

RailCorp

Chief Executive Officer: PO Box K349, Haymarket NSW 1238
Level 6, 18 Lee Street, Chippendale NSW 2008
Tel: (02) 8202 3175 Fax: (02) 8202 2291
www.railcorp.info

7th August 2007

Ms Margaret Arblaster
General Manager, Transport and Prices Oversight
Regulatory Affairs Division
ACCC
GPO Box 520
Melbourne VIC 3001

Dear Ms Arblaster

AUSTRALIAN RAIL TRACK CORPORATION (ARTC) 2007 ACCESS UNDERTAKING – RAILCORP COMMENTS

Thank you for the opportunity to comment on the ARTC 2007 Access Undertaking. Our Submission is attached.

RailCorp's primary concerns with ARTC's Access Undertaking are that it:

- generally fails to acknowledge non-indicative services, such as RailCorp's passenger services, that operate on the ARTC network;
- fails to give any effective guidance to the operators of non-indicative services as to how they will be treated compared with indicative services on the ARTC network;
- fails to acknowledge that some smaller operators on the ARTC network are at a competitive disadvantage in dealing with ARTC under the negotiate and arbitrate model; and
- has the potential to pre-empt the process that the Council of Australian Governments has initiated in relation to consistent rail regulation.

If you have any questions or wish to be provided with additional information please contact:

Mr Colin Hunter
Manager Operations Access
02 8202 3263
colin.hunter@railcorp.nsw.gov.au

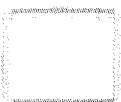
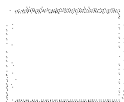
Yours sincerely

Vince Graham
Chief Executive Officer

Submission to ACCC

ARTC Undertaking 2007

RailCorp



Summary of RailCorp's View

RailCorp's concerns with ARTC's Access Undertaking are that it:

- generally fails to acknowledge non-indicative services, such as RailCorp's passenger services, that operate on the ARTC network;
- fails to give any effective guidance to the operators of non-indicative services as to how they will be treated compared with indicative services on the ARTC network;
- fails to acknowledge that some smaller operators on the ARTC network are at a competitive disadvantage in dealing with ARTC under the negotiate and arbitrate model; and
- has the potential to pre-empt the process that the Council of Australian Governments has initiated in relation to consistent rail regulation.

RailCorp Operations in ARTC Territory

RailCorp's rail services in ARTC territory are:

- CityRail regional commuter services between Campbelltown and Moss Vale and Goulburn on the Main South, and between Newcastle and Telarah, Dungog, Muswellbrook and Scone in the Hunter Valley;
- CountryLink long-distance XPT services to Melbourne, Brisbane, Casino and Grafton;
- CountryLink regional Xplorer services to Canberra (as far as Joppa Junction), Griffith (as far as Junee), Armidale and Moree (as far as Werris Creek) and Broken Hill (beyond Parkes);
- RailCorp infrastructure maintenance services (work trains, such as ballast, sleeper and rail trains, and track machines).

These services of CityRail, CountryLink and maintenance services use the ARTC network to varying degrees depending on destinations. In total RailCorp's timetable involves approximately 130 train services operating on the ARTC network on any weekday, and approximately 90 on any weekend day. With the exception of work trains, these services are scheduled in ARTC's Standard Working Timetable, operate in basically the same format every day, and represent long-term consistent access business for ARTC.

The Canberra, Griffith, Armidale, Moree and Broken Hill services also operate over the Country Regional Network (CRN), under ARTC's management on behalf of Rail Infrastructure Corporation NSW (RIC).

Application of the Undertaking

ARTC has a concise and well defined organizational objective which effectively relates to the performance of the interstate rail freight industry. This objective is reflected by both the Explanatory Guide and the draft Undertaking indicating that its strategy for long term asset sustainability depends on growth in rail freight volumes. In line with this strategy the draft Undertaking focuses on access to the ARTC network by freight trains.

ARTC proposes to use a hybrid pricing framework based on a global negotiate/arbitrate model while identifying prices and contractual conditions that would apply to a nominated Indicative Service which is the equivalent of an intermodal freight service. ARTC suggests that use of



such a hybrid framework will provide certainty to its customers and promote the Indicative category of service.

