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Re: Transport for NSW Response to ACCC's Issue Paper, *The Regulatory Framework for ARTC's Interstate Network*

Dear Matthew Schroder,

Thank you for the opportunity to respond to the Issues Paper.

Transport for NSW (TfNSW) is the lead agency of the NSW Transport cluster. Our role is to lead the development of a safe, efficient, integrated transport system that keeps people and goods moving, connects communities and shapes the future of our cities, centres and regions.

NSW Government transport agencies interact extensively with the ARTC, and the economic regulatory framework that applies to its network. This includes directly as an access seeker through NSW Trains, which runs services to Brisbane and Melbourne. A significant component of the regulated ARTC network also falls within NSW, with this being leased by the NSW Government to ARTC under a long-term agreement. NSW has also signed a bilateral agreement with the Commonwealth Government to facilitate the construction of the Inland Rail, which will traverse the state. Negotiations have commenced with ARTC for the formal leasing arrangements agreed in the bilateral agreement.

TfNSW has a direct interest in the future of economic regulation of rail access, as the NSW Rail Access Undertaking applies to rail infrastructure in NSW not subject to the ARTC Access Undertaking. TfNSW and Sydney Trains manage third-party access to the shared sections of the Metropolitan Rail Area (MRA), under an agency agreement with the infrastructure owner, the Transport Asset Holding Entity (TAHE). TfNSW also manages the NSW Country Regional Network (CRN) as an agent on behalf of the infrastructure owner, TAHE. This network is also subject to the NSW Rail Access Undertaking. The NSW Rail Access Undertaking also applies to the parts of the Metropolitan Freight Network (MFN) not subject to the ARTC Undertaking. The MFN is a dedicated freight network servicing Port Botany and related intermodal terminals within Sydney. These NSW networks (the MRA, the MFN and the CRN), all have operational interfaces with the ARTC network, and therefore, also regulatory interfaces for rail access.

TfNSW notes therefore the potential reform opportunity that has arisen through the ACCC's review of the regulatory framework for the ARTC coinciding with the review of the NSW Rail Access Undertaking. This review is being done by the Independent Pricing and Regulatory Tribunal (IPART). This timing means that the two economic regulatory instruments that apply to all regulated networks in NSW will be independently reviewed at the same time. While both reviews have areas of focus that are specific to each network, there is an opportunity to improve industry and economic outcomes across both networks and nationally. TfNSW consequently suggests and supports close liaison between the ACCC and IPART as the two reviews occur.

TfNSW has responded to each of the questions raised in the Issues Paper in the attachment. The below points highlight some key issues where further consideration by the ACCC would be welcomed by TfNSW.

- Much of the analysis contained in the Issues Paper is focused on ARTC's ability to raise access prices. TfNSW suggests that due emphasis be also given on the other main option open to a natural monopoly – that being the ability to reduce the quality of its service offering without losing revenue or market share. This can induce an economic welfare loss analogous to that from price distortions. Effective regulation may therefore also need to ensure the setting of appropriate service (i.e. track) standards as well as prices. Experience suggests that this is the main way that NSW Transport agencies may have experienced the exercise of ARTC's market power to date, particularly in the form of ongoing track speed restrictions and choice of technical systems
- A further issue that TfNSW would like to see the ACCC consider is how grants (as opposed to alternative financing arrangements, such as equity injections) should be treated when determining access charging by ARTC. Grant funding is provided to support the achievement of public policy outcomes in the case that a commercial return is unlikely. This suggests that for track sections that receive grant funding, access pricing possibly should be set by ARTC at the floor. Greater transparency on how ARTC does, or should, differ its access pricing in response to having received equity injections or grant funding, should be considered.
- As a closing consideration in the Issues Paper, the ACCC has raised the possibility of "broader changes to rail regulation". This includes states possibly transferring responsibility for rail access regulation to the Commonwealth, or "mirroring" a national approach to their own regimes. TfNSW has the following suggestions to these observations:
  - Broader changes to regulation including possible flagged legislative changes, should be preceded and informed by a comprehensive evaluative process. Australian jurisdictions now have over 20-years of experience and learnings from what was a bold, open-access experiment for improving rail freight. This would appear overdue, having not been systemically examined since the Productivity Commission's 1999 report on "Progress in Rail Reform". Ideally, the evaluation should assess both the current progress against and ongoing suitability of the intergovernmental policy objectives that were sought when the ARTC was established, and when its role was further extended into various jurisdictions.
  - This should include an assessment of which freight networks may not be suited to access regulation. For some networks the question of the optimum regulatory approach may extend beyond considerations of heavy or light approaches to open-access regulation. Instead, for some markets, the economic benefits of competition for the market may exceed those of competition within a market. TfNSW suggests that the empirical experience may now be suggesting an over-application of the open-access model to some freight tasks. Such an over application may be hindering the optimal operation of some rail markets, potentially including grain and dedicated port shuttle networks. For these networks, the benefits of competition could be better achieved by periodic franchising for the market.
  - In the case of jurisdictions potentially "mirroring" a national approach to access regulation in their own access regimes, care should be taken that this may be a preoccupation of regulatory and policy professionals, rather than industry. "Mirror" regimes may address an administrative desire for regulatory neatness in a multi-jurisdictional environment. However, this would only offer limited benefits to industry unless the "mirrored" regimes interfaced with each other effectively, and ideally seamlessly, from the perspective of an above-rail operator. Such benefits are not likely achieved by the relevant access regimes looking alike, but more likely through cross-regime

