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Economic Regulation Authority
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Submitted online via: <https://www.erawa.com.au/current-consultations>

Arc Infrastructure – Proposed Standard Access Provisions – Invitation for public submission

Co-operative Bulk Handling Limited (**CBH**) is pleased to provide feedback to the Economic Regulation Authority (**ERA**) regarding Arc Infrastructure Pty Ltd's (**Arc**) Proposed Standard Access Provisions (**SAP**) which comprise the following documents:

- Track Access Agreement (**TAA**); and
- Commercial Track Access Agreement (**CTAA**) inclusive of appended Operational Track Access Agreement (**OTAA**).

CBH is Australia's largest co-operative and is owned and controlled by around 3,500 Western Australian Grain Growers. CBH's core purpose is to create and return value to WA growers, both current and future. CBH operates a bulk handling supply chain which manages the complexities of accumulating, transporting and exporting grain from growers utilising both road and rail infrastructure.

Submission overview

Section 47A of the *Railways (Access) Code 2000* (WA) (the **Code**) requires Arc to submit proposed SAP to the ERA for approval. Sections 47A(1)(2)(a) and 47(A)(1)(2)(b) of the Code require these SAP to be "reasonable" and "sufficiently detailed and complete to form the basis of a commercially workable agreement".

While CBH acknowledges that the form (long form) of Arc's proposed SAP is appropriate, CBH considers that the proposed terms are not reasonable, sufficiently detailed or complete and therefore do not satisfy the requirements of sections 47A(1)(2)(a) and 47A(1)(2)(b) of the Code.

CBH has suggested amendments to Arc's proposed CTAA and OTAA to address these requirements in the form of a mark-up appended to this covering letter. CBH considers these amendments are necessary for the SAP to be consistent with the requirements of the Code. CBH has focussed on the CTAA and OTAA as these documents are the most relevant to CBH, however considers that, where relevant, CBH's suggested amendments should be reflected in the TAA for consistency.

CBH notes that its commentary on Arc's SAP is on the basis that this is a standard contract. CBH has therefore not sought to address CBH specific access requirements in the SAP.

The key areas CBH considers require addressing are summarised below:

1. Maintenance Standards (CTAA clause 7.1, OTAA clause 6.1) and Key Performance Indicators (KPIs)

- Arc's proposed maintenance standards require the Network to be maintained to the highest of the standard existing as at the Commencement Date of the Agreement, the minimum standard for Arc to maintain its Accreditation as an Accredited Owner or, any other standards as the parties may agree in writing from time to time.
- Further, there is no mechanism to ensure performance transparency and accountability in meeting these standards. This is a key area of information asymmetry that is of critical importance to rail users as it impacts efficiency of the broader freight supply chain.
- CBH considers that a further benchmark for maintenance standards, specifying the Network must be maintained to the standard required to perform the Services under the SAP, should be included.
- CBH proposes that KPIs should be reported on to provide clear measures of the standard of the service being provided by Arc and paid for by the Customer. This is a common feature of standard track access agreements in other jurisdictions (see for example Queensland Rail (QR) Standard Access Agreement and Australian Rail Track Corporation (ARTC) Indicative Access Agreement).

2. Fixed charges (CTAA clauses 7.7 and 10.3)

- Arc's proposed SAP impose liability on the Customer for fixed charges when train paths are not available due to no fault of the Customer. For example, where Arc is conducting maintenance, or when a Force Majeure event impacting Arc has occurred. This would mean, for example, that a user would be liable to pay fixed charges if use of a Train Path was prevented due to a wash-out.
- CBH asserts that this places disproportionate financial risk on the Customer and reduces the accountability of Arc in relation to the provision of services and management of the Network.
- CBH proposes that the Customer should not be liable for fixed charges where pathways are not available due to no fault of the Customer. This is consistent with the regulatory precedents set in QR's Standard Access Agreement and ARTC's Indicative Access Agreement.

3. Parking (OTAA clause 3.11, Schedule 2, section 4)

- Arc's proposed drafting in relation to Parking specifies that an Operator has no right to park on the Network. A right to Park may however be granted by Arc to an Operator at their request. If granted, Arc may levy a per minute charge for any parking that exceeds 15 minutes.
- CBH considers Parking to be a normal part of efficient operational practice that is often required to facilitate use of a service. Arc's drafting is therefore unreasonable and goes beyond protecting Arc's legitimate concern of ensuring parking does not adversely impact services. It gives Arc ultimate discretion to approve parking, which may adversely impact the Customer's ability to utilise train services and has the potential to impose disproportionate administrative and financial costs on an Operator / Customer in circumstances where parking has no effect on Arc's operation of the network.
- CBH proposes an Operator can request Arc's consent to Park on the Network and that Arc must act reasonably when considering, declining or approving such a request. Furthermore, CBH asserts that no charges should be levied for Parking.

4. Arc's Network Rules (Definitions and Interpretation)

- The proposed definition of Arc's Network Rules includes other policies and procedures issued by Arc.
- CBH considers that this is too broad. Important rules and policies should be included in the Rules themselves and not as ad-hoc policies and notices issued from time to time. This definition lacks transparency and makes compliance challenging as it is unclear what

exactly constitutes the Arc Network Rules. Unlike Part 5 Instruments, Arc's Network Rules can be amended at Arc's discretion and without oversight.