In the event that an Access Seeker proposes to operate a service that does not fall within the definition of an Indicative Service, ARTC proposes that a negotiate/arbitrate framework will be used with subsequent negotiations based on:

- Indicative access charges
- Service characteristics
- Commercial impacts on ARTC
- Logistical impacts on ARTC
- Cost of additional capacity

These categories are extremely broad, even with specific examples provided in the draft Undertaking, and the Undertaking does not impose on ARTC any obligation explain or justify its treatment of non-indicative services, such as:

- the way or extent to which other services are considered to be different from Indicative Services,
- the impact of such variations on ARTC's business or operations, or
- the basis on which ARTC will assess train path applications, set access charges or negotiate terms within the Access Agreement.

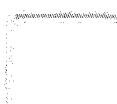
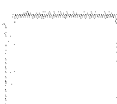
This creates a measure of uncertainty for those access seekers like RailCorp, who operate services which significantly differ from the "Indicative Service". RailCorp considers that the failure of the Undertaking to give guidance to operators of non-indicative services places them at an unreasonable disadvantage in a negotiate/arbitrate environment, in responding to ARTC's focus on Intermodal services.

An alternative approach would be for ARTC to include in its Access Undertaking a recognition of the characteristics and requirements of RailCorp's services, in the form of an access framework for an "Indicative Passenger Service".

Negotiation

RailCorp considers that the negotiate/arbitrate approach adopted within the Undertaking places it at a significant disadvantage in its negotiations with ARTC, with very little ability to contest ARTC's monopoly position as access provider. This disadvantage arises from the following characteristics of RailCorp's services:

- RailCorp is a small player in ARTC's business, representing only approximately 5% of ARTC's access revenue in 2006/07, and with the exception of one train to Broken Hill each week, being limited to the North-South corridor and the Hunter Valley.
- The operational characteristics of RailCorp's trains are unique on the ARTC network, being smaller, lighter and faster than those of any other operator.
- RailCorp's rail operations in ARTC territory are predominantly non-commercial community obligation services heavily underwritten by the NSW Government.
- RailCorp has virtually no discretion in relation to the number or type of services that it is expected by Government and the community to provide, and cannot take advantage of the incentives towards fewer, longer trains and lower speeds, for example, built into



RailCorp

ARTC's pricing strategy.

- RailCorp is subjected to far higher levels of community scrutiny than any other rail operator, in relation to its costs, operating performance and customer service delivery.
- RailCorp's only available response under the existing and proposed Access Agreements, to a provision with which it disagrees, is to not run its services on the ARTC network. Such an action by RailCorp is unlikely to be considered by ARTC as a threat to its business that warranted concessions from its freight based approach.

ARTC has demonstrated RailCorp's relative lack of negotiating power in the past, through either rejecting outright RailCorp positions, or not responding to enquiries.

RailCorp considers that the negotiate/arbitrate approach should be backed-up by obligations on ARTC in the Undertaking, for dealing with customers at risk of disadvantage under ARTC's monopoly position.

Dispute Resolution Mechanism

The draft Undertaking proposes a dispute resolution mechanism similar to that which formed part of the 2002 ARTC Access Undertaking. The implementation of efficient and effective dispute resolution is a prerequisite to the efficient provision of access. The effective resolution of disputes under the proposed ARTC Undertaking relies heavily on the services in question being an "indicative service". Once outside the indicative service category, dispute resolution follows a potentially expensive and time consuming process ending in formal arbitration.

It is not clear that the lack of disputes submitted for arbitration under the previous ARTC Undertaking is a measurement of success of the mechanism. It could equally be considered an acknowledgement of the deterrent the dispute resolution mechanism represents to Access Seekers with legitimate issues and limited commercial leverage.

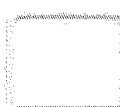
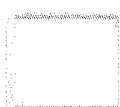
Competitive Position

RailCorp operates its regional and long-distance passenger services in ARTC territory in competition with road transport, in the form of private cars and the road coach industry. RailCorp has no competing rail operators, with the possible exception of the Indian Pacific on the Broken Hill corridor.

RailCorp is of the firm belief that the key principle of competition in downstream markets needs to be considered in the overall context of an effective Access Undertaking. The current draft of the 2007 ARTC Undertaking and the current ARTC pricing policy both acknowledge the market dynamics of the interstate intermodal freight market to the extent that ARTC offers significant pricing discounts to services operating in this market. However neither the draft Undertaking or ARTC's pricing policy recognise similar dynamics in the passenger market.