initiatives such as a common train path booking portal, and/or a single billing process. Assumedly above-rail operators would value such innovations more highly than just similar-looking regimes that did not interface effectively.

The above observation may be of potential significance to the central dilemma identified by the ACCC in its issues paper – that being the choice between uniform or targeted regulation. It is suggested that effective interfacing between regimes, or even between varying approaches within a regime, does open the scope for a greater use of targeted regulatory frameworks, and the ensuing benefits of flexibility and adaptability that it would enable.

TfNSW looks forward to responding the ACCC's further considerations on both the regulatory framework for the ARTC and the future of rail access regulation.

Sincerely,

[redacted]

Rob Sharp
Secretary
17/02/2022

Transport
for NSW

Response to ACCC Issues Paper

The Regulatory Framework for ARTC's Interstate Network

February 2022

transport.nsw.gov.au

NSW GOVERNMENT

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1. Do stakeholders agree with, or have any comments on, the observations set out in sections 2.2.1 and 2.2.2 on the competitive conditions for short and long haul freight?

TfNSW agrees with the observations in this section of the Issues Paper. Our experience is that rail is more competitive over longer distances, and that road competes more strongly with rail in the short-haul market. TfNSW notes the figures proposed by the ACCC of rail's 60-80% market share of the East-West (Melbourne/Sydney–Perth and Adelaide–Perth) freight market, and 25% of the north-south (Melbourne-Brisbane) route. These are a reasonable extrapolation of the findings of the 2009 BITRE report, "Road and Rail Freight: Competitors or Complements?" referenced in the Issues Paper. With this BITRE report now being over 10-years old we suggest that the figures may not reflect more recent changes, such as in heavy vehicle productivity. The disruptive ability of emerging technologies, such as increased automation of road vehicles, may soon further alter current assumptions on market dynamics and shares.

2. To what extent are passenger services on the Interstate network constrained by competition or effective transport substitutes? Why?

The NSW Transport cluster's experience is that passenger services operating on the interstate network are considerably constrained by transport substitutes. The long-distance passenger market between capital cities is dominated by the airline industry, which is able to provide faster, more reliable and more cost-effective transport than rail. Air travel from Sydney to Melbourne is typically around 90 minutes whereas train is around 11 hours. Rail passenger services also face competition from interstate coach operators.

Interstate rail passenger services are largely provided to meet public expectations for subsidised public transport and regional connectivity. Passengers are more likely to use long distance rail services between intermediate destinations. However, even this market for shorter links (e.g. Sydney to Canberra or Dubbo) is difficult for rail due to comparatively slow travel times. These are caused by excessively curved (steam-era) track alignments. Our understanding is that this may be less of an issue in Victoria, due to the closer proximity of regional towns to Melbourne and comparatively straighter track alignments.

