NSW Track Access Collective Bargaining (AA10000425-1)

Applicants' response to TfNSW submission

This document sets out the Applicants' confidential response to the TfNSW's submissions to the ACCC dated 2 July and 6 July, 2018.

Confidentiality claim: This response and the information provided in it contain commercially confidential information. Disclosure of this confidential material could result in material financial loss and prejudice to the competitive position of the Applicants. The Applicants' request that the information marked [Confidential] be kept confidential by the ACCC and be excluded from the register kept by the ACCC in accordance with section 89(5) of the CCA. The Applicants have prepared a public version of this response which may be placed on the ACCC's public register.

1 Summary

The Applicants consider that TfNSW's basis for opposing interim authorisation is misguided. TfNSW has not established how the proposed conduct would lead to alleged pricing consequences or competitive impacts and which would be *detrimental* to competition, either intra-rail or as against road freight.

Further, the Applicants disagree with a number of TfNSW's assertions concerning the rollover of current arrangements, rail operators' ability to negotiate (both in relation to the current and proposes STAAs), risk allocation and information sharing.

The Applicants submit that interim authorisation remains necessary, and should be allowed, for the following reasons.

- Despite the rollover, negotiations are likely to take a full 12 months and awaiting a final decision would reduce the time, and ability, to negotiate.
- Non-price terms of the STAA are not the basis on which rail operators compete; accordingly, the risk of reduced competition among the Applicants is unfounded.
- On the contrary, there are likely to be pro-competitive, public benefits from collective negotiations, as:
    - they would likely result in a better "base" STAA than could be achieved individually, allowing the Applicants to focus on the aspects of service on which they do vigorously compete (e.g. labour, equipment); and
    - the Applicants do not consider that they have been able to achieve more reasonable terms in individual negotiations with TfNSW (see section 4 below).
- Despite TfNSW's assertions, the STAA is materially different from the current, "rolled over" arrangements (as described in section 4). To the extent that these differences result in price impacts and competitive consequences downstream, these will actually be *detrimental* to both rail operators and their freight customers, unless a better collective outcome can be reached, because:
    - the new performance measures, if strictly applied, are very difficult to comply with and will likely lead to freight trains being taken off the network at increased cost to freight customers and operators;

- the Operating Protocol, performance measures and other terms (including terms which create uncertainty of train paths) shift more risk onto rail operators, leading to increased overheads to ensure compliance;

- increased costs will either have to be absorbed by rail operators, making them less competitive or passed through to rail freight customers, and as a result making rail less attractive than road freight.

- The smaller operators (e.g. Linx, SSR, SRS and SCT Logistics) do not have the level of resources and bargaining power which TfNSW attributes to other Applicants, and firmly believe that their position is strengthened by the Rail Operator Group and collective bargaining.

The Applicants have sought to explain the above matters, and address the other issues raised by TfNSW in more detail below.

2 Rollover does not negate need for interim authorisation

2.1 Rollover terms

The Applicants note that TfNSW agreed to the rollover only after the application was made.

In agreeing to rollover the current STAA, TfNSW appears to have stated to some, if not all of the Applicants, that any performance meetings currently taking place between TfNSW and the rail operator will continue during the extension. The Applicants accepted the rollover on this basis in order to continue providing their services to customers. However, those Applicants who have had recent performance meetings consider that TfNSW seems to be insisting on implementing new (and onerous) performance reporting measures that are not yet agreed, during the period of extension.

The performance reporting measures are a critical industry issue, and were top of the Applicants "Issues List" but were merely "noted" by TfNSW. For example, the 15 minute window for running on time has been reduced to 5 minutes, resulting in instances of severe delays, and various operators' trains being taken off TfNSW networks (or being threatened to be taken off those networks). Consequently, customers' freight was not delivered on time (although it was not clear that the rail operator was at fault) and led to increased costs to rail operators and customers in getting delayed freight to destination.

Implementing this one aspect of the proposed STAA highlights the need for interim authorisation to facilitate collectively negotiation of a more reasonable and workable STAA for industry, including to ensure performance measures and consequence are proportionate to the impacts. The Applicants are concerned that, if the current performance measures continue to be implemented, it will be very difficult to achieve compliance, the number of incidents of trains being taken off Networks will increase, and rail freight customers will increasingly switch to road freight.