RailCorp believes that such an omission from the 2007 ARTC Draft Undertaking derogates from the overall principle of an Access Undertaking providing a competitive access framework for passenger service operators. The Access Undertaking must provide a platform for access seekers to effectively compete in their respective downstream markets and provide certainty of access to enable a strategic approach to service provision, or it may be justifiably claimed that the structure of the ARTC 2007 Draft Undertaking is discriminatory in its treatment of non-indicative service operators.

RailCorp is also in competition with other rail services for train paths on the Main South, North



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Coast and Upper Hunter Valley (beyond Maitland). ARTC very clearly identifies Intermodal services as its core business on the North-South corridor, which takes in the NSW Main South and North Coast lines. While the Undertaking also excludes the Hunter Valley from its application, it is clear that ARTC's core business in the Hunter Valley is coal.

RailCorp recommends that the inclusion of an Indicative Passenger Service in ARTC's Undertaking would go some way to redressing RailCorp's limited ability to effectively compete with other access seekers on the ARTC network, and with the alternative forms of passenger transport that constitute RailCorp's downstream market.

Regulatory Framework

The current regulatory debate on the desire for a more consistent approach to infrastructure regulation in the rail industry is seen as a positive general principle. The Council of Australian Governments supports the principle of a consistent approach to rail access regulation where appropriate and has demonstrated this through the Competition Infrastructure and Regulation Agreement (CIRA).

The consistent/uniform regulation that has been achieved in the gas and electricity infrastructure industries is generally the result of homogeneity of key infrastructure, operational and economic characteristics. The rail infrastructure industry has significant differences of operational and economic characteristics between networks and the appropriate terms and conditions of access. The Productivity Commission recognised this in both its Progress in Rail Reform report and more recently in its Road and Rail Infrastructure Pricing Report by suggesting that different regulation frameworks should apply to different rail networks, including moves to a lighter handed regulation and consideration of re-integration in some circumstances.

In line with the views of the Productivity Commission and in accordance with the CIRA, the benefits of consistency need to be weighed against the particular characteristics of each network and the nominated objective of the CIRA in establishing a "simpler and consistent national approach to economic regulation of significant infrastructure"¹. It should be noted that in lodging the proposed 2007 Access Undertaking ARTC has concluded that the characteristics of the Hunter Valley are sufficiently far removed from the Interstate Network that a separate regulatory framework is to be developed.

It is not clear that acceptance of the proposed ARTC Undertaking will provide a framework and guiding principles that would encourage a consistent approach to access regulation in the industry, specifically in relation to rail networks that are owned and controlled by vertically integrated operators.

RailCorp would support a regulatory framework flexible enough to take account of varying characteristics of networks and network owners. However it is clear that the draft ARTC Undertaking has been written for the operation of a vertically separated network owner with a strictly commercial agenda. Such characteristics, it should be acknowledged, are clearly not representative of the entire industry. Specifically RailCorp believes the 2007 ARTC Access Undertaking would be inappropriate for the RailCorp network on a number of fundamental issues. The form of any future regulatory framework that may apply to the RailCorp network must be determined by identifying objectives to be met and the cost and benefits of the various options. Such a process would be entirely consistent with the CIRA.

The ARTC proposal appears to offer little possibility of providing "a framework and guiding principles to encourage a consistent approach to access regulation in each industry"² Additionally consideration of the draft ARTC Undertaking would appear to pre-empt COAG

¹ Council of Australian Governments Meeting
10 February 2006 Communiqué p42

² Section 44AA (b), Part IIIA, Trade Practices Act

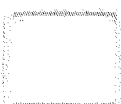


deliberations via the CIRA on the development of a consistent approach to access regulation. For these reasons the RailCorp believes that consideration of the ARTC Undertaking should be postponed.

RailCorp Recommendations

1. The ARTC 2007 Access Undertaking should provide effective guidance to non-indicative operators on the ARTC network, and binding obligations on ARTC, as to the manner in which ARTC will deal with operators of non-indicative services.
2. Alternatively, the ARTC 2007 Access Undertaking should provide for an Indicative Passenger Service, and commit ARTC to specific approaches in dealing with such services.
3. The ARTC 2007 Access Undertaking should include provisions to ensure that the negotiate and arbitrate model effectively protects the interests of operators on the ARTC network who have limited negotiation leverage.
4. The ARTC 2007 Access Undertaking should acknowledge the nature of RailCorp's operating environment, including its competitive position in relation to road transport.
5. The ARTC 2007 Access Undertaking should not be allowed to pre-empt the development of a consistent approach to rail network regulation applicable to both vertically separated and vertically integrated networks.

Vince Graham
Chief Executive Officer



RailCorp