NSW Trains also faces competition from private motor vehicle travel as it is difficult for rail operators to compete on convenience (i.e. door to door service and time of travel). A private motor vehicle travel time from Sydney to Melbourne is approximately 9 hours and 16 minutes, against rail's 11 hours. Additional time also needs to be added to the rail travel time as transfers to a different mode of transport to the final destination are also required.

NSW Trains does not have direct competition with other passenger rail operators as it does not operate services between the same destinations as other passenger rail operators, other than for a small overlap of service offering between Albury and Melbourne. Passenger rail operators like NSW Trains and V/Line offer a different type of service offering from other passenger rail operators like GSR, the operators of the Ghan and Indian Pacific, so they are not a direct form of competition. NSW Trains and V/Line offer primarily basic transport services relying on repeat custom with low fares regulated by government policy, whereas GSR and other tourist operators are privately owned and offer premium services (including tourist activities and side trips associated with the journey), without any government regulation of fares.

NSW Trains therefore is confronted by a high degree of competition from the airline and coach industries. A key issue for the current review is the extent to which NSW Trains' ability to compete is further impeded by ongoing temporary speed restrictions on the ARTC network, due to the condition of the track. This restricts NSW Trains from being able to operate at the potential top speed attainable by its rolling stock. This has flow-on effects to service offering in regard to travel times and reliability.

3. Do stakeholders have any views on the current regulatory framework for the Interstate network and its effectiveness?

TfNSW suggests that the current regulatory framework is fundamental for managing access ceiling pricing.

For state government owned and operated passenger rail operators, such as NSW Trains, with regulated fares, there is little opportunity for access fee increases by ARTC to be met by passing through costs to customers. Approximately 60% of NSW Trains' customers travel on some form of discounted fare. Currently, cost recovery is only approximately 13 cents in the dollar, so any increase in access fees could have a significant additional impact on NSW Trains' ability to compete and operate within its current budgetary limits. This would place an additional burden on tax-payers if significant increases in access fees needs to be funded.

TfNSW has also raised in its cover letter concerns over ARTC's possible ability to express its natural monopoly through decreasing service levels (track condition). This market power, and associated imbalance in bargaining position, may mean that such concerns are not be able to be addressed through commercial negotiation over access agreements. As the rationale for regulated access includes re-balancing the bargaining power between an infrastructure owner and an access seeker, TfNSW suggests that direct linkages between ARTC's level of access pricing and KPIs for the level of service it is providing be considered as part of the regulatory regime.

4. Is ARTC currently able to exercise market power? Why and how, or why not?

In addition to the examples raised above, a possible expression of ARTC's market power are its decisions to favour particular technical systems.

ARTC has chosen to implement a proprietary digital signalling technology (Advanced Train Management System or ATMS) that is not currently interoperable with the train signalling technology favoured by most networks that interface with its network. This includes Sydney's Metropolitan Rail Area (MRA), for which the European Train Control System or ETCS, is being implemented. ETCS is also the favoured choice for the metropolitan networks in Brisbane and potentially Melbourne. This decision was made within the ARTC's rights as a commercial entity however there have been flow on consequences as a result of ARTC and other network owners not coordinating their investments in these train signalling technologies. The implementation of differing signaling technologies has resulted in a national interoperability challenge between networks, requiring dedicated research and funding to resolve the lack of interoperability. The National Rail Action Plan and Australian Infrastructure Plan have now called for a 'common standard for track and signalling'.

TfNSW notes that ARTC's corporate charter includes that the organisation is to:

- Provide seamless and efficient access to users of the interstate rail network.
- Encourage uniformity in access, technical, operating and safe working procedures.

While ARTC has prioritised these objectives within the part of the interstate network under its direct control, it has arguably placed less emphasis on achieving these objectives for the parts of the interstate network that are outside its direct control.

5. In the absence of regulation, could ARTC exercise market power on the Interstate network (for example, due to the lack of competitive alternatives)? If so, in which geographic areas is ARTC able, or unable, to exercise its market power?

As the Issues Paper has noted, ARTC enjoys a higher proportion of market share on the East West freight market and rail enjoys a competitive advantage over longer distances. Therefore, it can be assumed that ARTC's ability to exercise market power, in the form of charging, in that market is also higher.