2.2 Interim authorisation is still required as negotiations take the full 12 months

Despite TfNSW's rollover of current arrangements to 30 June 2019, the Applicants all believe that it will take the full 12 months to negotiate an STAA given the lack of progress on issues raised in the three months prior to the Applicants making the application. Simply maintaining the status quo (albeit with more onerous conditions) does not alleviate the potential for the following detriments as a result of delaying collective negotiation until a final determination:

- (**Loss of valuable negotiating time**) The Applicants may individually decide not to progress negotiations on an individual basis until a final determination is made. Given the ACCC's statutory timeframe, an authorisation determination may not be made until 21 December 2018. At this point, the Applicants will have only approximately 6 months (including the holiday period) to negotiate and agree an STAA with TfNSW, obtain internal approvals and make any operational adjustments

required to meet to implement the agreement. The industry will have lost the benefit of 6 months' negotiation time to resolve numerous and key industry concerns.

- (**Increased costs of individual negotiation**) Should any of the Applicants attempt to negotiate individually with TfNSW while awaiting a final determination, they will incur increased costs and require additional resourcing compared to collectively negotiating as part of the Rail Operator Group [which is sharing the costs of collective negotiation].

The Applicants consider that no meaningful harm is likely to occur if interim authorisation is granted but for some reason final authorisation is not, given the voluntary nature of participation, the limited scope of the proposed conduct, and that any information sharing will be strictly limited to what is necessary to negotiate non-price terms and will be sufficiently high level to not contain competitively sensitive individual operational and performance-related information.

[Confidential information redacted] The Applicants note that below rail operators have not generally opposed the many collective negotiations that the ACCC has authorised in the past in relation to other monopoly service providers. The proposed STAA presents the first real opportunity to rail operators to negotiate with a monopoly service provider on non-price terms for the good of the industry, where previously track owners (not just TfNSW) have presented access agreements on a "take it or leave it" basis.

Smaller rail operators such as SSR, SCT Logistics, Linx and SRS in particular, have been anxious to be part of the Rail Operator Group and believe this significantly strengthens an otherwise weak bargaining position vis a vis TfNSW.

3 Impact of collective negotiation on rail competition

3.1 Not clearly shown how collective negotiation reduces rail competition

TfNSW's submission does not explain how interim authorisation will have a significant *detrimental* impact on the economy and/or on competition. The proposed conduct relates to the provision, and acquisition, of TfNSW's monopoly services (i.e. track access); not the freight services provided by rail operators.

TfNSW appears to claim that below rail track access prices vary based on the terms and conditions in the STAA. **[Confidential information redacted]** No further detail is provided as to how discussion of non-price terms will lead to "pricing consequences" (other than the potentially adverse consequence of increasing costs discussed above). The below rail prices are regulated by IPART. Further, there are other below rail STAAs, such as ARTC's, which have been collectively negotiated in the past without issue or concerns of reduced competition for above rail services.

Based on their preliminary review of the proposed STAA and the practical operation of their current STAAs, the Applicants find it difficult to see how different rail operators would be charged significantly different access rates based on the non-price terms of the STAA which could be impacted by collective negotiation.

The quote referenced by TfNSW on page 2 of its 2 July 2018 letter is used out of context and not referenced. However, it appears to come from the ACCC's Aurizon Determination (p. 10). Viewed in the proper context, it is clear the statement confirms that the authorised conduct does not extend to "the prices or other terms and conditions in respect of the above rail haulage services *which the Applicants offer in competition* with one another" (i.e. operation of rolling stock, as clarified on p.3, emphasis added). Consistent with the Aurizon Determination, the Applicants are not seeking to collectively agree the prices at which *they offer* competing services; they seek to collectively negotiate the non-price terms on which they *acquire services* (i.e. track access) from TfNSW.

Rail operators do not compete on the basis of their below rail track access costs, as this is set by the STAA's access price schedule and regulated by IPART. Nor do they compete on

the basis of having “negotiated” better non-price terms such as environmental indemnities, payment terms or safety requirements etc. These are not “core commercial terms”.

