



Draft Determination

Application for authorisation AA1000425

lodged by

a group of rail operators in NSW
in respect of
NSW track access collective bargaining

Date: 29 August 2018

Authorisation number: AA1000425

Commissioners: Sims

Keogh

Rickard

Cifuentes

Court

Featherston

Summary

The ACCC proposes to grant authorisation to a group of nine NSW rail operators to enable them to collectively negotiate with Transport for NSW (TfNSW) in relation to the non-price terms and conditions on which they acquire below rail access to parts of TfNSW's Sydney Metropolitan Passenger Network and Country Regional Network (CRN).

The ACCC proposes to grant authorisation for five years.

The ACCC has previously granted interim authorisation for the Applicants to engage in the proposed conduct.

The ACCC invites submissions in relation to this draft determination before making its final decision.

1. The application for authorisation

- 1.1. On 21 June 2018, a group of nine NSW rail operators (the **Applicants**) lodged application for authorisation AA1000425 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation to collectively negotiate with TfNSW in relation to the non-price terms and conditions on which they acquire below rail access to parts of TfNSW's Sydney Metropolitan Passenger Network and CRN for five years.
- 1.2. The Applicants also requested, and on 25 July 2018 the ACCC granted, interim authorisation to enable them to engage in the proposed conduct (i.e. to begin collective negotiations with TfNSW) while the ACCC is considering the substantive application.

The Applicants

- 1.3. The Applicants are rail haulage service providers:
 - Pacific National
 - Aurizon
 - SCT Logistics
 - Genesee & Wyoming Australia (GWA)
 - Linx Rail
 - Qube
 - Manildra Group
 - Southern Shorthaul Railroad (SSR)
 - Sydney Rail Services (SRS)
- 1.4. The Applicants offer a variety of rail freight and logistics services for a range of products including food and bulk commodities such as coal, grain, steel and minerals.

- 1.5. The Applicants have requested that any authorisation be expressed to apply to future rail operators using the networks who will similarly need to negotiate a STAA.
- 1.6. Nationally, Pacific National and Aurizon currently each have around a 20% share of the market for rail freight transport. The next two largest companies in rail freight transport nationally are SCT Logistics, at 2-3%, and GWA at 1-2%.¹

The Proposed Conduct

- 1.7. The Applicants propose to collectively:
 - discuss and negotiate the non-price terms and conditions of access to TfNSW's Sydney Metropolitan Passenger Network and the CRN with TfNSW for the purpose of freight transportation by rail,
 - enter into and give effect to contracts, arrangements or understandings regarding the access arrangements to TfNSW's Sydney Metropolitan Passenger Network and the CRN with TfNSW, in the form of the Standard Track Access Agreement (**STAA**), and
 - discuss among themselves matters relating to the above.

(the **Proposed Conduct**)

