

My Ref: DT 95 1142

Ms M Arblaster
General Manager – Transport and Prices Oversight
Australian Competition and Consumer Commission
GPO Box 520 J
MELBOURNE VIC 3001

Dear Ms Arblaster

Australian Rail Track Corporation (ARTC) Access Undertaking

Thank you for the opportunity to comment on the ARTC access undertaking.

We have not attempted to respond to all the issues raised by the ACCC. Rather, the focus of the Department's submission has been on the ACCC's first question in its issues paper – *Is the ARTC undertaking accommodating of possible moves by other States or Territories to establish an appropriate interface with their respective access regimes?*

Essentially, we have concentrated on providing comments on issues of compatibility of the proposed ARTC undertaking with the ARTC-Westrail Infrastructure Owner Agreement and the WA Rail Access Regime. These are currently the two avenues for access for an interstate operator to the WA track network

I trust our comments will be taken fully into consideration in the ACCC's assessment of the ARTC undertaking. Do not hesitate to call if additional information is required.

Yours sincerely

Mike Harris
Director General of Transport

1 June 2001

/Attachment

ARTC Access Undertaking

Transport WA's Submission to the ACCC Issues Paper

The Australian Competition and Consumer Commission (ACCC) has invited interested parties to provide comments and submissions on the Australian Rail Track Corporation (ARTC) access undertaking.

It is understood that the undertaking covers terms and conditions of access to rail tracks owned or leased by ARTC. The tracks are part of the interstate mainline standard gauge track linking Kalgoorlie in Western Australia, Adelaide and Wolseley and Crystal Brook in South Australia, Broken Hill in NSW and Melbourne and Wodonga in Victoria.

Transport WA has not attempted to respond to all the issues raised by the ACCC. Rather, the focus of the Department's submission has been on the ACCC's first question in its issues paper – *Is the ARTC undertaking accommodating of possible moves by other States or Territories to establish an appropriate interface with their respective access regimes?*

Specifically, the Department has focussed on providing comments on issues of compatibility of the proposed ARTC undertaking with:

1. The ARTC-Westrail Infrastructure Owner Agreement (that is, are there conflicting principles and requirements?);
2. The WA Rail Access Regime (in situations where an access seeker may wish to negotiate access with ARTC to Kalgoorlie, and with WestNet Rail, the rail infrastructure management arm of the Australian Railroad Group, from Kalgoorlie to Perth).

This is because there are currently two avenues for access for an interstate operator to the WA track network:

1. Through the ARTC as a result of the Inter-Governmental Agreement (IGA) and subsequent actions (primarily the ARTC-Westrail Infrastructure Owner Agreement) to provide ARTC with the capacity to provide this access;
2. Through WestNet Rail within the framework of the WA rail access regime.

Although the assessment criteria for accepting an access undertaking differs from the certification of a State legislated regime under Part IIIA of the Trade Practices Act, Clause 6(2) of the Competition Principles Agreement (CPA) – which establishes principles for the treatment of facilities with an influence beyond a single jurisdiction – has particular relevance to this undertaking simply from the point of view of why the ARTC was set up in the first instance, and its close proximity to the WA regime.

Western Australia decided to withdraw its rail access regime from the NCC certification process late in 2000 because the State and the NCC could not agree on how Clause 6(2) of the CPA could be met in the absence of an access regime east of Kalgoorlie.

It is therefore of some importance to Western Australia that the ARTC undertaking is framed with an “interstate” perspective in mind to ensure that its influence across the WA-SA border is fully recognised and addressed.

General comments

It is interesting to note the following excerpt from the ARTC submission dated 11 May 1999 to the National Competition Council (NCC) in relation to the application by the WA Government for certification of its access regime for rail services:

“The creation of ARTC as a ‘one-stop shop’ for access to the interstate rail highway has been seen by the industry as a means by which the negotiation of access to and use of this network can be most efficiently achieved. The establishment of several different state based regimes to be applied to individual rail movements is likely to erode the confidence of operators and end-users of rail in the ability of this part of the national infrastructure ...”

It is our view that the ARTC undertaking as submitted has the effect of creating another “state based regime” by an organisation established to facilitate interstate rail services across Australia.

We understand that the ARTC may have been constrained in this regard as it cannot submit an undertaking for services on those parts of the interstate rail network that it does not own or lease. However, it is unclear as to the ARTC’s intent when it states that the undertaking “does not extend to providing access to such parts of the Interstate Rail Network not included in the definition of Network (and) if operators require access to such segments of the Interstate Rail Network, they should make contact with the relevant owners of such segments” – Section 2.1(b) of the undertaking.

Indeed Section 2.1(b) has generated some confusing messages about the roles and responsibilities of ARTC for interstate rail services outside the area covered by the undertaking. It is inconsistent with the intent of the IGA that establishes the ARTC and ignores actions taken to date under the IGA such as the ARTC-Westrail Infrastructure Owner Agreement.

Clearly, the undertaking has not made provisions to establish an appropriate interface with respective access regimes in other States or Territories, as was required of the ARTC by Clause 15.2 of the IGA under which the Commonwealth and mainland States agreed to its establishment.

Consistency with the ARTC-Westrail Infrastructure Owner Agreement

As a signatory to the IGA to establish the ARTC, Western Australia fully supports the concept of an interstate rail agency to enhance the national movement of rail freight and

passengers. As such it committed, under the ARTC-Westrail Infrastructure Owner Agreement, to directing all requests for such services on the Perth-Kalgoorlie interstate line to the ARTC in the first instance, and to providing access to track capacity to ARTC. This agreement was transferred from the State to WestNet Rail under the Rail Freight System (Transfer) Order 2000.