Rail operators, do however, strongly compete on the basis of, including for example:

- Equipment – having newer wagons or locomotives, or more volume can reduced maintenance costs or drive better fuel efficiency;
- Labour – having negotiated better enterprise bargaining arrangements can provide more flexibility in shifting human resources to meed client demands; and
- Price – and related terms of their rail freight services.

The non-price terms of the STAA are not a material differentiator between rail operators which go to the core aspects of intra-rail competition. Accordingly, it does not follow that any non-price terms “by definition influence” competition for the rail freight on TfNSW’s networks (as this is not the basis on which operators compete); they merely govern the access to a monopoly input.

3.2 Any impacts are likely to be pro-competitive, rather than detrimental

As noted above, bargaining which results in a better “base” is likely to benefit rail freight customers 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. Therefore, it is not clear how collective discussion would discourage competition in rail haulage.

[Confidential information redacted] As a network owner, TfNSW should be establishing mechanisms via STAAs that sustain and grow rail freight, not creating additional costs to rail operators and therefore their customers.

3.3 Individual negotiations likely to increase costs

Without collective negotiation, the proposed STAA is more likely to have detrimental impacts. If rail operators cannot individually negotiate better terms with TfNSW (which the Applicants consider to be a real risk), operating costs and inefficiencies will likely increase for example, due to the additional time and resources require to ensure compliance with more onerous times. As a result:

- some rail operators may absorb additional overhead costs, but may become less competitive as a result;
- alternatively, the increased costs may be passed on to customers, making rail freight less attractive and encouraging a switch to road freight;
- smaller operators who may have less flexibility and resources to respond to the changes may be disproportionately impacted; and/or
- larger operators, due to their scale, are likely to have more trains impacted and potentially taken off the network, meaning a greater volume of rail freight customers may switch to road.

These increased costs, and the uncertainty of train paths, are likely to make rail freight a less attractive alternative to road.

4 TfNSW has not demonstrated willingness to negotiate

4.1 Historic lack of negotiation of the STAA

TfNSW’s redacted examples appear to be very limited, or one-offs, and not reflective of TfNSW’s overall approach. However the STAA has been developed internally by TfNSW

over several years, with the current arrangements rolling over, and so no real opportunity for negotiation has been provided until now.

4.2 Lack of negotiation of Operating Protocols / performance measures

TfNSW introduced its new Operating Protocol in early 2018 for "consultation" but did not agree to any of the changes proposed by rail operators during the consultation process, or amend their position. The Operating Protocol was simply introduced as it was.

Similarly, new performance measures were proposed in March 2018, and became a condition of rollover without negotiation or amendment by TfNSW, despite feedback from rail operators. For example, performance targets were left open in the March version of the STAA but in the revised version from TfNSW on 8 June 2018targets were set for rail operators, but were "N/A" for TfNSW. As noted above, the reduction of the 15 minute on-time window to 5 minutes is already causing issues on parts of the network. Whereas freight trains would previously run within a 15 minute window either side of its time and still reach their destination, under the new measures trains 5 minutes ahead or behind schedule can be held for a lengthy period and sometimes not reach their destination at all. In addition, ARTC's track connects to the TfNSW Network and is an integral connecting point for all SCT's services, and other rail operators' services. The ARTC STAA has a 15 minute on-time window under its performance measures, so rail operators may always be on-time in ARTC's network requirement, but always late on TfNSW's network. This inconsistent treatment is likely to contribute to further issues on several network, not just TfNSW's for no discernible benefit. These measures put significant risk on the rail operator (for issues which may be beyond their control) with very little accountability for the network owner.

The prior performance measures were also more reasonable as they required rail operators to report on issues they had caused, rather than reporting on every minor issue or delay (even where there is no impact to the TfNSW networks) as required by the new measures. In addition, the data from TfNSW which TfNSW uses for its performance measure requires additional time and resources for rail operators to validate. Some Applicants are concerned that the data on their respective services is not accurate, and it is not clear how reliable it is.

