



AUSTRALIAN RAIL TRACK CORPORATION LTD

Ref No:

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Ms Audrey Hia
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GPO Box 8469
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Dear Ms Hia

**REVIEW OF THE RAILWAYS (ACCESS) CODE 2000
ARTC SUBMISSION**

Please find attached a submission prepared by the Australian Rail Track Corporation in response to your 2009 review of the Code.

The submission contains no information that ARTC would consider commercial-in-confidence.

For further information regarding the preparation of this submission, could you please myself (08)82174315, sormsby@artc.com.au, or Mr. Glenn Edwards, (08)82174292, gedwards@artc.com.au.

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2009 REVIEW OF THE RAILWAYS (ACCESS) CODE 2000

ARTC SUBMISSION

Background

The Western Australian Economic Regulation Authority (“Authority”) has sought submissions from interested parties with respect to its review of the Railways (Access) Code 2000 (“Code”). ARTC notes that the Western Australian Rail Access Regime (“Regime”) has been in place since September 2001. The review to take place on every third anniversary of the commencement of the Regime (and every five years thereafter) is required under the Railways (Access) Act 1998 (“Act”). The Act requires that the purpose of the review “is to assess the suitability of the provisions of the Code to give effect to the Competition Principles Agreement (“CPA”) in respect of the railways to which the Code applies”.

The WA Government made an application for certification of the Regime to the National Competition Council (“NCC”) in February 1999. The certification review undertaken by the NCC effectively requires it to assess the draft Code with respect to the provisions of the CPA. As such, the Regime has previously undergone similar review at that time and in 2004. ARTC notes that following some refinement of the Code required by the NCC, the NCC considered the Regime broadly ‘effective’ (consistent with the CPA provisions, except for the issue of providing for an effective interface between the Regime and ARTC’s Access Undertaking (which may largely form the basis of a national regime) that was yet to be approved by the ACCC at the time. The NCC suggested that the Regime be amended to require the track owner, in the event that a national regime was developed, to submit an access undertaking to the Australian Competition and Consumer Commission (“ACCC”) to also adopt the new national regime. The WA Government decided against this approach arguing that it was concerned about automatically committing to a national regime without knowing the detail of that regime. In the end, the WA Government withdrew its application for certification.

ARTC actively participated in the NCC review of the Regime, and in the 2004 review. In both instances, ARTC arguments in its submissions largely arise from its concerns as to whether the Regime would act as an effective stimulus to third party access in an

environment where the infrastructure owner was vertically integrated, and whether the Regime would be sufficiently consistent with the provisions for access that may apply on the broader interstate network.

ARTC's primary interest in WA is with that part of the rail network connecting the ARTC at Kalgoorlie to Perth and the relevant ports. Substantial volumes of interstate freight move between the eastern States and WA and despite much of this being subject to strong intermodal competition from road and sea, rail maintains a strong presence in these markets.

ARTC now manages the entire interstate network with the exception of that part of the interstate network between Kalgoorlie and Perth. ARTC has a wholesale agreement in place with the network manager in WA that permits it to enter into contracts for access for interstate services to available capacity on that part of the network. The network is still maintained, improved and controlled by the network manager. This agreement was initially made with a view to the establishment of a one-stop-shop for access to the interstate network. It has been in place for around 10 years, but has not been particularly successful in delivering the one-stop-shop concept. To date, no customers have an access agreement with ARTC for access to the interstate network in WA. ARTC understands that this is largely because rail operators would prefer to contract directly with the entity responsible for maintaining and controlling the network.

ARTC, and its customers, consider that it is important that access regulation be applied consistently across the interstate network. The Authority would be aware of the Competition and Infrastructure Reform Agreement (CIRA) executed by all Australian governments in early 2006 which provides for governments to implement a simpler and consistent national system of rail access regulation. The proposed national system would have the following features:

- ❖ nationally significant railways, including the interstate network and major intra-state freight corridors, should use the ARTC access undertaking as the regulatory model;
- ❖ access regimes should facilitate commercially negotiated access terms and conditions in the first instance; and
- ❖ state-based rail access regimes must be submitted for certification before the end of 2010.

Within this framework, ARTC believes that it is appropriate that the nature of an access regime reflect the extent of market power held by the network and the structure of the network, be it vertically integrated or separated.

The Code applies to a number of quite different networks in WA with varying degrees of market power and which are vertically integrated and separated. The Code therefore needs to be sufficiently flexible to deal with the circumstances of these different networks. Importantly, in dealing with market power and integrated networks, it is important that the additional prescription required does not place too onerous a burden where the network does not have substantial market power and/or is vertically separated. ARTC notes that different characteristics of a network can largely be dealt with through other documents specific to the network such as segregation arrangements, train path policy and costing and over payment principles.

ARTC will provide comments in this submission largely focused around the application of the code to the Kalgoorlie – Perth section, and around the desire for consistent regulation of access to the interstate network.