Rail's market share is less in the current North South market, which assumedly means ARTC's ability to exert market power is also more constrained. However, as indicated in TfNSW's cover letter, excessive pricing is not the only indicator of market or monopoly power. An assessment of ARTC's use, or potential use, of market power would also need to include its ability to lower service standards, in both the North South and East West markets.

6. Who are the captive customers or services on the Interstate network?

TfNSW notes that 'captive customers' are defined in the Issues Paper as interstate network users who do not have road or coastal shipping services as an effective substitute if rail prices were to be increased significantly by ARTC.

NSW Trains is arguably a captive customer of ARTC, as its business is the provision of rail passenger services. It does not have a realistic option to change its service delivery model to another mode. Similarly, freight rail operators working on the ARTC network are captive customers as their operations are tied to accessing the network. While NSW Trains does have a large coach network which supplements its rail services, its service model is centrally based on the significant difference in the customer experience for rail and coach travel, particularly in respect of longer journeys such as the Sydney – Melbourne and Sydney – Brisbane journeys. Essential to NSW Trains' market offering is that rail offers customers more opportunity to move freely around the train while in motion, obtain hot meals and beverages and, on some services, access sleeper compartments. NSW Trains' rail services also have a greater level of accessibility and comfort for customers with a disability. By comparison, coach customers are confined to their seats (unless using the toilet), cannot consume food or access sleeping compartments. Coaches also have reduced accessibility for customers with a disability – at least in terms of the number of accessible spaces and the ability to accommodate some mobility devices.

Additional "captive customers" on the interstate network would assumedly be heavy bulk haulage services on the interstate network. For bulk tasks, particularly coal, road is often not a viable alternative. While most coal transport in NSW is dominated by the Hunter Valley coal network, significant intrastate movements also do occur, including on sections of the ARTC network. Other bulk products without an easily available alternative option include agricultural products, with almost half of NSW agricultural produce moved by rail.

7. In the absence of regulation, what is the likelihood of ARTC being able to exercise market power in relation to captive customers or services on the Interstate network?

TfNSW notes that ARTC, while owned by the Commonwealth Government, was established with a clear commercial imperative and constituted as a company under the Corporations Act. Its corporate charter includes operating as a business on commercially sound principles.

It is a matter of corporate strategy for ARTC to determine how to meet its charter. But this could include increasing its revenue, or declining its service offering, to captive customers. TfNSW has raised in its cover letter that the risk of ARTC exercising its market power may be reduced by greater transparency on how ARTC determines access pricing for track sections that received grant funding, rather than equity injections. Assumedly, while there is a requirement for ARTC to seek to make a commercial return on equity funding from the Commonwealth, this requirement does not apply to grant funding. TfNSW is interested in the ACCC's views on whether the difference in ARTC receiving grant or equity funding for infrastructure and technology improvements should also be reflected in its approach to access charging.

8. Will the introduction of Inland Rail potentially allow ARTC to exercise market power on the Melbourne–Brisbane corridor?

TfNSW concurs with the ACCC's observation in the Issues Paper that, as the intent of Inland Rail is to make rail a more attractive option than road, this could mean road becoming a less effective substitute and thereby increasing ARTC's power in that (Melbourne-Brisbane) market.

As Inland Rail is also an equity-based investment of up to $14.5 billion in ARTC by the Commonwealth Government, there may be additional incentives on ARTC to leverage its market position. This could include preferential access pricing, within the bounds of the floor and ceiling pricing limits, to encourage higher-value rail users onto the Inland Track, and what ARTC sees as low-value users onto the existing coastal routes. This could also extend to ARTC not supporting an initiative by NSW Trains to expand its customer service offering by possibly accessing Inland Rail.

9. Would any of the policy changes set out in section 4.3.3 significantly alter the competitive environment of the Interstate network? Are there any other changes that are likely to do so?

