;

and
 - (b) include in the notice the following information —
 - (i) the places at which a copy of the proposal may be obtained;
 - (ii) a statement that written submissions relating to the proposal may be made to the Regulator by any person within a specified period;
 - (iii) the address to which the submissions may be delivered or posted.
- (3) The period specified under subsection (2)(b)(ii) is to be not less than 30 days after both of the notices under subsection (2)(a) have been published.
- (4) For the purpose of making a decision under subsection (1) the Regulator —
 - (a) may be informed in such manner as he or she thinks fit; but
 - (b) must have regard to —
 - (i) any submission relevant to the decision that is made in accordance with a notice under this section;
 - (ii) what the Regulator determines to be the public interest; and
 - (iii) any other matter that he or she considers relevant.

In addition, under section 20(4) of the Railways (Access) Act 1998 (WA), the ERA must also take into account:

- (a) the railway owner's legitimate business interests and investment in railway infrastructure;
- (b) the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;
- (c) the economic value to the railway owner of any additional investment that a person seeking access or the railway owner has agreed to undertake;
- (d) the interests of all persons holding contracts for the use of the railway infrastructure;
- (e) firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;
- (f) the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure;
- (g) the economically efficient use of the railway infrastructure; and
- (h) the benefit to the public from having competitive markets.

4. Role of the ERA

The ERA is responsible for fulfilling a number of roles described in the Code. The Code describes a negotiate-arbitrate form of regulation. The role of the ERA in making a decision under section 10 of the Code is to approve or not approve the railway owner entering into negotiations in relation to the access proposal.

The ERA's role and the administrative requirements of the role are described in Part 2 of the Code. The costs approved or determined by the ERA under the provisions of Part 2 affect the price which is offered by the railway owner in negotiations with the proponent.

The provisions governing the negotiations between the railway owner and the access seeker are described in Part 3 of the Code.

5. Merits of section 10

The ERA is of the view that section 10 is not intended to disallow the negotiation of access to a route simply because its current configuration may not accommodate an access proposal.

This approach is consistent with section 6(4)(j) of the Competition Principles Agreement, which is included in Schedule 5 to the Code. This section states that an owner may be required to expand a facility, provided that it is technically and economically feasible to do so.

Clause 6(4)(j)

The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to —

- (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;
- (ii) the owner's legitimate business interests in the facility being protected;
- (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

In 2002, the Independent Rail Access Regulator (the organisation which regulated rail access before the ERA was established) made a Section 10 decision in relation to an access proposal made by Portland Iron. The IRAR described the merits of section 10 as:

- Informing the Regulator when there are potential constraint issues on the capacity of a route within the Western Australian railway network.
- Allowing interested parties an opportunity to bring their capacity constraint concerns to the Regulator and other stakeholders in a public forum for consideration.
- Requiring the Regulator to independently assess the implications of further access to a route taking into consideration the broadest perspective.
- Providing to the railway owner an indication of the public and stakeholder concerns if capacity is constrained on that route, as well as an indication of future needs for access on that route.

Section 10 provides for two possible outcomes. The ERA can either approve or not approve the negotiation of access. There are no provisions to enable the ERA to give its approval subject to certain conditions being met.

For the ERA to not approve the commencement of negotiations, it must be certain that it is technically not feasible to augment the capacity of the route and that, on balance, it is not in the public and stakeholders' best interests to approve the commencement of negotiations.

6. Submissions received

The ERA issued a notice inviting submissions on the section 10 proposal on 29 January 2021. The ERA received one submission from Arc.

Arc submission

Arc provided several train planning diagrams with its submission, which detail the level of congestion on relevant route sections in the form of train paths. These diagrams were provided as confidential information.

AWR currently operates on the Arc network under agreements made outside the Code.

In its submission, Arc stated that the train paths included in AWR's proposal are the same train paths that Arc currently provides AWR access to, outside the Code. Arc submitted that the current and proposed train paths would allow AWR to transport greater tonnages across the routes than are included in the proposal.

Arc calculated that AWR needed only three train paths per week to transport the tonnages specified in AWR's proposal.

Arc submitted that there was insufficient capacity to provide access to AWR for the seven requested paths per week as well as to an additional seven paths per week to any other entity. Arc advised its opinion that any prospective new operator on these routes was likely to require a seven-day service as a minimum. In its submission, Arc stated:

The train planning diagrams clearly show that there is insufficient available capacity on these routes to provide access to AWR for the 7 requested train paths per week as well as an additional 7 train paths per week to another entity. The Kalgoorlie to Kwinana route is predominately used by both interstate and intrastate freighters, as such it is likely, that in future an entity may request a cyclical 7 day per week service across this route.

In its submission, Arc stated:

As a result, once Arc has provided access to AWR for these routes, an expansion of both the route and associated infrastructure was likely to be required to ensure other entities are not precluded from access to these Routes and that infrastructure.

