

[REDACTED]  
Regulated Access – Rail – Infrastructure & Transport - Access and Pricing  
Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601

Via email to [REDACTED]

23 April 2024

Dear [REDACTED]

## GrainCorp proposed amendments to ARTC draft 2023 Interstate Access Undertaking

We refer to:

- a) recent discussions between the Australian Competition and Consumer Commission (**the ACCC**) and GrainCorp in relation to GrainCorp's submission dated 23 February 2024 responding to the ACCC's consultation paper regarding Australian Rail Track Corporation's (**ARTC**) proposed 2023 Interstate Access Undertaking (**IAU**) in respect of the ARTC railway corridor in the Interstate Network (**ARTC Interstate Network**);
- b) the ACCC's request for high level priority changes to the IAU and GrainCorp's subsequent email response of 12 April 2024 setting out those high level priority changes; and
- c) the ACCC's request for suggestions on how the IAU could be amended to capture GrainCorp's high level priority changes.

GrainCorp has prepared suggested amendments to the IAU in line with the high-level priority changes communicated on 12 April as set out in **Annexure 1**. Broadly speaking, these amendments seek to ensure that rail loading operator access to the ARTC Interstate Network forms part of the IAU so that access for both rolling stock operators and rail loading operators can be governed by the principles of fairness and transparency that only rolling stock operators currently have the benefit of under the IAU framework.

Further, we have set out those amendments proposed by Pacific National Pty Ltd in its IAU submission to ACCC dated 8 March 2024 set out in **Annexure 2** which are relevant to and supported by GrainCorp as they relate to rail loading operations.

We look forward to discussing this with you further.

Your Sincerely,

[REDACTED]

[REDACTED]

General Manager, Grains Commercial

## Annexure 1 - GrainCorp proposed amendments to the IAU

GrainCorp has marked up in red below the priority amendments that it believes can readily be incorporated into the IAU.

GrainCorp has also made drafting recommendations in blue that sets out the longer term matters for ACCC to consider incorporating into future IAUs.

### Part 1 – Preamble

#### 1.1 Introduction

- 1.1(c) ARTC currently owns or leases and is responsible for the granting of access to that part of the Interstate Rail Network comprising the Network, including Rail Loading Operator Access.

#### 1.2 Objectives

- (a) provide a framework to manage negotiations with Applicants for Access to the Network for the purpose of operating Services;
- (b) [insert a new (b) provide a framework to manage negotiations with Rail Loading Applicants for Rail Loading Access to the Network for the purpose of Rail Loading Services] or  
[insert a new 1.2.1 Objective and retain the current drafting in the clause 1.2 Objective and insert a new clause 1.2.2 Objective for Rail Loading Access that mirrors the drafting in the current clause 1.2]
- (b) establish a workable, open, non-discriminatory, efficient and inclusive process for lodging and processing Access Applications and Rail Loading Access Applications [GNC drafting note: this drafting would apply to the current clause 1.2(b) and is additional to the above suggestion]

Insert the relevant Rail Loading Operator and Rail Loading Operator Access references as required.

### Part 2 – Scope and Administration of Undertaking

#### 2.1 Scope

- (a) This Undertaking provides for the negotiations of Access and Rail Loading Access required for the operation of Train Services by Operators, which rely on Rail Loading Services by Rail Loading Operators on the Network, with details of the specified services and sections of the Network defined during Access and Rail Loading Access negotiations. Access and Rail Loading Access will include, in addition to the track and airspace in the Network, the benefit of Associated Facilities required to facilitate such Access and Rail Loading Access. [GNC drafting note: the basis for this drafting is that this Rail Loading Access to the Network needs to be incorporated into this framework to manage negotiations with Rail Loading Operators for the purpose of operating Services and the Rail Loading Services without which the Operators would not be permitted to enter into Network Sidings. GrainCorp submits that both types of access to the Network are of equal important for the effective operation of the Network and therefore both types of access need to be governed by the IAU. Only Operators currently have the benefit of fairness and transparency in their dealings with ARTC through the IAU. These amendments would mean that Rail Loading Operators would be treated equally]
- (b) This Undertaking does not extend to any Extension to the Network nor to the track and infrastructure not part of the Network that may connect to the Network. [GNC drafting note: the infrastructure that Rail Loading Operators and Operators rely on to access the Network are located on the Rail Loading Operators' land, however access to this infrastructure can only occur from the Network. Without this access both the Operator and Rail Loading Operator would not be able to access the Network. Accordingly, GNC does not propose any drafting to this subclause and proposes the drafting only in clause 2.1(a).]