The new Operating Protocol and performance measures are examples of not taking the views of the industry into account, and which are already having adverse impacts on rail freight. It is also not clear why many of changes proposed by TfNSW are necessary, or what issues they seek to resolve. The combination of changes (and as outlined in the Application and the Applicant's letter dated 2 July at section 1.3), present a real risk of an operator losing its right to access, and being unable to do business.

4.3 Lack of engagement on preliminary key issues with the STAA

As noted in the Application and Applicants' 2 July letter, TfNSW's initial engagement has been limited and protracted over several months since the proposed STAA was introduced. TfNSW states that it cannot move on some positions but, if so, these reasons have not been explained in TfNSW's responses.

TfNSW claims it has informal, regular meetings with individual rail operators, however these have only occurred recently and relate to the new performance measures and operational matters. They do not involve discussion of the other proposed STAA non-price terms, even when individual rail operators have sought to discuss the STAA at these meetings.

TfNSW's approach to the situations outlined above in 4.1 – 4.3 led the Applicants to consider it necessary to apply for authorisation as they have not been able to achieve reasonable outcomes with TfNSW to date.

5 Applicants' bargaining power and information sharing

5.1 The Applicants are not in an already strong position

The Applicants comprise the large and small rail operators in NSW and vary in scale, resources, sophistication and negotiating experience. As such, the Applicants are not all in

an “already strong” bargaining position as asserted by TfNSW. Nor is this evident from their past experiences or preliminary discussions of the STAA described in section 4 above, which led the Applicants come together as a group and apply for authorisation.

5.2 Smaller rail operators are in a weak bargaining position

The smaller rail operators including SSR, SRS, Linx and SCT Logistics do not have the resources or bargaining strength that TfNSW purports to larger operations. These operators consider that they would have no bargaining power if they were not part of the Rail Operator Group and that TfNSW’s resources far exceed the resources available to them to negotiate the STAA. **[Confidential information redacted]**

For these reasons, the Applicants and in particular the smaller operators among them are not disenfranchised by the proposed conduct. On the contrary, these smaller operators stand to potentially gain greater benefits from, and consider their respective bargaining positions are significantly strengthened by, collective negotiation. Accordingly, interim authorisation should be granted in order to facilitate these outcomes most expeditiously.

5.3 Scope of conduct and information sharing

The Applicants disagree that interim authorisation would facilitate discussion of price, or other competitively sensitive information; the application is not drafted or intended that way. There is no need to discuss the price of below rail access and the access price schedule is set by TfNSW based on parameters regulated by IPART.

Further, the Applicants are aware of the competition law risks associated with discussion of above 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 operational information or individual performance measures. The competition protocol established for the group is **attached** for the ACCC’s reference. In addition, the Applicants consider that they could not in any event boycott TfNSW as they all require the essential monopoly service provided by TfNSW.

In relation to TfNSW’s concern that the proposed conduct is too vague as it includes discussing matters relating to collective discussion and negotiation of the non-price terms of the STAA and entering into the STAA (in paragraph 2.2 of the 2 July letter), the Applicants reiterate and confirm that any discussion would be strictly limited, in accordance with the competition protocols, to what is necessary to enable a common negotiation position to be put to TfNSW on the non-price terms of the STAA.

TfNSW asserts on page 2 of its 6 July letter that “*the potential sharing of information on individual performance measures and TfNSW assessment of performance against them may have a detrimental impact*…”. However, the Applicants have not sought authorisation for, and do not intend, discussing detailed information of individual performance or of TfNSW’s assessment of that performance. Nor is this level of detail necessary to enable negotiations to occur so operators would not gain insight as to how their competitors perform, or be able to negotiate benchmarks that reduce competition. The measures need collective discussion so as to ensure realistic benchmarks are set which do not exacerbate delays, and non-delivery of freight services because they are unachievable.

To the extent that any of the Applicants, or TfNSW did wish to discuss individual performance or operational information that may be competitively sensitive, this can be shared between the Applicant and TfNSW bilaterally, and has occurred to date in the bilateral operational meetings held with individual rail operators.

