

ARTC 2024 Interstate Access Undertaking

Response to ACCC Draft Decision



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1. Overview

Aurizon welcomes the opportunity to provide a submission to the Australian Competition & Consumer Commission (**ACCC**) in response to its Draft Decision on the Australian Rail Track Corporation (**ARTC**) Proposed 2024 Interstate Access Undertaking (**IAU**).

Aurizon is Australia's largest rail operator, with operations extending across Australia, including the large scale bulk haulage of coal and iron ore, integrated supply chain services for other bulk products and the recent introduction of inter-city containerised freight services across the national rail network. Aurizon has strong ambitions to grow its containerised freight supply chain, with an objective of increasing from its initial installed capacity of ~200,000 TEU pa to ~500,000 by 2030, which can only be achieved by attracting new freight volumes to rail. We aim to drive modal shift onto the national interstate network (particularly ARTC's Melbourne-Sydney-Brisbane corridor), as well as on other corridors such as Brisbane-Perth, Brisbane-Darwin and Perth-Darwin, by offering efficient service linkages including with Aurizon's existing Bulk Central service offering. We are also actively seeking new markets to drive additional rail volumes, such as land-bridging via Port of Darwin and bulk products such as those for new economy minerals. Achieving efficient access to the national rail network, crucially including ARTC's portion of the national rail network, is essential to realising these ambitions.

ARTC's Proposed IAU incorporates several material changes to the current framework that are supported by Aurizon, including:

- > expanding the number of core regulated services from 1 to 8 and implementing a stand alone price cap for regulated services, due to issues with the existing Regulatory Asset Base;
- > changing the arbitration framework so that arbitrations are conducted by a commercial arbitrator instead of the ACCC;
- > providing greater transparency and reporting of financial data; and
- > introducing an Interstate Network Development Strategy to be updated annually.

Through the ACCC's process of consulting on the Proposed IAU, a range of further issues have been raised by operators and stakeholders, key amongst these being better recognition of ARTC's network forming a component of the broader national rail network, and opportunities to promote optimised scheduling of services to achieve more efficient use of the network, advance rail competition and modal shift from road.

While there has been insufficient time for a number of these issues to be fully considered and incorporated into the 2024 IAU, the ACCC has recognised their importance and the need for ongoing development of these concepts for inclusion in a future IAU. Accordingly, in addition to its proposed amendments to the 2024 IAU (which have been developed having regard to stakeholder consultation), the ACCC's draft decision includes a number of recommendations regarding how ARTC should engage with its stakeholders in order to continue to progress these outstanding issues following finalisation of the 2024 IAU.

Aurizon supports the ACCC's recommended amendments to the Proposed IAU. But, importantly, Aurizon believes developing and maintaining momentum on addressing these outstanding issues is critical to achieving a fit-for-purpose access framework that promotes efficient utilisation of the national rail network and enables rail to more effectively compete with road. Therefore, in responding to the Draft Decision, Aurizon has focussed on the recommended processes for addressing outstanding issues, in order to ensure that stakeholders can have confidence in how they will be progressed and ultimately implemented. In particular, this includes:

- > providing greater guidance around the expected procedural arrangements for the annual stakeholder forum, and in particular, the processes to be used to ensure that sufficient analysis and preparatory work is undertaken on issues that will remain outstanding following finalisation of the Proposed IAU;

- > providing clearer expectations around the development of the capacity management guidance paper to ensure that it effectively addresses information gaps, and how it will be used to provide a platform for the assessment of ways to improve and optimise capacity allocations; and
- > recognising that some changes to the ITAA are likely to be further considered following finalisation of the IAU, establishing a pathway to introduce changes in an access agreement to align with changes made to the IAU and/or ITAA emerging from the above processes, especially recognising any changes to the capacity management arrangements will need to be universally included in all access agreements in order to work effectively.

