



**NSW Track Access Collective Bargaining –
application for authorisation AA1000425
Interim authorisation decision
25 July 2018**

Decision

1. The Australian Competition and Consumer Commission (the ACCC) has granted interim authorisation in respect of the application for authorisation lodged by a group of nine NSW rail operators (the **Applicants**) on 21 June 2018.
2. Interim authorisation is granted to enable the Applicants 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.
3. The Applicants' proposed conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the *Competition and Consumer Act 2010* (the **Act**) or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
4. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect.

The application for authorisation

5. The Applicants are:
 - Genesee & Wyoming Australia
 - Linx Rail
 - Qube
 - Manildra Group
 - Pacific National
 - Southern Shorthaul Railroad
 - Sydney Rail Services
 - SCT Logistics
 - Aurizon
6. The Applicants seek authorisation for five years to collectively:
 - discuss and negotiate the non-price terms and conditions of access to TfNSW's Sydney Metropolitan Passenger Network and the Country Rail Network (**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 Agreements (**STAAs**), and
 - discuss among themselves matters relating to the above.

(the **Proposed Conduct**).

7. Participation in collective negotiations will be voluntary, both for the Applicants and for TfNSW. Further, each Applicant will determine independently whether to accept the terms and conditions offered by TfNSW following collective negotiations. Each Applicant may also freely and independently negotiate with TfNSW on any matter.
8. The Applicants have provided a competition law protocol for discussions about TfNSW's STAA which governs how the Applicants' discussions will proceed. This 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-publicly available pricing or strategic information, or
 - breach confidentiality obligations that each participant owes to TfNSW.
9. The Applicants requested interim authorisation to be able to commence collective negotiations while the ACCC completed its assessment of the substantive application.

The authorisation process

10. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the Act. Broadly, the ACCC may grant authorisation if it is satisfied that the likely benefit to the public from the conduct outweighs any likely public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