TfNSW appears to be concerned with “*entering arrangements on common terms*”. However, this is what would occur if the Applicants sign the STAA proposed by TfNSW as it currently stands, because it has been presented to rail operators as a standard form contract. In any event, those common terms are not price-related or ones on which rail operators compete with each other. As set out above, a better common “base” would facilitate a level playing field and encourage rail operators to compete on other aspects of their services.

6 Conclusion

Notwithstanding the rollover of the current arrangements (which were conditional on new performance measures that are causing concerns for the Applicants already), interim authorisation remains necessary because it is likely to take the full 12 months to negotiate the proposed STAA, given the Applicants' current experience of negotiations to date.

TfNSW has not clearly established how interim (or final) authorisation is likely to reduce competition among the Applicants. The non-price terms of the STAA do not comprise terms on which rail operators directly compete and to the extent that collectively negotiations result in a better "base" of non-core, non-price terms and conditions, this will allow operators to compete more vigorously on other key aspects of service and enhance, rather than reduce intra-rail competition.

The Applicants do not propose, nor is it necessary, to share competitively sensitive individual operational and performance-related information for the purposes of the collective negotiation. The discussions would be at a higher level to enable collective negotiation of reasonable performance measures and would not allow operators to gain insight as to how their competitors are performing, and thereby reduce performance. Accordingly, the Applicants consider that this does not provide a sufficient basis for opposing interim authorisation.

KING&WOOD MALLESONS

Competition law protocol for TfNSW – Standard Track Access Agreement discussions

Context and purpose

A number of rail operators (the **participants**) wish to discuss the terms of the draft Standard Track Access Agreement (**STAA**) proposed by Transport for NSW (**TfNSW**) and the most efficient process for the industry to discuss and negotiate those terms with TfNSW.

The participants are committed to complying with all applicable laws, in particular the *Competition and Consumer Act 2010* (**CCA**) during these discussions.

This Protocol governs how the participants' discussions will proceed, and all participants agree to adhere to this Protocol to ensure compliance with the CCA.

Key principles

The purpose of the participants' discussions is to discuss industry concerns with the terms of the STAA.

Each participant **must make an independent and unilateral decision** about the terms and timing on which they will contract with TfNSW.

The participants **must not**:

- **Discuss the price** for rail access (including an element of price such as pricing methodologies etc) or their individual costs or revenues etc;
- **Discuss boycotting**, or otherwise not collectively contracting with TfNSW in relation to obtaining rail access;
- **Share competitively sensitive** and non-publicly available pricing or strategic information including e.g. details of customers, suppliers (or the terms on which they do business), volumes, future capacity etc
- **Breach confidentiality obligations** that each participant owes to TfNSW.

Communication & Meeting guidelines

Participants must ensure that **all communications** (including emails and verbal discussions) adhere to the Key Principles.

Any meeting between participants should be conducted in accordance with the following rules:

- Agree and circulate an agenda in advance of each meeting. Ensure the content of each agenda does not include anything that could contravene the Key Principles set out in this Protocol. Avoid "any other business" agenda items.
- Ensure all participants understand ahead of the meeting understand that any competitively sensitive matters must be subject to legal review before any commitment/agreement can be given.
- The below 'competition health warning' is read and minuted at any meetings or conference calls:
  - *Attendees at this meeting shall not enter into any discussion, activity or conduct that may infringe, on their part or on the part of other participants, any applicable competition laws. For example, participants shall not discuss, communicate or exchange any commercially sensitive information, including information relating to prices, marketing and advertising strategy or costs and revenues.*
  - *For any new attendees – please note that participating in these discussions is subject to you having read and understood the Protocols including the key principles. If you have not done so yet, please do so now.*
- Make sure accurate minutes are kept of all meetings, including details of attendees.
- Attendees should ensure that if something comes up during a meeting that could risk contravening any Competition Laws, they should:
  - Object immediately, and ask for the discussion to be stopped.
  - Ensure the minutes record that the discussion was objected to and stopped.
  - Raise concerns about anything that occurs in a meeting with competitors should raise it with their respective legal counsel immediately afterwards.
- Any decision about whether, and what terms, to contract with TfNSW is **an independent and unilateral decision** *of* each participant.