TfNSW notes and agrees with the ACCC's observation that a number of current policy initiatives could impact on the competitive dynamic between road and rail. TfNSW makes the below comments on the two of the policy areas raised by the ACCC that fall with TfNSW's remit:

- Port Botany Rail Line Duplication – this project is focused on improving rail's ability to effectively service the import/export task at Port Botany. The project is not focused on the interstate freight task, as 80% of all import containers travel no further than 40 kilometres from Port Botany where they are unpacked and distributed to customers, primarily in the Greater Sydney Area. It is therefore unlikely that the project will impact on the competitive environment of the interstate network.
- Road user/heavy vehicle pricing – this is the subject of ongoing policy development among Australia's jurisdictions. This will have variable impact on competition between road and rail in the interstate market, dependent upon what pricing scheme is ultimately adopted.

TfNSW also suggests that further policy initiatives that may impact on interstate road/rail competition dynamics include the Heavy Vehicle National Law Review, particularly in relation to heavy vehicle access. This may improve road competitiveness if significant increases in road's freight hauling capacity occurs; however, TfNSW supports productive road and rail transport. Upcoming changes to the Office of the National Rail Safety Regulator's cost recovery model may also have an impact as operators face increased accreditation fees and fees per kilometre of train travel.

10. Do stakeholders agree with our preliminary view on the case for regulation (as set out in section 4.4)?

TfNSW agrees that the ACCC has proposed a reasonable preliminary view, but with this to be subject to further analysis and stakeholder feedback. However, TfNSW repeats its previous points that an assessment of ARTC's use, or potential use, of market power also needs to include its ability to lower service standards and choice of technical systems, not just increase prices.

11. Would a uniform level of regulation be appropriate for the Interstate network, or would a targeted regulatory framework be more suitable?

While regulatory uniformity is often the preferred approach, TfNSW supports the further examination of the advantages of flexibility offered by tailoring economic regulatory approaches more closely to varying market dynamics. TfNSW notes that additional regulatory variation may arise from this approach, but as mentioned in the cover letter, this can be mitigated by focusing on effective interfacing between and within varying regulatory instruments.

Technological systems would also appear to offer the opportunity to ensure that the additional regulatory variation would not result in onerous administrative burdens on network users. If interoperability is prioritised, these technological systems should be able to interface. It would also be important for skills and training to prioritise interoperability to enable train crews to work across networks and services and be familiar with these different, but interoperable, technologies.

12. Do stakeholders think any of the regulatory approaches set out in section 5.2 are suitable for the Interstate network?

TfNSW's preliminary suggestion is that a cost-based approach, designed to allow the ARTC to earn revenue up to a ceiling point, is an accepted approach for both the transport industry and community. Access regulation under the NSW Rail Access Undertaking uses a DORC-based RAB valuation, so the approach is well understood within NSW. The benefits of a discounted cash flow model are also noted.

TfNSW notes that the regulatory options outlined in section 5.2 will also likely be the subject of analysis by IPART in its review of the NSW Rail Access Undertaking.

13. Are there other approaches (not mentioned in section 5.2 or drawing on State regimes) that could be appropriate for regulating the Interstate network?

The NSW Rail Access Undertaking does operate under a negotiate-arbitrate model, which as the Issue Paper notes, is intended to be a lighter touch approach to regulation, in that it encourages commercial negotiations rather than regulatory intervention.

Its suitability for application to ARTC's interstate network would need to consider the matters identified in the Issues Paper, including the possible imbalance in negotiating power that ARTC would enjoy.

TfNSW again notes that regulatory options, such as the effectiveness of the negotiate-arbitrate approach, will be the subject of analysis and consideration by IPART in its review of the NSW Rail Access Undertaking.

TfNSW does suggest that, for ARTC's interstate network, a key element for inclusion is the need for greater transparency. This is both in terms of cost/charging setting by ARTC, including possibly clearer transparency between grant funded and equity funded infrastructure; and for greater consultation with network users on maintenance expenditure and planning.

14. Do stakeholders support changes to the regulatory framework being made through a revised voluntary access undertaking, or do stakeholders consider legislative change is required?

TfNSW is interested in the views of stakeholders on whether specific legislation should be considered for the ARTC, and for this to codify the regulatory framework for the ARTC's interstate network.

TfNSW notes that while ARTC operates under a commercial and corporate structure, it does receive large amounts of public funding, with the intent of these being to secure public policy, rather than commercial outcomes.