2. Background

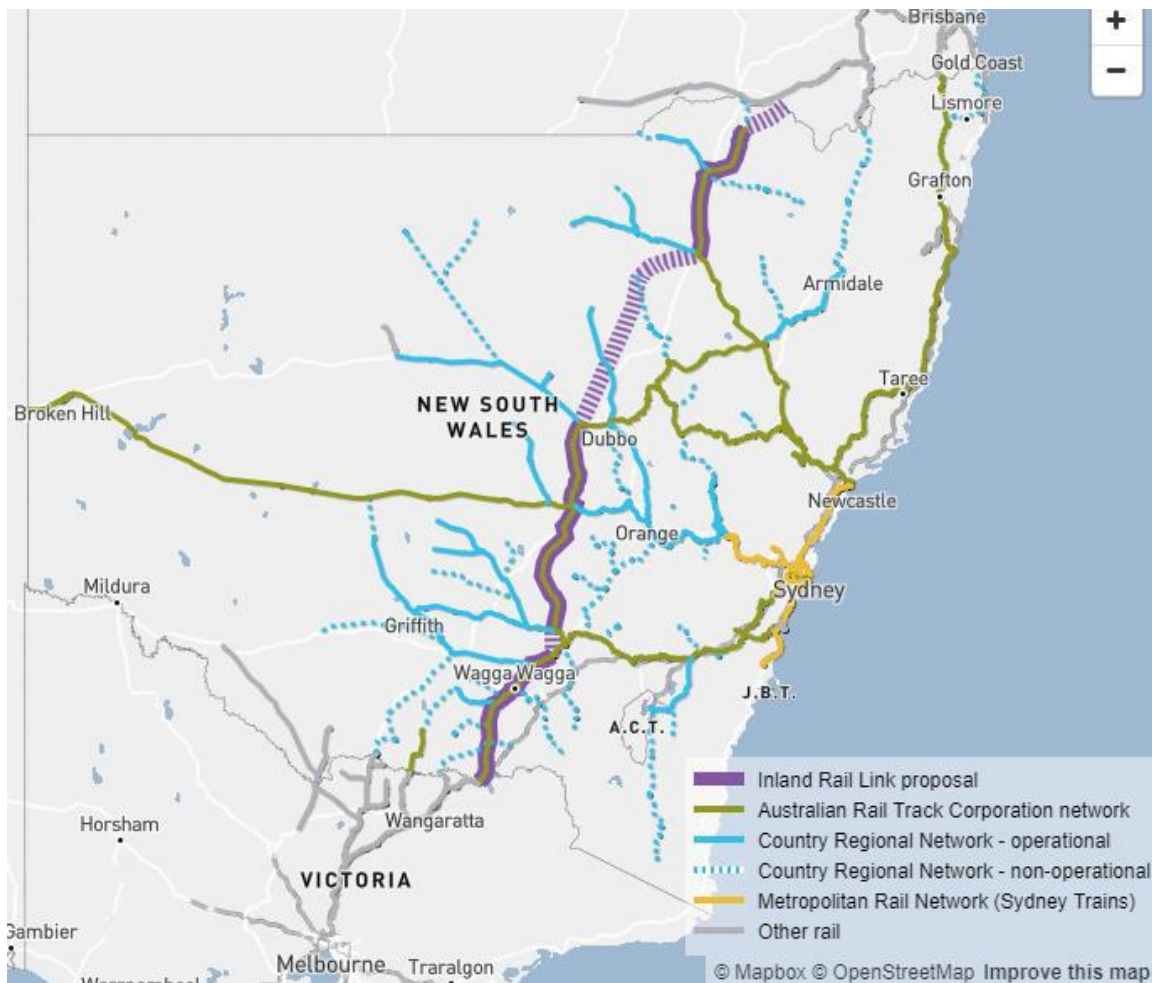
- 2.1. TfNSW is the NSW Government agency responsible for strategy, planning, policy, regulation, funding allocation and other non-service delivery functions for all modes of transport in NSW including road, rail, ferry, light rail, point to point, regional air, cycling and walking. TfNSW oversees the procurement, contracts, accreditation and regulation of its operators.
- 2.2. RailCorp is a statutory corporation constituted under the *Transport Administration Act* 1988. RailCorp is a NSW Government agency that holds rail property assets, rolling stock and rail infrastructure in the Sydney metropolitan area and limited country locations in NSW. RailCorp makes these assets available to Sydney Trains and NSW Trains for their operations. It also manages the NSW Government's contract with the Airport Link Company. From 2013 RailCorp's operation and maintenance functions were transferred to Sydney Trains and NSW Trains, leaving RailCorp as an asset owner.
- 2.3. In NSW, the various rail and track networks are owned and operated by several different entities, notably:
 - the Australian Rail Track Corporation, which operates the NSW interstate network, parts of the metropolitan freight network, Southern Sydney Freight Lines, and the Hunter Valley coal network (all owned by TfNSW),
 - Sydney Trains, which operates the Sydney Metropolitan Passenger Network (owned by RailCorp), and
 - John Holland Rail, which operates numerous regional rail lines in NSW comprising the CRN (owned by TfNSW).²

¹ IBISWorld, *Rail freight Transport in Australia*, June 2018.

² Applicants' submission supporting the application, 21 June 2018, p. 6.

2.4. The Applicants are seeking authorisation in relation to the Sydney Metropolitan Passenger Network and the CRN, shown in yellow and blue respectively on the map below.

Figure 1. Location of the rail tracks in NSW³



2.5. The Applicants submit they are seeking authorisation for collective negotiations with TfNSW in relation to the STAA due to difficulties they have encountered in individual negotiations. The STAA sets out rail operator obligations, access rights, charges and payment mechanisms, train path managements, and other operational matters.

2.6. The Applicants submit that TfNSW has been developing the latest STAA for a number of years, seeking industry feedback through briefings and individual meetings with operators in 2017 and early 2018. The Applicants submit that rail operators did not receive the first draft of the STAA until March 2018 (with current agreements due to expire on 30 June 2018), and that while TfNSW sought feedback on the draft, on important issues TfNSW did not substantively respond to the feedback.