2. Annual stakeholder forum

The ACCC has recommended an amendment to Part 2 of the IAU to include a commitment by ARTC to hold an annual stakeholder forum to discuss matters related to the IAU, also attended by the ACCC. Aurizon agrees that there is value in an annual forum to discuss and resolve issues regarding access and the operation of the IAU. However, the value of this forum in developing and maintaining momentum on addressing the key outstanding issues will depend heavily on how the forum is run, and the extent to which analysis and preparatory work is undertaken by both ARTC and other stakeholders. While the ACCC's Draft Decision has not explicitly set out its expectations around how this would work, the Draft Decision indicates an expectation that there will be issues where ARTC and stakeholders will need to work together (eg the investigation of feasible definitions of premium and non-premium paths)¹, and that including such issues in a forward agenda for the annual stakeholder forum would encourage collective problem solving among access seekers and ARTC².

The ACCC's suggested IAU provisions for the forum provide for a Terms of Reference and procedural arrangements to be agreed between ARTC and the ACCC, and published by ARTC within 6 months of the IAU's commencement. In order to maximise the effectiveness of the forum, Aurizon considers that these procedural arrangements should include the following:

- > the process for developing a 'forward agenda' well in advance of the forum (eg 6-12 months in advance), identifying issues where analysis and preparatory work will be undertaken prior to the forum. We consider this process should include:
 - for the initial forum, the forward agenda to include specified outstanding issues arising from the ACCC's assessment of the Proposed IAU, eg performance data transparency, tools for schedule optimisation and identifying and contracting for premium/non-premium paths;
 - for subsequent forums, ARTC to:
 - provide an opportunity for stakeholders to identify issues that they consider should be included in the forward agenda;
 - distribute proposed forward agenda items to stakeholders for their consideration and feedback;
 - provide a transparent method for prioritising forward agenda items, where required;
- > for those forward agenda items requiring significant analysis and preparatory work, ARTC to:
 - develop a workplan identifying the key analysis tasks and milestones, as well as to identify the mechanism/s it will use for stakeholder input into the analysis, eg through a working group or other process;

¹ ACCC Draft Decision on ARTC 2024 Interstate Access Undertaking (June 2024), p. 73

² ACCC Draft Decision on ARTC 2024 Interstate Access Undertaking (June 2024), p. 106

- provide an opportunity for stakeholders to review and provide input into these workplans, in order to ensure that they will adequately address stakeholder requirements;
- > in relation to the outcomes of the forum:
 - the process and timeframe for communication of forum outcomes; and
 - expectations around implementation of forum outcomes, including an acknowledgement that this may include progressive amendment to the IAU and/or ITAA (rather than issues simply being collected for the next IAU).

3. Capacity management

The ACCC has highlighted the criticality of effective capacity management in enabling competition in downstream markets. This is consistent with Aurizon’s view that access to efficient and attractive paths is the most important consideration for a new entrant in order to effectively compete with established operators.

The ACCC has taken the view that the investigation of varied capacity management arrangements could not be achieved within the timeframes for the Proposed IAU, and has proposed that this continue to be progressed following its finalisation. Therefore while not recommending specific amendments to the Proposed IAU, the ACCC has made a number of recommendations, including:

- > that ARTC consult with its stakeholders and shareholders about ways to optimise capacity allocation and provide greater transparency around path availability and utilisation, including non-price barriers to entry such as insurance costs and risks;³ and
- > as a first step, within 12 months ARTC publish a short guidance paper outlining in plain English the opportunities for Operators and non-Operators to seek, manage, resume or transfer capacity on the interstate network, including discussion of the rationale for its risk allocation and insurance arrangements.⁴

Aurizon is supportive of the ACCC’s recommendations and suggests additional guidance is provided to ensure timely progress is made on these issues.

There is limited transparency around ARTC’s processes for allocating, varying and transferring train paths on the network, particularly when this also involves amendment to third party pathing, and greater information around these processes would be beneficial. And more critically, there is a stronger need for increased transparency around pathing opportunities, including where there is the opportunity for amendment to existing MTP paths.