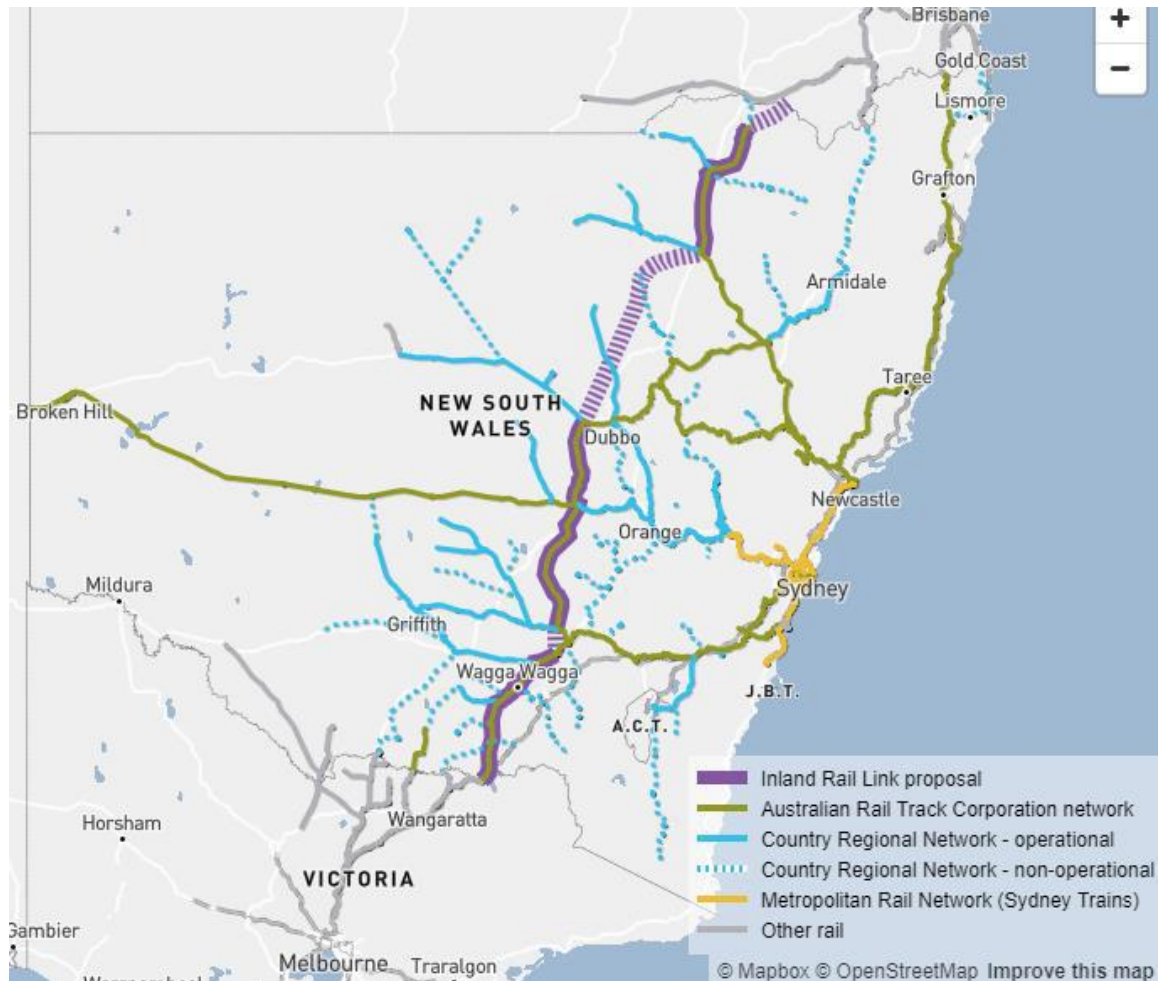
Background

11. 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.
12. 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 the State of 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.
13. 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).¹

14. The Applicants are seeking authorisation in relation to the Sydney Metropolitan Passenger Network and the CRN. The areas the three networks cover can be seen in the map below.

Figure 1. Location of the rail tracks in NSW²



15. Initially the Applicants sought interim authorisation as soon as possible because:

- their existing agreements expired on 30 June 2018
- the Applicants had sought an extension to the existing STAAs from TfNSW to maintain the status quo but had not received a response³
- if interim authorisation was not received by 30 June 2018, the Applicants would have to consider their individual positions and determine individually whether, and on what

¹ King & Wood Mallesons, supporting submission to the application, p. 6.

² King & Wood Mallesons, supporting submission to the application, p. 23.

³ Except Linx as its services are currently operated by Sydney Rail Services under their access agreement with TfNSW.

basis, to roll over the existing STAAs. This would substantially weaken the Applicants bargaining positions vis a vis TfNSW in the negotiations of the new STAAs.

16. Shortly after lodging the application for authorisation with the ACCC, TfNSW contacted each Applicant and extended the previous STAAs for another 12 months. This reduced the urgency of interim authorisation.

Interim authorisation

17. Section 91 of the Act allows the ACCC to grant interim authorisation where it considers it appropriate to allow the parties to engage in the conduct while the ACCC is considering the substantive application for authorisation.
18. The Applicants seek interim authorisation to allow them to engage in collective discussions and negotiations with TfNSW on the basis that:
 - there are a number of principles and issues to be discussed and they are therefore keen to commence negotiations as soon as possible,
 - Linx Rail does not have an existing contract with TfNSW and would otherwise have to individually negotiate with TfNSW to acquire services and start operations under its own STAA, and
 - negotiations are expected to take 12 months, noting that it has taken several years to develop the new STAA.