Common sense would suggest that the same processes and principles proposed in the undertaking would apply for services provided by the ARTC outside the coverage of the undertaking.

If we were to accept this premise, and notwithstanding Section 2.1(b), then the undertaking (and in particular the proposed Track Access Agreement) should be assessed against the ARTC-Westrail Infrastructure Owner Agreement to ensure that there is some consistency in the processes and principles. Areas include compliance with safety standards, transportation of dangerous goods requirements, network management principles, train control directions, etc.

Transport WA has not undertaken such an assessment, as the undertaking submitted by ARTC is specific in stating that it does not include the WA railway network. However, it is suggested that such an examination by the ACCC would be required to ascertain whether the undertaking will achieve consistent access arrangements for interstate operators across both the ARTC and the WA parts of the interstate network.

Consistency with the WA Rail Access Regime

The WA State Government supports the role of the ARTC as the access provider for interstate rail operations, as set out in the IGA, and has given effect to this in the ARTC-Westrail Infrastructure Owner Agreement. However, it is questionable whether the WA regime can legally exclude interstate services in the context of remarks made by Kenny J in *Hamersley Iron Pty Ltd v National Competition Council & others [1999]* 164 ALR 203 in relation to what constitutes a “service”. The WA rail access regime therefore does not discriminate between interstate and intrastate operators seeking track access – both have a right to negotiate directly with the track owner.

For those instances where an access seeker may opt to negotiate access with ARTC east of Kalgoorlie, and with WestNet Rail from Kalgoorlie to Perth, there is a need to assess the consistency of the undertaking with the WA rail access regime.

While the undertaking as proposed by the ARTC has a lot of similarities to the WA rail access regime, there are also some significant variations. The main differences can be summarised as follows:

1. Negotiation process

There are differences in the length of the various stages of the negotiation process, which would create difficulties for an access seeker looking for a service over the two networks.

2. Dispute resolution

The mediate-arbitrate process is featured in both regimes with arbitration conducted in accordance with the Commercial Arbitration Act 1986 (SA) for the ARTC undertaking and the Commercial Arbitration Act 1985 (WA) for the WA regime. However, it is unclear as to the degree to which the ARTC undertaking can impose requirements on the Arbitrator (eg. Section 3.11.4(b)(iv) and (vi) of the undertaking) and overrule the Commercial Arbitration Act (eg. Section 3.11.4(b)(iii)(C) of the undertaking).

The WA regime requires the appointment of an arbitrator who is qualified and acceptable to conduct an arbitration both under the WA Rail Access Code and another regime should the proposed rail operations relate both to railways covered by the WA rail access regime and railways covered by some other access regime. This is another aspect of establishing an appropriate interface with access regimes covering adjoining railways, which should be included in the ARTC undertaking.

The decision of the arbitrator is not binding on the access seeker in the WA regime. Following a determination by an arbitrator which does not achieve an outcome acceptable to an access seeker, the access seeker is free to reopen negotiations with the track owner. Again, this is an area of incompatibility between the two regimes.

The arbitrator in the WA regime can seek the assistance of the WA Rail Access Regulator. As there are potentially complex disputes which may require the arbitrator to have regard to such issues as economically efficient operation of the facility or the benefit to the public of having competitive markets, we believe this additional measure is necessary to assist the arbitrator. While Section 3.11.4(b)(iv)(C) of the proposed ARTC undertaking allows the arbitrator to call on any party to give evidence, we feel that specific guidance to the arbitrator on access to expert assistance would be desirable.

3. Pricing Principles

The main difference between the two regimes is the asset valuation methodology being adopted. WA has used Gross Replacement Value (GRV) in its calculation of capital costs whereas ARTC has used Depreciated Optimised Replacement Cost (DORC). However, it is noted that ARTC has also nominated a “steady rate of perpetuity” for its track, formation and structures related assets (through regular maintenance) with an infinite economic life and a depreciation charge of zero.

Other differences noted include the manner in which DORC (and subsequently how the revenue ceiling) is annually adjusted; the ability of ARTC to charge more than the ceiling (ie. monopoly rent) with the consent of the access seeker and to charge less than the floor (ie. cross-subsidisation) at its discretion; and the absence of how unders and overs are to be adjusted.

The methodology used to calculate the value of the WACC and the derived range of WACC values are similar to the WA regime. However, it is not clear as to what value within the range will be used.

4. Accountability and sanctions

The WA regime requires a number of determinations (eg. segregation arrangements including confidentiality, costing principles, weighted average cost of capital, statements of policy, train management guidelines, etc) to be undertaken by an independent rail access regulator having regard to public submissions, the requirements of the public interest and any other matter considers relevant.

Monitoring for compliance is also undertaken by the independent regulator and there are significant penalties for non compliance. Furthermore, changes to the WA Rail Access Act and Code are subject to public consultation processes as well as Parliamentary scrutiny.

Other than ACCC oversight, these safeguards seem to be absent in the ARTC undertaking.

The existence of differing provisions in adjacent regimes does not of itself make the regimes incompatible but more assessment of the implications of these differences would appear relevant to the ACCC's investigation.

However, it could be argued that, providing the ARTC has an authorised regime that covers both east and west of Kalgoorlie, an operator who chooses to deal separately with the ARTC and WestNet Rail is effectively deciding that the disadvantages of dealing with two separate regimes are outweighed by the advantages.