Aurizon proposes that the capacity management guidance paper as recommended by the ACCC address these information gaps and provide a platform for the assessment of ways to improve and optimise capacity allocations. To do this, we believe:

- > the guidance paper should not simply be a plain English restatement of the opportunities established in the IAU and ITAA, but also explain ARTC’s approach to working with Operators on implementing these processes in a way that promotes the efficient allocation of capacity on its network;

³ ACCC Draft Decision on ARTC 2024 Interstate Access Undertaking (June 2024), p. 81

⁴ ACCC Draft Decision on ARTC 2024 Interstate Access Undertaking (June 2024), p. 86

- > the draft guidance paper should be distributed to stakeholders for feedback on whether it reasonably addresses information gaps around ARTC's capacity management processes, with the expectation that ARTC will enhance the guidance paper to address any identified remaining gaps; and
- > given the ACCC intends this guidance paper to be a first step in addressing ways to optimise capacity allocation and provide greater transparency around path availability and utilisation, in order that this can be further considered in the annual stakeholder forum there should be a shorter timeframe for its development (i.e. within 6 months).

In addition, we consider that the ACCC should clarify its expectations around ARTC's assessment and consultation on ways to optimise capacity allocation:

- > this is linked to our comments in Section 2 around the preparatory analysis and consultation on forward agenda items for the annual stakeholder forum, in particular our suggestion that ARTC should:
 - develop a workplan identifying the key analysis tasks and milestones, and the mechanism/s it will use for stakeholder input into the analysis, eg through a working group or other; and
 - provide an opportunity for stakeholders to review and provide input into these workplans, in order to ensure that they will adequately address stakeholder requirements.

ARTC has indicated, in its response to the ACCC's Information Request 3, that it will seek to develop a set of capacity management arrangements that will be satisfactory to all operators, but notes that given the varying impacts on parties, it may be an area where consensus may be difficult to achieve.⁵ Aurizon is concerned that a requirement (whether formal or informal) for a consensus position on any amendments to the capacity management arrangements is unrealistic, and would effectively mean little or no change to the existing arrangements.

The importance of effective capacity management provisions has been long recognised in the aviation sector, with Governments specifying the slot management arrangements for major airports, aimed at improving efficiency in the allocation of slots and reducing incentives for anti-competitive slot misuse. This issue is again in the headlines, with the Australian Government recently announcing its intent to reform the Sydney Airport slot management arrangements, including revising the slot management rules to increase the transparency of slot allocation and to rebalance slot allocation towards new entrants, as well as reforming governance arrangements to provide for more effective enforcement of slot rules.⁶ There is no expectation that the revised slot management arrangements will need to be agreed by all airport users on a consensus basis – this recognises that incumbent airlines have a strong vested interest in maintaining their slots (even where they do use these on a consistent or reliable basis) and limiting the opportunities for new entrants, together with the public benefits from more efficient use of airport capacity and increased competition amongst airlines.

These same issues arise in the rail sector. As has been recognised by the ACCC,⁷ the optimisation of paths on the network is a key driver of network efficiency and competition in the rail industry. Given the network capacity is finite and there are real constraints in scheduling additional paths at peak times, optimising the use of existing capacity is likely to promote the objects and considerations under Part IIIA of the Competition and Consumer Act, particularly:

- > the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets;
- > the legitimate business interests of the provider of the service;
- > the public interest, including the public interest in having competition in markets;

⁵ ARTC Response to ACCC Information Request No 3 (August 2024); Appendix B Table, Item 36

⁶ Australian Government (August 2024); Aviation White - Paper Towards 2050; p.73-74.

⁷ ACCC Draft Decision on ARTC 2024 Interstate Access Undertaking (June 2024), p.78-79.

- > the interests of persons who might want access to the service.

However, incumbent rail operators will have an incentive to maintain their paths (even when they are not using these paths on a consistent or reliable basis) and minimise opportunities for new entrants to gain access to paths that allow the new entrant to compete for their premium customers. It is highly unlikely that a consensus agreement will be able to be achieved for changed capacity management rules if any existing operator has a vested interest in maintaining the status quo.