Consultation

19. The ACCC sought submissions from 18 interested parties potentially affected by the request for interim authorisation and the substantive application, including below rail operators, government agencies, industry associations and other rail users. The ACCC received a submission from TfNSW opposing both the interim and substantive authorisation. TfNSW provided a further submission in response to a request for more information from the ACCC. TfNSW's submissions outlined that:
 - the Applicants directly compete with one another, so any collective bargaining arrangement involving competitors will inevitably reduce competition in the markets in question, to the detriment of the ultimate consumers
 - the Applicants have substantial resources and negotiating experience. The Applicants are large sophisticated firms that have considerable experience in negotiating access agreements as they have access arrangements with multiple rail networks throughout Australia. TfNSW anticipates that collectively the resources that the Applicants will devote to the negotiations will far exceed those available to TfNSW
 - limiting the authorisation to non-price terms may nonetheless have an impact on pricing as they can impact the risk position of TfNSW and the relevant rail operator
 - there is a real risk that operational information that has competitive value may be shared between the Applicants in any collective negotiation process despite the competition law protocol put in place by the Applicants. In particular, the potential sharing of information on individual performance measures and TfNSW's assessment of performance against them may have a detrimental impact on the performance of the Networks as a whole. This would also hinder TfNSW's ability to maintain freight capacity on the Networks, impacting competition between the Applicants and the operations of other rail operators.
20. In response to these concerns, the Applicants submit that:

- any impacts are likely to be pro-competitive, rather than detrimental. Bargaining which results in a better base through a common STAA will benefit rail and freight operators by creating a more level playing field, reducing costs and creating efficiencies, allowing operators to focus more on competitive offerings and differentiation in relation to other aspects of their services over which they have more direct control,
 - the Applicants include both the large and small rail operators in NSW, such that some of the smaller rail operators including Southern Shorthaul Railroad, Sydney Rail Services, Linx and SCT Logistics consider they would have no bargaining power if they were not part of the Rail Operator Group, and
 - the Applicants are aware of competition law risks associated with discussion of below rail freight prices, collective boycotts or competitively sensitive information concerning how they compete and are not seeking authorisation in relation to any of those topics, including sharing competitively sensitive information or individual performance measures.
21. The Applicants also noted that new performance measures became a condition to the rollover of contracts without negotiation or amendment by TfNSW. They submit that this is indicative of the lack of bargaining power the Applicants have individually.
22. Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's [Authorisations Register](#).

Reasons for decision

23. Under s.91(2) of the Act, the ACCC may grant interim authorisation if it considers it appropriate to do so for the purpose of enabling due consideration to be given to an application for authorisation or for any other reason.
24. The ACCC's Guidelines for Authorisation outline some key factors that are relevant in considering applications for interim authorisation, including:
- the extent to which the relevant market will change if interim authorisation is granted - interim authorisation is more likely to be granted when it will maintain the market status quo
 - the urgency of the need for interim authorisation
 - the possible harm, if any, to the applicant and other interested parties if interim authorisation is granted or denied.
 - any possible benefit or detriment to the public from the proposed conduct that the ACCC could assess at the time of considering the request for interim authorisation.
25. Interim authorisation provides protection from competition law for the Applicants to jointly negotiate new STAAs to commence in July 2019. Interim authorisation only permits joint negotiations between the Applicants and TfNSW. Consequently, interim authorisation will not result in any new contracts before the final determination is released, such that there will be minimal impact on the status quo.
26. 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 Applicants have addressed this 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.

27. The ACCC considers there is potential harm to the Applicants if interim is not granted as a result of the reduced negotiation time available before the expiration of the extended agreements in July 2019, as this may reduce the possibility of successfully completing negotiations or result in poorer outcomes.
28. The ACCC accepts that there is merit in granting interim authorisation to enable negotiations to commence immediately given there are a number of issues to be negotiated.
29. The ACCC notes that the Applicants have not sought authorisation for any collective boycott activity nor to share information or discuss below rail freight prices or individual performance measures. The Proposed Conduct is voluntary for both the Applicants and TfNSW.
30. While the ACCC has had limited time to consult on and consider substantive issues related to the authorisation application at this stage, it appears that the proposed conduct may result in benefits from reduced transaction costs from collective negotiations and the potential for more efficient outcomes as a result of the parties having greater input into the terms of the STAA.
31. The ACCC grants interim authorisation 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. Interim authorisation does not extend to any collective boycott activity, nor to the sharing of information regarding below rail freight pricing or individual performance measures. Interim authorisation commences immediately and will remain in place until the ACCC's final determination comes into effect or it is otherwise revoked.

Reconsideration of interim authorisation

32. The ACCC may review the interim authorisation at any time. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.