Arc's submission did not demonstrate the existence of significant additional demand for train paths, other than those associated with AWR's proposal. In particular, Arc's submission did not indicate a prospective new customer requiring seven paths per week in addition to AWR's proposed requirement.

Arc provided in its submission that it had calculated that the freight task detailed in AWR's proposal could be met by fewer than seven trains:

Arc calculated the number of train paths required per week based on the maximum train length on the Routes. As shown in the table "Arc Recommended Capacity" Arc has calculated AWR requires three (3) return train paths per week in order to transport the tonnages specified in AWR's Proposal

In its submission, Arc did not contemplate capacity implications of an outcome involving the number of train paths required by AWR being reduced in the course of negotiations, were negotiations to proceed.

7. ERA considerations

The ERA has considered the matters raised by Arc Infrastructure in its submission. The ERA engaged Engenium PL as a consultant to advise on some technical matters raised in Arc's submission.

Engenium advised that, if required, the capacity of the relevant parts of Arc's network could be increased by doing some or all of the following:

- Installing more passing sidings creating smaller blocks and more passing opportunities.
- Installing more dual track to prevent conflicts occurring between trains travelling in opposite directions.
- Investing in "smarter" operating systems that would enable moving blocks to allow closer following movements.

Section 9(2) of the Code requires that, if the access seeker specifies an extension or expansion in its proposal, the railway owner must provide the access seeker with a reasonable preliminary estimate of the cost of any extension or expansion specified in the proposal and the railway owner's opinion as to the share of those costs that is likely to be borne by the proponent.

Section 8(5) of the Code provides that, if an extension or expansion is necessary to accommodate the proposed rail operations, and is not specified in a proposal, then such an extension or expansion may be proposed in the course of negotiations under Part 3 of the Code.¹

The ERA considers that a railway owner is able to negotiate the cost of any required extension or expansion, such that the extension or expansion would be fully funded by the owner and the operator. This would ensure that the railway owner's cost of providing access is taken fully into account, and that the economic value to the railway owner of any extension funded by operators is properly recognised.²

With reference to Arc Infrastructure's legitimate business interests, the ERA acknowledges that:³

- Arc may prefer to sell train paths to a new customer with greater prospects for growth than to an existing operator who is under-using train paths.
- Arc would benefit from decreased maintenance requirements if it were to sell train paths to AWR which were not fully used.
- Arc has provisions in its Train Path Policy enabling it to resume under-used train paths.
- Operators have rights enshrined in Arc's Train Path Policy to sub-let train paths under certain conditions.

The ERA considers that Arc is able to negotiate prices for train paths that reflect the opportunity cost of selling those paths to AWR, and not to another customer.

¹ This addresses the requirements of the Act section 20(4)(f)

² This addresses the requirements of the Act section 20(4)(b) & (c)

³ This addresses the requirements of the Act section 20(4)(a)

The ERA considers that, in negotiations, if AWR were prepared to pay for train paths regardless of their utilisation, that Arc would be indifferent between selling those train paths to AWR or to another operator.

Regard to submissions

Section 10(4)(b)(i) of the Code states that the ERA must have regard to any relevant submissions. These considerations also inform the ERA's consideration of matters outlined in section 20(4) of the Act, which refers to the interests and obligations associated with current contracted users of the infrastructure.

Arc's submission does not demonstrate the existence of significant additional demand for train paths, other than those associated with AWR's proposal. [REDACTED]

The public interest

Section 10(4)(b)(ii) of the Code states that, to decide whether to allow negotiations to commence on an access proposal that may preclude others from the infrastructure, the ERA must have regard to matters that it considers to be in the public interest.

The ERA considers that it would not be in the public interest to withhold approval for Arc to enter into negotiations. There is no evidence that the proposal will disadvantage existing or prospective customers or other external parties, and the Engenium report confirms that it is technically feasible to increase capacity if needed. No third party submissions were received raising concerns about the proposal. While the ERA must consider matters beyond the costs and benefits to the parties concerned in determining the public interest, in the absence of significant external considerations, the Code envisages that the most efficient outcome will be achieved through the parties negotiating an outcome to their mutual benefit.

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■ [REDACTED]

8. ERA conclusion

The ERA does not see any merit in not approving Arc entering into negotiations on AWR's proposal to access the route sections between Kalgoorlie and Kwinana on Arc's network. Taking all matters into account, the ERA considers that approving Arc entering negotiations will promote the objective of the regulatory scheme, which is to encourage the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations.

In reaching this conclusion, the ERA is mindful of the need for an appropriate balance to be arrived at by the purchasers and providers of access. While the Code constrains the ERA from placing conditions on what should be discussed in the negotiations process, the ERA expects that during that process, Arc and AWR would examine all options to achieve an efficient outcome, considered fair and reasonable to both parties. The ERA also expects that Arc Infrastructure would also consult with other existing and potential users of the route sections to manage the delivery of future capacity requirements.