2.7. The Applicants submit that the new STAA constitutes a step change in the contractual arrangements and risk allocation between the parties, and that it would have long term ramifications for the industry.

2.8. On this basis, the Applicants submit that collective negotiations are required to ensure the new STAA appropriately reflects the requirements of the rail freight industry,

³ Applicants' submission supporting the application, 21 June 2018, p. 23.

achieves efficient and fair common terms and conditions of access, provides the Applicants with some countervailing market power in negotiations with TfNSW, reduces negotiation and transaction costs, and shortens the length of time required for negotiations to be concluded.

2.9. TfNSW submits that:

- it has accepted variations to previous versions of STAA that have been negotiated individually with rail operators
- it expects to continue to do so
- the terms and conditions of the proposed STAA are largely based on those contained in the current agreements
- both STAA have a broadly similar risk allocation
- it does not consider it has approached negotiations with the Applicants over the proposed STAA on a 'take it or leave it' basis.

2.10. On 25 July 2018 the ACCC granted interim authorisation to allow the Applicants to commence negotiations.

3. Consultation

- 3.1. The ACCC tests the claims made in support of applications for authorisation through an open and transparent public consultation process.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including below rail operators, government agencies, industry associations and other rail users.⁴
- 3.3. The ACCC received a submission from TfNSW opposing the authorisation, followed by a further submission in response to a request for more information from the ACCC. The Applicants lodged submissions in response to TfNSW's submissions.
- 3.4. The submissions by TfNSW and the Applicants have been considered as part of the ACCC's assessment of the application for authorisation. No other party has made a submission.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the *Competition and Consumer Act 2010 (CCA)*.
- 4.2. The Applicants' Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the CCA or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the CCA. The ACCC must not grant authorisation unless it is satisfied in all the circumstances that the conduct would result or be likely to result in a public benefit and the benefit from the conduct would outweigh the likely public detriment.

⁴ The public submissions received are available from the ACCC's public register www.accc.gov.au/authorisationsregister.

Future with and without the proposed conduct

- 4.3. To assist in its assessment of the Proposed Conduct, the ACCC compares the benefits and detriments likely to arise in the future with the Proposed Conduct against those in the future without the Proposed Conduct.
- 4.4. The ACCC considers that, in the absence of the Proposed Conduct, the Applicants would each (individually) negotiate the non-price terms and conditions on which they acquire below rail access to parts of TfNSW's rail network.

Public benefits

- 4.5. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (**Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁵

- 4.6. The Applicants submit the Proposed Conduct will result in a number of public benefits. These are discussed below.

Transaction cost savings

- 4.7. The Applicants submit that the Proposed Conduct will realise transaction cost savings relative to the Applicants negotiating individually. They claim it will provide a significant reduction in legal expenses and management time of the Applicants, leading to a more efficient process. Further, they submit that TfNSW will also benefit from a more streamlined and shorter negotiation process and a reduction in the scope of matters required to be agreed amongst multiple operators, and to ensure that it is not unfairly differentiating between operators.
- 4.8. TfNSW did not comment on whether it considers that the Proposed Conduct would result in transaction cost savings.
- 4.9. Compared to the 'future without the conduct' in which each rail operator negotiates individually with TfNSW in relation to the STAA, the ACCC considers that the Proposed Conduct is likely to result in some transaction cost savings for all parties to the collective negotiations. The Proposed Conduct allows the parties to engage in a single, or fewer, negotiations, as well as potentially reducing the length of negotiations, reducing administrative and legal costs for all parties.

Improved outcomes and competition in rail haulage

- 4.10. The Applicants submit that collective negotiations are likely to result in more efficient outcomes by improving the Applicants' ability to input into the negotiations. The Applicants submit that this will promote the competitiveness of rail as against other modes of transport, and promote competition between the Applicants and other rail freight service providers by facilitating consistent terms and conditions for the same services, and allowing them to fairly and vigorously compete on other aspects of their service offerings.

