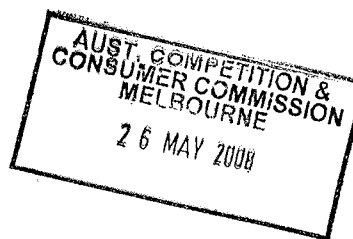


Mr Dominic L'Huillier
Director of Transport Regulatory
Australian Competition & Consumer Commission
by email: transport.prices-oversight@acc.gov.au
cc: dp.office@watkins.minister.nsw.gov.au
cc: Brendan.Bruce@watkins.minister.nsw.gov.au



Re: ACCC Draft Decision on the ARTC Access Undertaking (“ARTC Undertaking”)

Independent Rail is rail operator who runs services on the east coast, central and south west NSW. Independent Rail's operations currently account for around 30-50% of the containerised rail freight moving to / from Port Botany (depending on seasonal variability). Independent Rail is a member of the Freight Rail Operators' Group (FROG) and supports the FROG submission.

Currently, we run our NSW services on 3 distinct geographical networks managed by two different access providers under one set of rules, being the NSW Rail Access Undertaking (“NSW Undertaking”) which is in place under NSW legislation. This is hard enough. However, once the ACCC accepts the ARTC Undertaking, we will be trying to co-ordinate services within the one State on 3 networks managed by two different access providers under two different access regimes behind which sit two different regulators.

Specifically, we operate services on the following parts of the NSW rail network:

- the Sydney Metropolitan Network, which is covered by the NSW Undertaking - for services on this network, we arrange train paths with RailCorp;
- the Country Regional Network which is covered by the NSW Undertaking - for services on these lines (up to the point at which they connect to the Sydney Metropolitan Network or the ARTC Leased Network) we arrange train paths with ARTC acting as agent for Rail Infrastructure Corporation (RIC); and
- the so-called ‘ARTC Leased Network’, which is presently covered by the NSW Undertaking but about to be brought within the ARTC Undertaking – for services on these lines (up to the point at which they connect to the Sydney Metropolitan Network or the Country Regional Network) we arrange train paths with ARTC.

The rail services we run comprise essentially metropolitan port shuttles for containerised imports / exports on the main southern line between Port Botany and Minto (within the Sydney Metropolitan Network) and regional services for export of containerised freight and grain.

Essentially we have two types of clients for these regional services at present: freight forwarders and grain handlers. Both are intermediaries who aggregate volume for the end customers who own the export product, usually small-to-medium sized businesses (SMEs) located in regional NSW. For these services, we are required to line up co-ordinated train paths through at least 2, sometimes all 3, of the ARTC Leased Network, the Country Regional Network and the Sydney Metropolitan Network to get from the client siding or regional terminal through to Port Botany.

We are very concerned that, due to lack of connectivity, the ARTC Undertaking will significantly increase the cost and complexity of regional NSW rail services.

Our interest in the ARTC Undertaking is also due to the fact that the ARTC Undertaking is intended to cover the proposed Southern Sydney Freight Line ("SSFL"). The intention of the Federal and NSW Governments is that freight trains using the RailCorp main southern line to access Port Botany will move on to the SSFL to allow more efficient use of freight rail to ease congestion and to free up capacity for more passenger services on the main southern line.

Accordingly, we will also need to deal with ARTC as access provider under the ARTC Undertaking for our port shuttle services.

We have 3 areas of concern that we do not believe have been adequately addressed in the draft decision. Our comments on each of these follow.

Terminals

Independent Rail's owners also own the MIST terminal facilities located within the open access / common user Greater Minto Terminal (GMT) development described by Austrak in its 8 February 2008 submission to the ACCC. We strongly endorse Austrak's comments regarding terminals and do not believe that the draft decision has addressed the concerns Austrak raised.