#### 2.2 Grant and Duration of Undertaking

- (a) ARTC undertakes to the ACCC that it will comply with the terms and conditions specified in this Undertaking in relation to the grant of Access and Rail Loading Access to Operators and Rail Loading Operators to the Network for Services and Rail Loading Services.

## 2.4 Review of Undertaking

- (b) Prior to seeking the approval of the ACCC under clause 2.4(a), ARTC will first consult with Operators and Rail Loading Operators regarding the proposed variation.

## 2.5 Existing Contractual Agreements

This Undertaking applies only to the negotiations of new Access Agreements, Rail Loading Access Agreements, or the negotiation of Access Rights in addition to those already the subject of an Access Agreement. Nothing in this Undertaking can require a party to an existing Access Agreement or Rail Loading Access Agreement to vary a term or provision of that agreement.

## 2.6 Insurance

Insert the relevant Rail Loading Operator and Rail Loading Operator Access reference as required.

## 2.7 Contact Details and Website

- (a) Persons wishing to contact ARTC for further information or to apply for Access or Rail Loading Access to the Network should contact ARTC at any of the following addresses: **[GNC drafting note: insert relevant email address for ARTC section that manages Rail Loading Access requests]**

## Part 3 – Negotiating for Access

### 3.1 Introduction

As part of ARTC's philosophy, it seeks to encourage utilisation of the Network and as such will negotiate with the Applicant and Rail Loading Applicant in good faith. ARTC recognises that the process needs to be flexible to suit specific circumstances and is willing to tailor the process in consultation with the Applicant and Rail Loading Applicant. However, ARTC also recognises that the industry seeks some certainty and provides this framework to satisfy that need.

### 3.2 Framework

This part of the Undertaking seeks to outline the process which will be followed to enable an Applicant or Rail Loading Applicant to gain Access or Rail Loading Access to the Network. It provides for:

- (a) preliminary meetings and exchanges of information;
- (b) submission of an Access Application or Rail Loading Access Application by the Applicant or Rail Loading Applicant (as applicable);
- (c) preparation of an Indicative Access Proposal by ARTC;
- (d) negotiations to develop an Access Agreement or Rail Loading Access Agreement (as applicable) for execution;
- (e) dispute resolution procedures; and
- (f) both ARTC and the Applicant or Rail Loading Applicant (as applicable) to negotiate in good faith.

**3.3 Provision of information, 3.4 Parties to Negotiation, 3.5 Confidentiality, 3.6 Access Application, 3.7 Acknowledgement, \*3.8 Indicative Access Proposal, 3.9 Negotiation, 3.10 Negotiation Process, 3.11 Access Agreement, 3.12 Dispute Resolution**

Insert relevant Rail Loading Operator and Rail Loading Access references throughout these Parts of the IAU.

**[GNC drafting note: whilst there isn't an existing indicative rail loading access agreement, this is something that GrainCorp has flagged to be considered in the longer term. Acknowledging that an indicative rail loading access agreement does not yet form part of the IAU, GrainCorp submits this doesn't and shouldn't prevent ACCC adopting the changes GrainCorp proposes. GrainCorp submits that, in the interim, the inclusion of a new Schedule to the IAU adopting the same sentiment as the current Schedule C "Essential Elements of Access Agreement" to be developed and included as part of this IAU and form the basis upon which Rail Loading Access Agreements are negotiated until such time as an Indicative Rail Loading Access Agreement is drafted and agreed upon. ARTC would then be bound by the principles of the IAU and the terms of an Access Agreement that cover the Essential Elements which would assist in ensuring fair, transparent and reasonable access to the Network is achieved in the interim period]**

#### Part 4 – Pricing Principles

Insert the relevant Rail Loading Operator and Rail Loading Operator Access references throughout this Part as required.

**[GNC drafting note: charges for Rail Loading Access should be cost reflective, fair and transparent noting that Rail Loading Operators are already liable to pay access charges for access to the Network which are fully passed on through Operators. Any charges for Rail Loading Access above those charges that are passed through i.e. for accessing the Network should be covered under the IAU]**

#### Part 5 – Management of Capacity

Insert the relevant Rail Loading Operator and Rail Loading Operator Access references throughout this Part as required.