5 Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- 4.11. In response, TfNSW submits that the bargaining position of the Applicants is already strong, as the Applicants are large sophisticated firms that have considerable experience in negotiating access agreements and extensive resources available. TfNSW anticipates that collectively the resources the Applicants will devote to the negotiations will far exceed those available to TfNSW. It is concerned that any increase in the bargaining power of the Applicants will result in the Applicants dictating terms to TfNSW.
- 4.12. TfNSW also submits that it has been and continues to be open to the negotiation of variations of STAAs by individual rail operators, and that the Proposed Conduct would result in the standardisation of terms as it would be likely to discourage rail operators from seeking to individually negotiate the terms of the STAA. In particular TfNSW is concerned that the Proposed Conduct may proceed in a way that disenfranchises other smaller rail operators. TfNSW argues a standardisation of terms is likely to result in a reduction in competition in the markets in which rail operators compete.
- 4.13. Based on the information before it, the ACCC understands that there is already a high degree of standardisation in access agreements between rail operators and TfNSW, and that there is little negotiation about the terms and conditions of STAAs. On this basis, the ACCC considers that the Proposed Conduct would allow the Applicants to have greater input into the agreements than would otherwise be the case, and therefore that the Proposed Conduct is likely to result in more efficient negotiated outcomes, which constitutes a public benefit. Given that the proposed collective bargaining is voluntary and that TfNSW is the only provider of rail services in NSW, the ACCC considers it is unlikely that the conduct will result in significant detriments from the Applicants dictating terms to TfNSW..

Promoting rail freight haulage

- 4.14. The Applicants submit that the conduct will lead to increased use of rail transport due to modal substitution from road, which the Applicants submit is in line with government policy, resulting in benefits including lower carbon emissions, reduced road congestion and fatalities, reduced road wear and lower Government expenditure on road maintenance.
- 4.15. TfNSW submits that the Proposed Conduct will in fact result in a movement of consumers from rail to road freight transport, because it will result in a reduction in competition between rail freight operators.
- 4.16. The ACCC considers that, to the extent the Proposed Conduct results in increased use of rail freight over road freight due to the transaction cost savings and more efficient outcomes identified above, it may capture some benefits in the form of lower emissions, and reduced road congestion, fatalities, and maintenance. While the ACCC does not consider the Proposed Conduct is likely to result in a reduction in competition between rail freight operators, for reasons discussed further below, there is also insufficient information to conclude the proposed conduct will lead to a significant shift from road to rail. The ACCC invites further information on this point.

ACCC conclusion on public benefits

- 4.17. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:
- some transaction cost savings for all parties to the collective negotiations,
 - more efficient commercial outcomes as a result of the Applicants having greater input into the terms of the STAA, and

- potentially some benefits from increased rail freight over road freight in the form of lower emissions, and reduced road congestion, fatalities and maintenance, although more information would be required before the ACCC could be satisfied that this third benefit is likely to arise and should be given weight.

Public detriments

4.18. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*⁶

4.19. The Applicants submit the Proposed Conduct is likely to result in minimal, if any, public detriments, because:

- participation is voluntary for all parties and no collective boycott is proposed
- the objectives of the bargaining are consistent with regulation of below rail services in other markets (i.e. to establish consistent terms and conditions for a benchmark service offering)
- the conduct is limited to access to below rail services on the two relevant networks
- the Applicants are subject to competition from alternative forms of transport
- the Applicants have established a competition protocol to ensure that information is shared only to the extent that it is reasonably necessary for, and related to, legitimate purposes, and do not propose to share information relating to downstream pricing, customers, costs of operations, volume and capacity projections.

4.20. The competition law protocol outlines the guidelines that meetings will follow, as well as explicitly outlining that the Applicants must not:

- discuss price for rail access or their individual costs or revenues ,
- discuss boycotting, or otherwise not collectively contracting with TfNSW in relation to obtaining rail access,
- share competitively sensitive information and non-publically available pricing or strategic information, or
- breach confidentiality obligations that each participant owes to TfNSW.

4.21. TfNSW submits that the Proposed Conduct may, through collective boycott activity, collective agreement and discussion of access agreement, and discussion of price, discourage competition in rail haulage.

4.22. TfNSW submits that, even though a competition law protocol is in place and the sharing of price information is not proposed to be authorised, there is a real risk that operational information that has competitive value may be shared between the Applicants. In particular, the potential sharing of information on individual performance

6 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

measures and TfNSW assessment of performance against them may have a detrimental impact on performance of the networks as a whole and the ability of TfNSW to maintain freight capacity on the networks, which would impact competition between the Applicants and the operations of other rail operators.

