

Mr Anthony Wing
General Manager
Transport and General Prices Oversight
ACCC
GPO Box 520
MELBOURNE VIC 3001

Dear Mr Wing

ARTC Hunter Valley Access Undertaking

I am writing with regards to the proposed access Undertaking for the Hunter Valley Rail Network submitted by the Australian Rail Track Corporation (ARTC).

Transport NSW (then NSW Transport and Infrastructure) made a submission on the previous access Undertaking which ARTC submitted to the ACCC last year. In that submission, we expressed concern about that Undertaking's lack of recognition of the non-coal traffic that uses the network, including passenger, grain and inter-modal services. The NSW Government was and continues to be particularly concerned to ensure that the ARTC's obligations to accord priority to passenger services are not diminished.

ARTC's obligation to accord passenger priority

ARTC is required by the Transport Administration Act 1998 (NSW) to give reasonable priority to passenger services in exercising network control (sections 88L(3)(a) and 99D(5)(a)). Network control involves both service planning and the control of movement of rolling stock in real time (section 99D(1)). These legislative requirements are supplemented by provisions in ARTC's lease of parts of the NSW rail network, which includes the Hunter Valley network.

The proposed Undertaking

The NSW Government acknowledges the amendments that ARTC has made to the proposed Undertaking which strengthen its recognition of its obligation to accord passenger services reasonable priority.

For instance, the amendments to the Introduction of the proposed Undertaking now explicitly recognise the requirement to give reasonable priority to passenger services and the role of non-coal users of the Network (section 1.1(d)).

However, we are concerned that the ACCC referred to the 'Introduction' of the previous Undertaking as '*essentially descriptive*' (ACCC, Draft Decision (5 March 2010), p88). Transport NSW seeks clarification from the ACCC that the 'Introduction' is an operative part of the proposed Undertaking.

The ACCC has sought views on whether ARTC's approach in section 3.14 of the proposed Undertaking by which it establishes 'mandatory' (Tier 1) and 'negotiable' (Tier 2) elements of negotiated coal and non-coal access agreements is appropriate, including the provisions that should be included in, or excluded from, the Tier 1 and Tier 2 categories outlined in Schedule A. Transport NSW is mindful that the provisions listed as 'mandatory' (Tier 1) provisions of negotiated agreements have primarily been determined with a view to achieving workable alignment of the coal supply chain.

The NSW Government is concerned at the inclusion of provisions relating to ARTC's obligation to accord passenger priority as 'negotiable' provisions (Schedule A:1, Tier 2 items 3, 11 and 23 and Schedule A:2, Tier 2 items 3, 10 and 12). 'Negotiable' Tier 2 provisions are to be addressed in a negotiated agreement '*unless otherwise agreed between ARTC and the Applicant*' (section 3.14(b)(i)(B) and 3.14(b)(ii)(B)). This suggests at least a theoretical possibility that the ARTC and an access seeker can negotiate out of legislated passenger priority considerations.

In order to ensure that negotiated access agreements under the proposed Undertaking are consistent with ARTC's obligation to accord priority to passenger services under the lease and the Transport Administration Act 1998 and there is accordingly workable alignment of the coal supply chain, provisions relating to passenger priority should be elevated to 'Tier 1' provisions in Schedule A:1 and Schedule A:2 of the proposed Undertaking.

The Indicative Access Holder Agreement at Annexure A

Transport NSW acknowledges the continued recognition of ARTC's statutory obligation to accord passenger priority in the Indicative Access Holder Agreement at Annexure A to the proposed Undertaking (refer clauses 3.1(d), 3.6, 3.8, 6.2(a)(i), 6.3(a)(i) and 11.1). In particular, Transport NSW:

- welcomes the amendments to clauses 6.2(a)(i) and 6.3(a)(i) of the Indicative Access Holder Agreement which now mirror sections 5.5 and 5.6 of the proposed Undertaking and provide that, where there is a shortfall in capacity, available capacity is to be allocated first to passenger services in accordance with ARTC's obligations under section 88L of the *Transport Administration Act*;
- considers that the acknowledgment at clause 3.8(b) of the Indicative

Access Holder Agreement could be improved by simply referring to ARTC's obligation to *'preserve passenger train paths'*. Referring only to *'existing'* passenger train paths is too limited and an inaccurate reflection of ARTC's obligations under section 88L of the *Transport Administration Act*;

- suggests that the proposed Undertaking and the Indicative Access Holder Agreement would be improved if the definition of 'Capacity' included an explicit reference to ARTC's obligation to accord passenger priority. For example, that amendment could be made by inserting *'including its obligation to provide passenger services priority'* at the end of *'(b) other assumptions relating to operating the Network for non-coal services as reasonably determined by ARTC'*. This approach would also have the flow-on benefit of ensuring that the ARTC accords passenger priority when determining the available capacity of the network, or managing medium term capacity.

Should you have any questions about this submission, please contact Mr Andrew Mogg, Principal Policy Officer, on 9268 2914 or by email andrew.mogg@transport.nsw.gov.au.

Yours sincerely



Les Wielinga
Director-General