The gravity of these concerns was recognised by the National Transport Commission ("NTC") in its report "National Transport Policy Framework – *A New Beginning*" considered by the Australian Transport Council Ministers at the February 2008 COAG meeting. In particular, the NTC said (at page 6 of the report):

“Open access common-user rail terminals are, therefore, important to a competitive above-rail sector; however, significant impediments exist.

The business model for common-user rail terminals is to capture volume within a geographic area which, in conjunction with investments in automation, drives down unit handling costs. Rail terminals are, however, unable to secure train paths (for hook and pull services) because ARTC will only issue train paths to train operators (who own competing terminals).

Freight customers also fear over-reliance on rail operators who control the train paths.

Customers and rail terminal operators should be able to secure train paths (using a model access agreement). “

We endorse these comments and believe that the lack of any mechanism to allow end customers or aggregators of freight (such as grain handlers or open access / common user terminals) to acquire access rights is a serious deficiency. We note that the Queensland access regime provides a mechanism which allows end customers such as coal mines to contract directly with the network access provider and then sub-contract with a train operator. We believe that such mechanisms are pro-competitive and there is no reason why ARTC should insist that it will only deal with rail operators.

Volume risk is a major issue for the commerciality of rail. There is an increasing tendency for rail operators not to offer regional services unless they are underwritten by long term “take or pay” contracts, especially as ARTC continues to push more risk on to rail operators. Few end customers in rural areas would have the volume or regularity of freight to underwrite dedicated rail services on their own. Volume and regularity of freight has to be achieved through aggregation (often requiring all the freight in a particular rural area).

Allowing freight aggregators such as terminals and grain handlers to contract for train paths provides the flexibility for these rail clients to manage the volume risk, making more regional rail services commercially viable. For example, it would allow the freight aggregator to invest in rolling stock (particularly where specialised wagons are used) and hire a rail operator simply to do the “hook and pull”, enabling smaller rail operators (who do not own such specialised equipment) to tender for this work.

By preventing such commercial responses and evolutions in rail, the ARTC Undertaking preserves static historical relationships and inhibits dynamic competition. We do believe this to be in the public interest.

Co-ordination between networks

Increasingly, Governments and regulators are realising that the national transport network must be viewed as a connected whole and from the perspective of dynamic supply chains. Institutional and regulatory arrangements that address piecemeal parts without connectivity across the network and through the supply chain will not produce efficient outcomes or promote competition. In many instances, they can create or serve to protect inefficiencies and hinder competition.

The lack of clear mechanisms to deal with connectivity between the parts of the NSW rail network covered by this undertaking and the parts of the NSW network that remain covered by the NSW Undertaking (including the situation where ARTC 'wears two hats') is a major deficiency.

As mentioned above, for our regional NSW services, we need to line up co-ordinated train paths from both ARTC and RailCorp through at least 2, sometimes all 3, of the ARTC Leased Network, the Country Regional Network and the Sydney Metropolitan Network to get from the client siding or regional terminal through to Port Botany. In addition, these paths need to be co-ordinated with the client sidings or terminals at one end and our port windows with the stevedores at Port Botany. Our experience has been that co-ordinating these elements can be a difficult exercise, especially dealing with ARTC as it does not consider the end-to-end journey, even where it is acting as RIC's agent.

For example, we might have secure paths allocated by RailCorp through the Sydney Metropolitan Network to the port and firm windows at the client siding. In theory, this should mean no reason why ARTC cannot issue a secure path from the siding to "honour" the RailCorp path. In practice we have had to operate on 'ad hoc' (ie temporary) paths because there is no regulatory mechanism to ensure this happens.

And this is for a service running on tracks managed by two different operators but currently covered by the same undertaking. The issue will become far worse trying to path across the two different undertakings, in part due to differences in how the undertakings classify rail services and prioritise and price access (discussed below).

The more that ARTC expands its activities beyond interstate mainlines, as it has done with the NSW network and will be doing with the SSFL, the more such lack-of-connectivity issues are going to have significant consequences such as increased congestion as freight is forced on to road because you don't have to line up different access rights from different access providers to drive a truck from A to B.

