



AUSTRALIAN RAIL TRACK CORPORATION LTD

9 October 2008

Mr David Salisbury
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Regulatory Affairs Division
ACCC
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Dear Mr Salisbury

Application for variation of ARTC Interstate Access Undertaking

I **enclose** an application to the ACCC for consent to vary aspects of the Australian Rail Track Corporation Ltd's Interstate Access Undertaking.

This Access Undertaking, which applies to ARTC's interstate rail network, was originally accepted by the ACCC on 30 July 2008.

The application includes detailed reasons for requesting the variation.

If you have any queries, please contact Simon Ormsby on (08) 8217 4314 or Gavin Carney on (08) 8217 4189

Yours sincerely

A handwritten signature in black ink that reads 'David Marchant'. The signature is written in a cursive, flowing style with a prominent flourish at the end.

David Marchant
Chief Executive Officer

Application by ARTC to vary the ARTC Interstate Access Undertaking

1 Application

1.1 Application

This is an application to the ACCC for consent to vary the ARTC Interstate Access Undertaking (**Access Undertaking**) under section 44ZZA(7) of the *Trade Practices Act 1974* (Cth). The Access Undertaking was accepted by the ACCC on 30 July 2008.

ARTC is proposing to amend clause 15 of the Indicative Access Agreement (**IAA**) that forms part of the Access Undertaking. Clause 15 allocates liability between ARTC and an operator for loss or damage arising out of an incident on ARTC's interstate rail network.

Clause 15 was drafted on the assumption that operators do not accept liability to third party claims. ARTC now understands this practice is changing.

The proposed amendments are set out in Attachment A. These amendments remove contractual liability to third parties from the clause 15 liability allocation regime. This is necessary to ensure that an operator cannot contractually accept liability to a third party and then seek to pass on that liability to ARTC under clause 15. As it stands, ARTC has no ability to manage that risk and could be liable for third party losses claimed through an operator even though ARTC would have no direct liability to the third party under general law. This was never the intention of clause 15.

1.2 Criteria for approving variation

A number of criteria under the Access Undertaking and the TPA must be satisfied before a variation can be made:

- (a) **Change in circumstances** - Clause 2.4(a) of the Access Undertaking sets out the conditions necessary to allow for review of the Access Undertaking:

If, during the Term, ARTC is of the opinion that circumstances have changed such that this Undertaking is no longer commercially viable for ARTC or becomes inconsistent with the objectives prescribed at clause 1.2, ARTC may seek the approval of the ACCC to vary this Undertaking.

- (b) **TPA criteria** - Section 44ZZA(7) of the TPA allows ARTC to vary the Access Undertaking at any time with the consent of the ACCC. The ACCC may only consent to the variation if it thinks it appropriate to do so having regard to the matters set out in section 44ZZA(3).
- (c) **Consultation** - Clause 2.4(d) of the Access Undertaking states ARTC may only approach the ACCC with a request to vary the Access Undertaking following consultation with operators regarding the proposed variation.

2 Operation of existing clause 15

2.1 Operation of clause 15 as it exists

Clause 15 of the IAA establishes a regime to allocate liability between ARTC and the operator for loss or damage arising out of incidents on the rail network.

In clause 1.1 of the Indicative Access Agreement, an "Incident" is defined as:

"a breakdown, accident or emergency on the Network which involves the Operator and which causes or may reasonably be expected to pose a danger of causing any one or more of the following:

- (a) Material damage to or interference with the Network or any Associated Facilities managed by ARTC;*
- (b) Material damage to property;*
- (c) Material personal injury to any person;*
- (d) an Environmental Condition;*
- (e) a Category A Incident or a Category B Incident as defined in the Standards;*
- (f) an Incident which requires notification under the relevant Rail Safety Act to the Administering Authority (as defined in such Act); or*
- (g) an Incident requiring notification under the Dangerous Goods Code."*

Under the IAA liability regime, ARTC and the operator are liable to each other for their own direct loss and damage, as well as the liability of either ARTC or the operator to a third party. "Consequential Loss" is excluded from the liability regime, but the definition of Consequential Loss does not include third party claims.

The essential aspects of the liability regime are as follows:

Incidents not involving breach of the IAA

Clause 15.1(b) releases both parties from claims against each other resulting from an Incident, including where this Incident was caused or contributed to by the negligence of a party, unless otherwise agreed.