**[GNC drafting note: the Network plays a societally significant role in the viability of Australia's grain production and grain growing businesses both domestically and internationally and therefore needs the IAU to extend to all access to the Network to limit cost increase, preserve access to the Network, preserve the capacity of the Network traditionally afforded to bulk grain transport and ensure rail transport for bulk grain movements via rail remains efficient. Access under the IAU needs to include Rail Loading Access and Rail Loading Operators so ARTC can work with all key stakeholders and beneficial freight owners to develop solutions and maximise freight on rail]]**

#### Part 6 – Network Connections and Additions

Insert the relevant Rail Loading Operator and Rail Loading Operator Access references throughout this Part as required.

**[GNC drafting note: Rail Loading Operators are a key stakeholder both directly through Rail Loading Access and indirectly, but equally as important through, Operators. Accordingly, Rail Loading Operations require input into ARTC's investment planning and network development to support and protect current volumes and meet future demand of high value export sales and to give market confidence in the cost and capacity]**

#### Part 9 – Definition and Interpretation

Insert the following new definitions:

**Indicative Rail Loading Access Agreement** means the indicative rail loading access agreement in Schedule [x].

**Rail Loading Access** means access by a Rail Loading Applicant to use the Network, or any part thereof, for the purpose of carrying out Rail Loading Services

**Rail Loading Access Agreement** means an access agreement entered into between ARTC and the Rail Loading Applicant for Rail Loading Access which at least address the essential elements set out in Schedule [x]. **[GNC drafting note: ARTC to be consulted in respect of the key terms / essential elements of a Rail Loading Access Agreement to form a new Schedule to the IAU. Noting this would be an interim measure before an indicative rail loading access agreement is developed and agreed]**

**Rail Loading Access Charges** means the access charges ARTC will charge the Rail Loading Applicant for Rail Loading Access

**Rail Loading Access Indicative Agreement** means an indicative access agreement or other document to be entered into between ARTC and the Rail Loading Applicant [in Schedule [x]]

**Rail Loading Access Rights** means the specific configuration and nature of the Rail Loading Access sought by the Rail Loading Applicant

**Rail Loading Applicant** means the person seeking Rail Loading Access from ARTC who is a Rail Loading Operator

**Rail Loading Application** means the application for Rail Loading Access as described in clause 3.6

**Rail Loading Operator** means an entity that carries out Rail Loading Services on the Network

**Rail Loading Operator Access** means the Rail Loading Access a Rail Loading Operator requires to carry out Rail Loading Services on the Network

**Rail Loading Services** means rail loading by a Rail Loading Operator from land immediately adjacent to the Network Schedule A, Schedule B, Schedule C\*, Schedule D, Schedule E (see also above definitions), Schedule I, Schedule J

Insert the relevant Rail Loading Operator and Rail Loading Operator Access references throughout these Schedules as required and insert a new Schedule “Essential Elements of Rail Loading Access Agreement”.

Insert new Schedule “Indicative Rail Loading Access Agreement”.

## Annexure 2 - Pacific National IAU submission to ACCC – GrainCorp response

Following the ACCC's invitation to consider Pacific National's submission, GrainCorp supports a number of amendments proposed by Pacific National in their IAU submission to ACCC dated 8 March 2024 as it is relevant to the Rail Loading Operator principles GrainCorp submits should be adopted, noting that GrainCorp reserves its position outlined in GrainCorp's submission in response to Question 6 regarding the proposed use of a commercial arbitrator.

To assist the ACCC, GrainCorp has extracted the relevant sections from Pacific National's IAU submission to ACCC below.

### Arbitration

#### **Clause 3.12.5(a)(xii)(B)**

Under the proposed Undertaking in clause 3.12.5(xii)(B) the Arbitrator must take into account the ARTC's legitimate business interests and investment in the Network. Pacific National proposes an amendment so that the Arbitrator must also take into account "the Applicant's legitimate business interests and investment in the Network". We also suggest the addition of "the benefit to the public from having competitive markets" after clause 3.12.5(xii)(F).

#### **Clause 3.12.5(a)(xiii)**

Pacific National is not comfortable that the arbitral award cannot require ARTC to bear some of the costs of maintaining extensions or interconnections, particularly when there may an occasion where these are firmly in the public interest.