Parts 1 and 2A – Preliminary and Publication of Information

Whether the required information specified under sections 6(a) and 6(b) is sufficient for prospective access seekers to gain a preliminary understanding of the railway network characteristics and relevant route section infrastructure capability and traffic loads.

Whether the required information specified under sections 6(a) and 6(b) should be provided on the railway owner's web site, in circumstances where a railway owner has a web site, as well as in published hard copy format.

ARTC's Interstate Access Undertaking provides for ARTC to make the following relevant information available on the ARTC website.

- ❖ illustrative maps showing a geographical description of the Network in the form of the annexures to Schedule E as amended by ARTC from time to time during the Term;
- ❖ a narrative description of the Network;

- ❖ Indicative Access Charges for Indicative Services;
- ❖ prices for which Access has been granted to Services other than Indicative Services, together with a general description of the Services to which such prices relate;
- ❖ the Network Management Principles;
- ❖ the Indicative Access Agreement;
- ❖ current available market terms and conditions;
- ❖ a copy of ARTC's annual report;
- ❖ a graphical representation of Committed Capacity on the Network (excluding track possessions for Network maintenance);
- ❖ indicative section running times for Indicative Services by corridor;
- ❖ route standards by corridor; and
- ❖ the Performance Indicators.

ARTC notes that section 6(a) and 6(b) of the Code provide for similar types of information to be made available to an access seeker, with the exception of pricing information and performance indicators.

To improve consistency between jurisdictions on the interstate network, ARTC considers that this type of information including indicative pricing for existing use and performance information should be published on the network manager's website.

Part 2 – Proposals for Access

Whether the extent of information, which entities seeking access can request from the railway owner under section 7, is sufficient to allow such entities to properly prepare a proposal for access pursuant to section 8.

ARTC's Interstate Access Undertaking provides for ARTC to make the following relevant information available upon request to an applicant for access.

- ❖ available capacity;
- ❖ axle load limitations;
- ❖ maximum allowable speeds;
- ❖ infrastructure characteristics;
- ❖ applicable safeworking requirements;
- ❖ Segment run times;
- ❖ DORC values in relation to the segment to which access is being sought;
- ❖ the incremental cost and the economic cost in accordance for the segment to which access is being sought; and
- ❖ any other information relating to capacity or train operations reasonably required by the applicant in relation to the access application, provided ARTC is given an opportunity to provide to the applicant an estimate of the reasonable cost of preparing the aspects of such other information which are not ordinarily and freely available to ARTC, and the applicant agrees to pay such costs.

ARTC currently publishes a lot of this information. However, it can be quite specific to the nature of the access being sought, and would rely on some understanding of the access being sought.

ARTC would expect that this information would be provided as part of an initial exchange of information prior to the applicant submitting a formal application for access.

Section 7 requires the network manager to provide current available capacity, likely pricing and terms and conditions and path availability prior to receiving an access application. ARTC's Interstate Access Undertaking provides for ARTC to provide detail in relation to specific pricing and terms and conditions as part of an indicative access proposal prepared following receipt of the access application. Having said this, in most cases pricing for access would fall within the scope of the price information ARTC publishes on its website.

As such, there may be timing differences (in terms of the access process) in relation to information provision between the Code and ARTC's Interstate Access Undertaking. It is likely to be preferable to an access seeker that the information needed to prepare an access application and proceed to negotiation be made available for the whole journey at the same time. As such, ARTC would consider aligning the type and timing of information to that provided by ARTC would improve the Code in relation to requests for access to the interstate network.

Whether it may be of benefit, under section 7(1)(a)(i), for entities seeking access to also be provided with forecasts of available capacity over future years (up to three years ahead for example) in order to have a more complete indication of available capacity.

Whilst it is possible that the infrastructure owner could provide a forecast of the general level of capacity that might be available into the future, such forecasts would be qualified by a range of assumptions that would need to be made around future demand and investment, including demand and investment assumptions around the access being sought. Such assumptions may be better made once firm details in relation to the access being sought are provided in the access request, and so dealt with under section 9.

Whether a further clause should be added to section 7 noting that any capacity information provided by the railway owner must be compiled on a reasonable basis consistent with the railway owner's obligation not to unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner (consistent with the requirements under section 16(2)).

ARTC supports the inclusion of such an obligation to deal with a vertically integrated network, if such an obligation is not covered by any broader anti-discrimination provision in the Code.

Whether section 9 should allow for the railway owner to also provide floor and ceiling prices to a proponent for future upgrades to rail infrastructure to meet that proponent's proposed traffic requirements. This would require the GRV methodology under Schedule 4 to be amended to provide for forecast rail infrastructure upgrading expenditure to be taken into account.

In developing an indicative access proposal under ARTC's interstate access undertaking, ARTC would likely give the applicant some indication of future pricing (on a non-binding basis) particularly where there is new investment involved, or at least an indication as to the direction of future pricing. The interstate access undertaking requires both floor and ceiling limits and indicative pricing to be made available at various points in the application process.