ARTC was also established under an intergovernmental agreement between the Commonwealth and the States, with its expanding role being the subject of further bilateral agreements with state governments. These intergovernmental agreements outlined public policy objectives as well as commercial expectations on the ARTC.

The public policy objectives were largely focused on ARTC model being an initiative to help progress a national seamless economy. Importantly, this included harmonising operating standards and practices across the Defined Interstate Rail Network (DIRN), not just the interstate infrastructure under its direct control.

As noted above, ARTC appears to have prioritised harmonisation within the part of the interstate network under its direct control. However, ARTC has been less successful, and possibly exacerbated, challenges with interconnectivity and interoperability with interstate track outside its network, through commercially based decisions, such as the adoption of ATMS.

TfNSW is therefore interested in the ACCC's and stakeholders' views on whether greater legislative direction may be an option. The scope of such legislation may not just include mandating that ARTC is required to submit an Undertaking to the ACCC but also as a means of providing clearer policy direction to the organisation.

TfNSW additionally notes that, as an intergovernmental experiment to facilitate an efficient national transport system, the ARTC has now been operating for over 20 years. However, there does not appear to have been a formal evaluation of its progress in meeting the policy objectives for which it was established. TfNSW suggests that such legislative considerations should be informed and preceded by an evaluation of ARTC as a policy initiative.

15. Are there any other issues that stakeholders would like to raise?

TfNSW has outlined its additional issues in the cover letter. However, the following safety and risk management observations are also made:

Safety critical information:

- The communication, distribution and publication of safety critical information (SCI) to rail operators is of critical importance, particularly in relation to the safe management of railway operations.
- As the rail infrastructure manager for the largest part of the railway network in Australia, ARTC is in a unique position to influence the safety of railway operations by providing accurate and up to date SCI in a timely and easily accessible manner.
- However, ARTC's systems in relation to the communication, distribution and publication of SCI are not uniform and consistent within its own network and differ depending on the state. For example, in NSW, ARTC sends SCI directly to operators whereas in Victoria it publishes the same information on its web portal and leaves it to the operator to retrieve the information from the portal. This inconsistency has the potential for SCI to not be obtained by the operators or, for it to not be obtained in a timely manner which has the potential for SCI to be out of date by the time it is accessed from the portal.
- Accordingly, it would be a significant improvement if ARTC could adopt a uniform and nationally consistent approach for the communication, distribution and publication of SCI, for example by providing SCI directly to operators in a timely fashion so that accurate and up to date SCI is received by operators either directly to their nominated point of contact and/or by the use of available technology (i.e. ICE radio) directly to the cabin of trains.

Freight and Passenger performance monitoring:

- Risk management is another area where ARTC is in full control of an issue pertaining to its network. ARTC controls the process of undertaking risk assessments in relation to its network. ARTC should consult with all relevant operators in relation to a condition affecting the network.
- Access to the ARTC network is via Access Agreements with Rolling Stock Operators. Access Agreements point to an agreed priority matrix that shows what types of services will receive priority at a time when conflict exists on the network. While this is a theoretical prioritisation process, the reality of the impacts on services can be different to the agreed priorities. Greater communication between ARTC and operators would enable operators to better plan their services.
- While the Issues paper focuses on both passenger and freight services on the Interstate network, TfNSW notes that changes to regulation of the Interstate network may have a greater impact on freight rail performance. The ACCC's review should consider the impacts to freight versus passenger rail.

The impact on ARTC risk management measures on operator services:

- Many of the known risks within the ARTC network are controlled with a reduction in rolling stock speed within the defined area of risk (Temporary Speed Restrictions - TSR). The duration that these TSR's are in place (compounding) has significant impact on the outcome experienced by the customer. The compounding nature of TSR's can result in necessary track speed not being achieved for long distances creating further conflict.
- Having a very large coach operation that is inherently linked to the train timetable, there is both a customer and commercial impact for NSW Trains when services are impacted, delayed or cancelled.
- As a Rolling Stock Operator, NSW Trains has little visibility of ARTC infrastructure/maintenance spend as it relates to NSW Trains services. This lack of visibility creates an unknown with regard to short/medium/long term planning for customer services.