Government-owned enterprises, such as ARTC, are often expected to operate at higher standards of corporate social responsibility than private equivalents, including giving a higher weight to long- term national and community interests. This balancing of commercial and non-commercial priorities is reflected in clause 1.2 of the 2024 IAU, which explains the intent of the Undertaking includes reaching an appropriate balance between:

- The legitimate business interest of ARTC
- The interest of the public
- The interests of Applicants wanting access to the Network.

To align with clause 1.2, Pacific National recommends amending clause 3.12.5(a)(xiii) by removing subsections (I), (J), (K):

*(xiii) In making an award, the Arbitrator:*

*(I) must not require ARTC to bear some or all of the costs of extending the Network (including expanding the capacity of the Network and expanding the geographical reach of the Network);*

*(J) must not require ARTC to bear some or all of the costs of maintaining extensions of the Network (including expansions of the capacity of the Network and expansions of the geographical reach of the Network); and*

*(K) must not require ARTC to bear some or all of the costs of interconnections to the Network or maintaining interconnections to the Network.*

### ITAA drafting

#### **Clause 9.3 Repairs, Maintenance and Upgrading of the Network**

The 2024 IAU and the ITAA should recognise the interfaces that exist between the ARTC part of the interstate network, and those parts of the network owned by other track providers. These interfaces have a significant impact on all train operations in terms of day-to-day running. Pacific National proposes amending clause 9.3 to incentivise

improved coordination with adjacent networks and to prevent an unreasonable burden being placed on rail operators. Where feasible, ARTC planning of maintenance, repairs and upgrades should be coordinated with planned possessions or closures on adjoining networks.

Maintenance and non-urgent repair should consider customer demand profiles and avoid peak services. Where possible, ARTC should avoid disruption to the Scheduled Train Paths during peak retail periods such as Christmas and Easter, and avoid service disruption during peak agricultural seasonal periods.

We also propose adding clause 9.3(d) to recognise ARTC should have an obligation during maintenance activities to keep tracks and related areas clear of equipment where they can. There is currently an issue on the ARTC Interstate Network of track machines being parked. Our drivers will go out to stable a train or load a train, only to find there are track machines in the area. In instances where Pacific National gets a confirmed path and then arrives to find a track machine parked there, it creates operational complexity. It also creates additional cost if we are then required to commit extra crews to taking the train to another point to stable, or we are compelled to change arrangements with customers to load.

Our proposed amendments to clause 9.3 are outlined in red:

### *9.3 Repairs, Maintenance and Upgrading of the Network*

*(a) Notwithstanding any other provisions to the contract in this clause 9, but subject only to clauses 9.3(b), 9.3(c) and 9.4 ARTC may, with reasonable notice, perform repairs, maintenance or upgrading of the Network, carry out any new work on the Network, or take possession of any part of the Network, at any time.*

*(b) If repairs, maintenance or upgrading of the Network, the carrying out any new work on the Network, or taking possession of the Network, are reasonably likely to materially affect the Scheduled Train Paths, ARTC will, prior to commencement of the works:*

*(i) take all reasonable steps to minimise any disruption to the Scheduled Train Paths and commercial impact on the Operator;*

*(ii) notify the Operator of the works as soon as reasonably practicable; and*

*(iii) use its best endeavours to provide an alternative Train Path, but need not obtain the Operator's consent to such repairs, maintenance or upgrading, or possession of the Network;*

*(iv) Coordinate maintenance plans with interface networks to minimise the impact on rail operators; and*

*(v) take all reasonable steps to avoid disruption to the Scheduled Train Paths during peak retail periods (e.g., Christmas, Easter) and peak agricultural seasonal periods.*

*(c) Possession of the Network means closure of the relevant part of the Network to all traffic for the purpose of effecting repairs, maintenance or upgrading. ARTC will consult with the Operator a reasonable time before taking possession of the Network (except in the case of an emergency) and undertakes to involve the Operator in the planning process as early as reasonably practicable, with a view to efficient possession planning and with a view to minimising disruption to Services and ARTC may at its discretion waive the flagfall charge applicable to any Services affected by this clause."*

*(d) ARTC will take all reasonable steps to keep tracks and related areas clear of equipment when it is possible to do so.*