Where there is a wide floor/ceiling band (as might be the case on many parts of the WA network, and in the interstate network in WA), the provision of pricing limits (whether current or forecast) is not likely to be particularly helpful to the access seeker without some indication of where acceptable pricing may lie in that band.

Parts 3 – Negotiations

Whether, under section 15, sufficient information is able to be obtained from the railway owner by a proponent pursuant to sections 6 and 7, to show that its proposed rail operations can be accommodated on the relevant route or that an upgrading, if required, is technically and economically feasible.

On the interstate network, ARTC would generally undertake a capacity assessment in relation to an access request, and make an assessment as to the technical and economic feasibility of any upgrading that may be required. ARTC considers that the network owner is in a better position to do so. Capacity analyses are often fairly complex, requiring scheduling and modeling expertise that only the network owner would be likely to have.

Whilst the information made available under sections 6 and 7 of the Code may be sufficient for a proponent to undertake its own capacity analysis, ARTC considers that it is unlikely to be a comprehensive analysis, and also not certain that all of the factors that should be considered would surface under section 6 and 7 disclosure.

For consistency, ARTC considers it better for the responsibility for capacity analyses to lie with the network manager on the interstate network. To address a vertically integrated network, the results of such an analysis should be transparent and open to dispute.

Whether, under section 16, there is a need to expand 16(2) to clarify the intended meaning of the term “unfairly discriminate” in this context.

It is difficult to make an assessment as to whether ‘unfairly discriminate’ is sufficiently well defined to make it enforceable. ARTC is not aware of any case history in this regard or any other instances in regulation where discrimination has been limited through greater prescription.

It may be better to leave the definition fairly broad and so potentially wider in its application, rather than limit application to certain behaviours.

Parts 5 – Certain approval functions of the Regulator

Whether section 45 should include the costing principles and over-payment rules in order to ensure consistency in the public consultation process across all four Part 5 Instruments.

ARTC would have no issue with including costing principles and over-payment rules in the public consultation process. Reasonably detailed costing principles relating to the determination of revenue limits are incorporated in ARTC’s interstate access undertaking, subject to public consultation.

ARTC notes that the Authority already conducts public consultation around all four Part 5 instruments and the above inclusion would only mirror current practice.

Whether a provision should be included providing for reviews of the Part 5 Instruments after a specific period (for example 5 years or as otherwise determined by the Authority).

ARTC’s interstate access undertaking has a term of 10 years, but provides for ARTC to undertake a review of the undertaking in consultation with operators and other stakeholders after 5 years. This may result in a variation to the undertaking which would require ACCC approval.

ARTC notes that the proposal only mirrors the Authority’s current approach.

Whether in the case of section 42, relating to public consultation of segregation arrangements or variations to segregation arrangements, provision should be made to only require such consultation for variations to segregation arrangements considered by the Authority to constitute material changes.

ARTC considers that the segregation arrangements represent the key basis by which the Authority and the Code can constrain anti-competitive activity on a vertically integrated network. ARTC would be cautious about limiting public consultation to only 'material' changes to the segregation arrangements given some uncertainty as to what constitutes a material change.

Schedules

Whether under Schedule 2; (a) any clarification of any of the items listed under this schedule is required or (b) there is a need for any further information to be made available by the railway owner under this schedule. These matters have also been discussed in this issues paper under Parts 1 and 2A of the Code.

As stated earlier, ARTC notes that Schedule 2 of the Code provides for similar types of information to be made available to an access seeker as is provided for under ARTC's interstate access undertaking, with the exception of pricing information and performance indicators.

ARTC proposes that relevant information, as applicable, in relation to these areas be included in Schedule 2 to provide for consistent disclosure on the interstate network.

Whether section 3(2) of Schedule 4 should include the requirement that for a new railway under the Code, the public consultation arrangements set out under sections 3(3) to 3(5) of Schedule 4 should apply to the initial WACC determination under the Code for this railway.

ARTC has no issue in relation to this proposal. This would merely codify the Authority's current approach.

Whether Schedule 4 should include provisions setting out a review period for floor and ceiling determinations, along similar lines to that suggested for the Part 5 Instruments and segregation arrangements (ie; five years or as otherwise determined by the Authority).

ARTC considers that section 12 of Schedule 4 which provides for the Authority to review floor/ceiling costs whenever a material change occurs provides sufficient opportunity for review, and cannot see any need for a set review period.

However, if it is the Authority's current practice to review floor/ceiling costs every three years and seek to change this to five years to bring about greater consistency with Part 5 instruments then ARTC would raise no objection.

Whether the GRV methodology under section 2 of Schedule 4 should be amended to include the provision for floor and ceiling cost calculations to take into account forecast expenditure by the railway owner on the upgrading of rail routes as previously discussed in this issues paper under Part 2 of the Code.

ARTC has no issue with this proposal.