- 4.23. In response, the Applicants submit that they are not seeking authorisation in relation to discussion of above rail freight prices, collective boycotts, or sharing competitively sensitive information. The Applicants are not seeking authorisation to discuss price or individual performance measures and discussing this information is not necessary to enable collective negotiations to occur.
- 4.24. The ACCC considers that the Proposed Conduct is likely to result in minimal, if any, detriments. The ACCC notes that participation is voluntary for all parties, and that the Applicants have not sought authorisation for any collective boycott activity.
- 4.25. The ACCC notes TfNSW's concerns that there is a real risk that operational information that has competitive value may be shared in any collective negotiation despite the competition law protocol put in place by the Applicants. The sharing of sensitive commercial information such as pricing would be likely to be anticompetitive (and may also be in breach of contractual obligations imposed by TfNSW), but the ACCC considers that the Proposed Conduct does not significantly increase the likelihood of that occurring; such conduct would not be covered under the authorisation and any such information sharing would be subject to the operation of the CCA. The Applicants have further addressed this issue by explicitly stating that they are not seeking authorisation (and they will therefore not have immunity) in relation to sharing competitively sensitive operational information or individual performance measures. The sharing of such information would not be covered by authorisation.

ACCC conclusion on public detriments

- 4.26. The ACCC considers that the Proposed Conduct is likely to result in minimal, if any, public detriments from any reduction in competition because:
- participation in collective bargaining will be voluntary, both for the Applicants and TfNSW
 - the Applicants have not sought authorisation for collective boycott activity
 - authorisation would not extend to discussion of issues about which TfNSW has concerns regarding sharing of sensitive information, such as pricing and individual performance measures, and
 - the Applicants have provided a competition law protocol which governs how the STAA discussions will proceed. The protocol explicitly outlines what the Applicants must not discuss or share with each other, including information regarding price or boycotts. This protocol will mitigate the risk of operational information that may harm competition being shared amongst the Applicants.

Balance of public benefits and detriments

- 4.27. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of some reduced transaction costs, and more efficient commercial outcomes as a result of the Applicants having greater input into the terms of the STAA. The Proposed Conduct may also result in benefits from diverting freight from road transport.

- 4.28. The ACCC considers that, given the voluntary nature of participation for all parties, the absence of any collective boycott activity, the limited scope of the information to be shared between the Applicants, and their adherence to a competition law protocol, the Proposed Conduct is likely to result in minimal, if any, public detriments.
- 4.29. Therefore, for the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct. Accordingly, the ACCC proposes to grant authorisation.

Length of authorisation

- 4.30. The Act allows the ACCC to grant authorisation for a limited period of time.⁷ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.31. In this instance, the Applicants seek authorisation for five years. The ACCC considers this an appropriate timeframe as negotiations for the new STAA are likely to continue for the next 12 months, and the new STAA will likely be in place for a number of years following negotiations.

5. Draft determination

The application

- 5.1. On 21 June 2018 the Applicants lodged application AA1000425 with the ACCC, seeking authorisation under subsection 88(1) of the CCA.
- 5.2. The Applicants seek authorisation to enable them to collectively negotiate with Transport for NSW in relation to the non-price terms and conditions on which they acquire below rail access to parts of TfNSW's Sydney Metropolitan Passenger Network and CRN.
- 5.3. Subsection 90A(1) of the CCA requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The statutory test

- 5.4. Pursuant to subsection 90(7) as modified by 90(8) of the CCA, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that public benefit would outweigh the likely public detriment.

⁷ Subsection 91(1)

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000425 to enable the Applicants to collectively:
- discuss and negotiate the non-price terms and conditions of access to TfNSW's Sydney Metropolitan Passenger Network and the CRN with TfNSW for the purpose of freight transportation by rail,
 - enter into and give effect to contracts, arrangements or understandings regarding the access arrangements to TfNSW's Sydney Metropolitan Passenger Network and the CRN with TfNSW, in the form of the STAA, and
 - discuss among themselves matters relating to the above.
- 5.7. The Applicants' Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the CCA or may have the purpose of effect of substantially lessening competition within the meaning of section 45 of the CCA
- 5.8. The ACCC proposes to grant authorisation AA1000425 for five years.
- 5.9. This draft determination is made on 29 August 2018.

Conduct which the ACCC proposes not to authorise

- 5.10. The proposed authorisation does not extend to the Applicants engaging in:
- any collective boycott activity, or
 - sharing information regarding pricing or individual performance measures.

Next steps

- 5.11. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the CCA, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.