- CBH proposes Arc must provide the Customer (and the Operator) with a copy of Arc's Network Rules (which must be reasonable and consistent with Good Industry Practice) and only amend them where required under the Rail Safety National Law or in accordance with Good Industry Practice. Furthermore, if Arc amends the Network Rules, Arc must notify the Customer (Operator). CBH has also included a right for the parties to discuss the changes and seek the determination of an expert (if necessary) if they increase the costs to the Customer (Operator), create additional restrictions on access, are not required under the Rail Safety National Law or are not in accordance with Good Industry Practice.
- CBH considers such changes will provide greater protection against adverse changes and ensure transparency and clarity of obligations.

5. Part 5 Instruments and their associated policies, principles and procedures (either directly or indirectly referenced in both the CTAA and OTAA)

- Inconsistencies between Part 5 Instruments and SAP have the potential to create uncertainty regarding obligations, increasing the risk of a party breaching its obligations under the Code or a Code based Access Agreement and provide avenues for Arc to avoid the regulatory regime under the Code.
- CBH considers that Part 5 instruments should be consistent with SAP and to the extent that any inconsistencies between Part 5 Instruments and SAP exist, the SAP should take precedence unless the SAP explicitly provides otherwise.

6. Operating Restrictions (CTAA clause 7.2, OTAA clause 6.2)

- The proposed drafting gives Arc a unilateral right to impose operating restrictions on the Customer.
- CBH considers that Arc should not be able to unilaterally impose restrictions in an unconstrained manner, particularly if restrictions are due to Arc's failure to maintain the Network to required standards.
- CBH proposes that operating restrictions should only be applied for safety reasons where required by the condition of the Network and that users should not be liable for payment of fixed charges where the imposition of unreasonable operating restrictions has rendered a pathway unusable.
- Creating a connection between fixed charges and operating restrictions increases accountability of Arc and provides recourse to users when faced with unreasonable operating restrictions.

7. Limits of Liability (CTAA clauses 13.4, 13.5 and 13.6, OTAA clauses 19.4 and 19.5)

- Arc's proposed clauses 13.4, 13.5 and 13.6 in the CTAA and clauses 19.4 and 19.5 in the OTAA unreasonably restrict the Customer / Operator's ability to bring action against Arc.
- For example, Arc's proposed drafting in relation to liability for the Network (clause 13.4) excludes Arc's liability for injury, death, damage, expense, injury, cost or loss arising from or in connection with the standard or any failure of the network, despite this being an integral responsibility of Arc.
- CBH considers that these clauses significantly erode (or, arguably, entirely negate) Arc's fundamental obligations under the CTAA / OTAA.
- CBH proposes the above-mentioned clauses should be removed as they are not reasonable.

8. Indemnities (CTAA clause 12.4, OTAA clause 18.4)

- Arc's proposed drafting of clause 12.4 of the CTAA and clause 18.4 of the OTAA specify that the Customer / Operator must indemnify Arc in relation to all claims and liabilities for any death, injury, loss, damage or destruction of third party owned property, without a proportionate reduction of indemnity by the extent to which Arc caused or contributed to the loss.
- CBH proposes that the indemnity to each Arc Indemnified Party be reduced proportionately by the extent to which Arc caused or contributed to the loss. This is fair and reasonable, and consistent with normal commercial practice.

9. Force Majeure (Definitions and Interpretation, CTAA clause 9.3, OTAA clause 16.3)

- Arc proposes that 'heat', including speed restrictions due to the impact of heat, should be considered Force Majeure.
- CBH considers that a regular, predictable event, such as a hot day in summer should not be considered a Force Majeure event. Furthermore, a speed restriction is not a cause, event or circumstance. It is an operational decision made as a result of a cause, event or circumstance.
- CBH proposes 'heat' be removed from the Force Majeure definition (noting extreme heat may still be classified as a Force Majeure event) and that heat speed restrictions be dealt with in accordance with the provisions relating to operating restrictions.

CBH submits that the ERA, in exercising its power under section 47A(4) of the Code, should not approve Arc's proposed SAP, or determine what are to constitute Arc's SAP, without the amendments recommended by CBH in our submission. CBH considers that these amendments are necessary for the SAP to be reasonable and capable of being approved by the ERA.

The ERA should not assume that any terms from Arc's existing contracts are reasonable as the circumstances on which those agreements were made is not known to the ERA (including if Arc was able to leverage its market power as owner of the Network). The ERA should look at each clause on its merits and determine if, on its own and in the context of the broader agreement, it is reasonable.

The establishment of Code-compliant, ERA approved SAPs is important as they provide a set of independently reviewed and approved foundational terms and conditions for the purpose of supporting negotiations between railway owners and access seekers. They are fundamental to ensuring the access regime achieves its objectives. Having sufficiently balanced and detailed terms is critical to supporting the achievement of the intended outcomes of the Code, with respect to transparency, certainty, and efficiency.

Furthermore, CBH considers that having SAPs of an appropriate form (long form) and substance (reasonable) will be one of the most impactful instruments in supporting the intent of the revised Code.

The opportunity to make a submission is greatly appreciated and we encourage you to contact Nelson Aylmore or CBH's Manager Network Planning, Kristina Primus, on 08 9237 9590 or kristina.primus@cbh.com.au if you require any further information.

Yours sincerely,

For: Co-operative Bulk Handling Limited



**Nelson Aylmore
HEAD OF NETWORK PLANNING**