As a result, Aurizon considers that this issue needs to be led by a party who is willing to consider the issues and concerns raised by all operators, but who is ultimately motivated to make a call on the path management arrangements that will best promote the public interest, being the efficient utilisation of the network and improved competition amongst rail operators. Aurizon considers that ARTC is best placed to take this leadership role, should it be willing to do so.

4. Indicative Track Access Agreement

In its Draft Decision, the ACCC highlighted that there were a range of changes proposed to the ITAA by ARTC and other stakeholders, but was concerned that there was not currently sufficient information or time available to adequately consider substantive or contentious changes. Accordingly, the ACCC has proposed a process whereby:

- > the ITAA is amended to only include uncontentious changes; and
- > ARTC is to engage further with stakeholders outside this assessment process to discuss any substantial changes to the ITAA that are not yet agreed.

Aurizon considers this process is reasonable in principle, but has concerns about the effectiveness of implementing changes to the ITAA on a staged basis as anticipated by the ACCC.

The ITAA does not create direct obligations on ARTC or access holders, but rather provides a template for negotiations between ARTC and access seekers. Aurizon understands that ARTC's approach to date has been to extend all existing access agreements to an expiry date shortly after the planned commencement of the Proposed IAU, to allow new access agreements to be negotiated under the flexible commercial framework that will be established. This means that changes made to the ITAA as part of the Proposed IAU can be reflected in access agreements with access holders within a short timeframe.

However, where changes are made to the ITAA following finalisation of the IAU, there may not be an opportunity to incorporate these into existing access agreements. For the most part, this is not a problem as the impact of variations between the ITAA and actual access agreements will be limited only to ARTC and the relevant operator. However, there are some issues where changed IAU and ITAA provisions will only be effective if they are universally incorporated in all access agreements. The most critical of these relate to the management of train paths and network operations.

As discussed in Section 3, one of the issues to be addressed following finalisation of the Proposed IAU is ensuring ARTC has effective tools to actively manage and optimise the MTP. However, any change in ARTC's approach to managing these issues will only be effective where it is reflected in all existing access agreements for all Operators. If such changes cannot be introduced during the term of access agreements created following finalisation of the Proposed IAU, this is likely to cause an excessively long period to implement these changes. Further, this issue is not limited to whether or not change are made during the term of this IAU. Even if all changes were deferred until the next IAU, in the absence of a process for reviewing existing access agreements, there is no certainty that there will be a similar 'agreement renewal window' that would allow them to be readily incorporated into new access agreements.

This issue is recognised in other rail access frameworks – for example, the Aurizon Network Standard Access Agreement provides for specified provisions of the Aurizon Network Access Undertaking (including

capacity management provisions) to be incorporated into the access agreement, including any changes to those Access Undertaking provisions that occur throughout the term of the agreement.⁸

In the context of the lighter touch IAU framework, Aurizon considers that the simplest way of addressing this is to include in the ITAA a trigger for review of specified clauses in the access agreement where changes are made to the corresponding provisions in the IAU and/or ITAA. We consider that this should be applied to Clause 2.9 (Renegotiation of Scheduled Train Paths), Clause 9 (Variation or Cancellation of Train Paths) and Schedule 4 (Network Management Principles) of the ITAA.

In relation to specific amendments to the ITAA, please refer to the attached table which sets out Aurizon's views on proposed changes to the ITAA, including suggested drafting where applicable. Where Aurizon has marked a change as uncontentious, we are willing to accept ARTC's position on this issue, as put forward in its response to the ACCC Information Request No 3, although in some cases we have suggested matters that we would like ARTC to further consider. Items classified as substantial are largely limited to capacity management provisions in Clause 9, with our proposed alternative approach to dealing with these issues in the current ITAA review discussed above.

⁸ Aurizon Network Standard Access Agreement Clause 3