Incidents involving breach of the IAA

Clause 15.3 provides that a breach of the IAA by one party could render that party liable to indemnify the other. For ARTC, the principal obligation in the IAA that, if breached, could render ARTC liable to the operator is clause 6.1, under which ARTC agrees to maintain the Network in a condition fit for use by the operator to provide rail transport services.

For an operator, there are several obligations which, if breached, would render the operator liable to ARTC, including:

- clause 5.4: to maintain rolling stock in a condition which is fit for use at all times;
- clause 5.5(e): to minimise obstruction to the network;
- clause 5.5(g): not to materially change, alter, repair, deface or otherwise affect any part of the network;
- clause 5.5(h): not to materially damage the network.

A breach of the IAA by ARTC or the operator could expose the party of breach to liability to the other party. As noted above, for the purposes of determining liability arising out of Incidents, negligence was not a relevant concept because 15.1(b) makes it clear that liability for negligence is released.

In drafting clause 15 in that manner, it was assumed that any third party that suffered loss and damage would have to prove negligence or a breach of statutory duty against either ARTC or the operator before ARTC or the operator would have any liability directly to that third party.

If there was no breach of the IAA (in the case of the operator, if the train was in a fit and proper condition) then it was unlikely that a third party could establish liability against the operator and hence there would be no claim by a third party, in turn, that could be passed on to ARTC under clause 15.

As discussed further below, if an operator enters into contractual arrangement with its customers that causes the operator to be liable to its customer irrespective of negligence, or breach of statutory duty by the operator, there is the potential for that liability to be passed on to ARTC in circumstances where such liability was never contemplated.

3 **Clause 2.4(d) - change in circumstances**

3.1 **Change in circumstances**

ARTC, in its role as a network access provider, does not deal directly with the customers of operators, being those who consign goods to the operators for carriage on the network (**Consignors**). ARTC does not require that any particular terms, conditions or rights be included in the contract of carriage between an operator and a Consignor. However, ARTC has always had an understanding that in all arrangements between operators and Consignors, operators do not accept liability for loss or damage to the Consignor's goods that the operators carry, or arrange to carry, on the network.

ARTC has over the years experienced a number of Incidents where substantial damage has been caused to an operator's train, ARTC's network and Consignor goods in transit on the network. Operators have, consistent with ARTC's understanding of the refusal by operators to accept liability for loss and damage to goods of the Consignor, never claimed or threatened to claim for loss of goods as a result of an Incident.

Recently, following discussions with an operator, ARTC was provided for the first time with extracts from agreements allegedly in place between an operator and its Consignors which suggest that the operator accepts the risk of loss in respect of all

goods it carries, regardless of the cause of the loss. This was the first evidence that ARTC had of this behaviour by operators and caused concern because under the IAA, the operator could potentially pass this loss on to ARTC. Further, given competition between operators in above rail services it is quite possible that such provisions could become industry standard for large Consignors.

The actions of an operator in accepting liability, in the absence of negligence or breach of statutory duty, creates a circumstance where, in the absence of a third party proving negligence or breach of statutory duty against either the operator or ARTC, the liability for Consignor claims may be effectively transferred to ARTC in circumstances where it would be quite unfair for ARTC to bear that liability.

A breach of the IAA by ARTC, in terms of failing to provide the network in a condition which is fit for use by the operator, may occur in the absence of negligence or any breach of statute. For example, a latent fault in rail, or actions of sabotage or malicious damage, could all result in the track not being fit for use – but not amount to circumstances where ARTC is in breach of any duty of care or statutory responsibility. In such circumstances, it would be perverse that an operator, who similarly may not be liable to the customer for any breach of duty of care or breach of statutory duty, might voluntarily accept liability for the losses and then cause these to be transferred to ARTC. This was never the intention of clause 15.

This risk also applies in the reverse - ARTC could contractually accept liability to third parties and then seek to pass it on to operators under clause 15.

ARTC considers this constitutes a change of circumstances. Clause 15 was based on past industry practice. It did not become aware of this new practice until after the ACCC accepted the final undertaking.

ARTC considers this change of circumstances makes the current Access Undertaking (namely clause 15):

- (a) no longer commercially viable for ARTC; and
- (b) inconsistent with its objectives set out at clause 1.2 of the Access Undertaking.

3.2 No longer commercially viable

The change in circumstances detailed above results in ARTC assuming risk under the IAA that is not commercially viable because the potential liability that ARTC faces is substantial and one that it is not able to mitigate.