Port shuttles and regional services

Finally, we understand that there are no metropolitan port shuttles currently operating on the network covered by the ARTC Undertaking (as these currently operate on metropolitan networks). The SSFL will be the first experiment in this regard.

FROG has commented on the pricing issue, but there are other non-price issues that have not been addressed. For example, the basis of splitting services into “indicative services” and “non-indicative services” does not make sense to us – other than to allow ARTC to be selective about what type of trains can use the network, with a clear bias towards long interstate trains carrying domestic containerised freight (because these trains make the most money for ARTC).

The NTC stated in the report referred to above:

“...the ARTC charging formula is geared towards long interstate trains and a commercial return, which disadvantages regional and port shuttle operations using the defined interstate rail network (including the future Southern Sydney Freight Line to Port Botany).”

For all the reasons FROG has discussed, the position of non-indicative services on the ARTC network is perilous. This makes it critical for rail operators to know when a service is entitled to the protections afforded to “indicative services”. In our view, the definition of “indicative services” does not provide that clarity.

A service with the following characteristics is said to be an “indicative service”:

- (i) maximum axle load of 21 tonnes;
- (ii) maximum speed of 110 km/h; and
- (iii) length not exceeding
 - (A) 1800 metres west of Adelaide and Parkes;
 - (B) 1500 metres east of Adelaide and Parkes (until Capital Expenditure is commissioned on the Segments Melbourne – Macarthur and Parkes - Cootamundra);
 - (C) 1800 metres on the Segments Melbourne – Macarthur and Parkes– Cootamundra (following commissioning of Capital Expenditure on the Segments Melbourne – Macarthur and Parkes - Cootamundra).

Are these the characteristics of the actual service or, as has been put to us, the capability of a service. Metropolitan port shuttles are often constrained in length due to port and terminal infrastructure (for example, some have been constrained to 300m). Both the NSW and Victorian Governments have undertaken studies that support the view that the optimal train length for a metropolitan port shuttle is 600m. Would a 300m port shuttle limited due to physical constraints be

an "indicative service"? Would an efficient 600m port shuttle train that had no physical constraints at the port or terminal be an "indicative service"?

Concluding comment

Under the NSW Undertaking, there is no distinction drawn between "indicative services" and "non-indicative services" - the relevant distinction is simply by type of freight service. Trains are charged on the basis of two components – being (a) a flagfall charge for the train (per distance) and (b) a GTK charge (weight x distance) – with different rates for each of these two charges for general freight and containerised grain on the one hand and bulk grain on the other. Pricing for other commodities is by negotiation.

The pricing under the NSW Undertaking works for regional services and port shuttles. There is an issue with lack of certainty about price increases (timing and magnitude) since ARTC started managing parts of the NSW network, which we have raised with ARTC. However for this consultation by the ACCC, the critical issue is that the relevant distinctions used under the NSW Undertaking that allow operators of regional services and metropolitan port shuttles to know the basis on which they can expect access and what access charges are likely to apply to their services do not match up with the distinctions used for the ARTC Undertaking which the ACCC proposes to accept.

It is not clear to us how existing regional services in NSW will be protected under the transition from one undertaking to the other. In addition, clause 2.1(c) of the ARTC Undertaking assumes that all that has to be done to make that regime appropriate for the type of traffic that will be on the SSFL is to set an access charge for "indicative services". If this means that regional services in NSW and metropolitan port shuttles will be left in definitional limbo or without clear access terms and pricing, then the undertaking the ACCC proposes to approve simply will not work for these vital services in NSW and there will be a major political backlash from end customers (especially regional exporters).

Yours Faithfully

Greg Heraghty
Commercial Manager Legal
Macarthur Intermodal Shipping Terminal
9 Stonny Batter Road
Minto NSW 2566
Ph: 02 9603 0906
Fax: 02 9820 9444
Email: gheraghty@mistrail.com
www.mistrail.com