For example, in relatively recent litigation arising out of a level crossing derailment, the liability for Consignor claims was asserted to be in the order of \$20 million. It is quite conceivable that Consignor claims could be much higher, particularly if Consignors' economic loss was included as well as property damage to transported goods.

ARTC is not a party to the contracts with Consignors and operators and has no ability to compel operators to limit their liability under their contracts to ensure there is no flow through of liability to it. In any case, ARTC does not consider it appropriate that it should be involved in setting the terms of those contracts.

ARTC has been in discussion with its insurance brokers. ARTC understands that the exposure to such liability is likely to materially impact its premiums, if, in fact, insurers are willing to provide insurance cover for such liability in the first place.

3.3 Inconsistent with Access Undertaking objectives

The Access Undertaking objectives, prescribed at clause 1.2, include reaching an appropriate balance between:

- (a) the legitimate business interest of ARTC, including a fair and reasonable return on ARTC's investment in the network and associated facilities commensurate with its commercial risk; and
- (b) the interests of applicants wanting access to the network, including providing access to the network on fair and reasonable terms.

The rate of return approved by the ACCC under the undertaking did not envisage ARTC taking on the risk exposures arising from the change in circumstances above.

There is now a mismatch between the ARTC's returns and level of commercial risk which was never intended and which is not necessary for users to obtain fair access to the network.

3.4 Effect of proposed variation

These amendments to the IAA set out in Attachment A have the effect of excluding from the definition of loss or damage any liability that either ARTC or the operator may have to a third party which arises:

- solely under an agreement, whether by way of indemnity or otherwise, to accept a liability; or
- from a breach of an agreement with that third party.

The proposed change addresses the disparity that has now arisen between the commercial returns and the level of risk to which ARTC is potentially exposed. It does so without materially impacting on operators. Operators are still free to accept no fault liability to Consignors but cannot, and should not, be able to pass on that liability to ARTC.

Importantly, this change does not exclude any rights of a third party to claim directly against ARTC in the event of loss or damage of its goods. ARTC will remain liable to third parties in the event that the third party can establish a legitimate claim based on the principles of general law, such as negligence or breach of statutory duty.

The change is limited to contractual liability. If either ARTC or an operator are liable to a third party for negligence or breach of statutory duty arising from an Incident and the other party has contributed to that Incident, then that liability is still potentially subject to allocation between ARTC and the operator in accordance with clause 15.

4 Section 44ZZA(7) of the TPA

The ACCC may consent to ARTC's proposed variation if it thinks it appropriate to do so having regard to the matters outlined in subsection 44ZZA(7)(3) of the TPA. These matters include:

- (a) the legitimate business interests of the provider; and
- (b) the interests of persons who might want access to the service.

These are essentially the same objectives as discussed in the preceding section and for the reasons outlined above, it is appropriate for the ACCC to consent to ARTC's proposed variation.

5 Clause 2.4(d) - consultation

In accordance with clause 2.4(d) of the Access Undertaking, ARTC may only approach the ACCC with a request to vary the Access Undertaking following consultation with operators regarding the proposed variation.

ARTC has advised all operators currently seeking contracts under the Access Undertaking that ARTC is amending clause 15 of the IAA in the terms set out in Attachment A. It did this by letters dated 3 October 2008.

ARTC is still in the process of negotiations with operators in relation to the new contracts, including clause 15.

Attachment A - Proposed variation to clause 15

5.1 Proposed variation

ARTC proposes varying two aspects of the IAA by way of amendment to clauses 15.1 and 15.2 as follows:

(a) **Clause 15.1(b)** - delete the words "for loss or damage" in the first line; and

(b) **Clause 15.2(b)** - amend the definition of "loss or damage" as follows:

"(b) 'loss or damage' includes:

(i) _____-loss or damage to property belonging to a party to this Agreement;

(ii) _____, ~~any liability to or claim made by~~ a third party, arising from the negligence or breach of statutory duty of ARTC or the Operator to such third party (as the case may be) but excluding any liability of ARTC or the Operator to a third party arising under an Agreement with that party (whether by way of indemnity or otherwise) or arising from a breach of an agreement with that third party;

(iii) _____ the costs of recovery of any property damaged or affected by the relevant Incident, and

(iv) _____ legal expenses on a full indemnity basis;"