

---

## COLLECTIVE NEGOTIATIONS WITH RAIL NETWORK OPERATORS (AA1000425-1) RESPONSE TO SUBMISSIONS AND QUESTIONS RAISED BY THE ACCC

---

This document sets out the Applicants' response to the issues raised by the ACCC on 26 July 2023, and in the submissions by Transport for New South Wales (TfNSW) and Transport Asset Holding Entity of New South Wales (TAHE) each dated 14 July 2023.

The Applicants welcome both TfNSW's and TAHE's support for the ACCC granting authorisation in respect of the Proposed Conduct. The Applicants also welcome Australian Rail Track Corporation's (ARTC) and Arc Infrastructure's confirmation that they do not have any concerns with the authorisation.

### 1 Collective bargaining will deliver material public benefits

As discussed with the ACCC on 26 July 2023, negotiations between rail operators<sup>1</sup> and Rail Network Operators (RNOs) currently take place against the backdrop of a range of regulatory regimes, involving different federal and State regulators and different regulatory processes and levels of regulatory oversight.

Attachment 1 sets out a high-level overview of each relevant federal and State-based regulatory regime.<sup>2</sup>

As set out in Attachment 1, some regimes involve the relevant regulator approving a rail access undertaking (including standard prices, price ranges and/or 'floor and ceiling' returns), together with the RNO's standard terms of access. This includes the federal and Queensland rail access regimes. However, other regimes adopt a 'lighter-handed' approach, with rail operators and RNOs negotiating access agreements in accordance with higher-level principles, frameworks and criteria set out in the relevant legislation or access codes. This includes the Australasia Railway Access Regime (which applies to the Darwin to Tarcoola network), the South Australian Rail Access Regime and the Western Australian Rail Access Regime.

In each case, the Applicants consider that the Proposed Conduct will promote better, more efficient, and more equitable outcomes. In particular, the Proposed Conduct will:

- assist regulators in obtaining timely and accurate information about issues of importance to a wide range of access seekers. This includes information in relation to operational issues, key commercial issues (e.g. insurance, risk allocation, necessary network investment, and other potential 'sticking points' in negotiations), as well as individual network features (e.g. interface issues and impacts between passenger and freight traffic etc.). This will involve significant efficiencies for regulators. It will also ensure that they have access to information on behalf of a wider range of potential users who may not have sufficient time or resources to provide detailed individual submissions, or to participate individually in the regulatory process; and
- enable smaller rail operators to participate in any regulatory process more actively - and at lower cost and with less individual investment in time - through their membership in the Rail Operators Group (ROG). Authorisation of the Proposed Conduct will enable the ROG Working Group to consult with other rail operators in relation to key issues, and ensure those issues

---

<sup>1</sup> Also referred to as 'access seekers'.

<sup>2</sup> ACCC, [Issues Paper: The Regulatory Framework for ARTC's Interstate Network](#), 25 August 2021, p 21 (Appendix A).



are raised effectively - both in any regulatory process relating to the approval of standard terms and, in lighter-handed regimes, in negotiations with RNOs in relation to their standard terms. The Proposed Conduct will enable all access seekers to benefit from the experience and combined resources of the ROG Working Group, and ensure that all access seekers are able to benefit from terms which are fairer, more equitable and more efficient than may otherwise be the case.

As discussed with the ACCC on 26 July 2023, a number of members of the ROG are smaller rail operators who are unlikely to have sufficient time or resources to participate actively or fully in each regulatory process, or in negotiations with each RNO in relation to their standard terms. There are also significant differences across jurisdictions and regulatory regimes which create material challenges for smaller and newer operators (as well as larger, more established operators). The Proposed Conduct will reduce these challenges and potential barriers by enabling all access seekers to benefit from the experience and combined resources of the ROG Working Group.

When smaller rail operators have to negotiate with RNOs on their own, experience has shown that they are far more likely to 'settle' for the position put forward by the RNO on more or less a take it or leave it basis. The ROG Working Group's collective experience is that RNOs frequently then seek to use the settled position with smaller rail operators as the template for future negotiations with other operators, citing the need for consistency. This result is that it is extremely difficult to achieve improvements in standard access terms. This perpetuates the existence of inefficient, unbalanced and uncommercial terms of access which are based on differences in bargaining power and heavily favour monopoly infrastructure providers.

Even in circumstances where the parties are large and relatively well resourced, it is well-accepted that collective bargaining can deliver significant benefits. For example, in June 2021, the ACCC granted authorisation to enable competing coal mining companies to negotiate collectively in relation to the terms and conditions for acquiring coal handling services at Dalrymple Bay Coal Terminal. The ACCC stated that collective negotiations were likely to result in public benefits, including 'increased efficiency from improving input into negotiations for access to the terminal'.<sup>3</sup>

These benefits have also been recognised by the NSW Independent Pricing and Regulatory Tribunal (IPART), with IPART recommending that the NSW rail access framework is amended to enable collective negotiation on the basis that there are likely to be a number of benefits associated with collective negotiations, including improving the efficiency of commercial outcomes.<sup>4</sup>

As discussed with the ACCC on 26 July 2023, the Applicants anticipate that any collective negotiations with RNOs would primarily take place during 'windows' set either by the relevant regulatory regime or the relevant RNO. For example, all regulatory regimes involve either review dates (with negotiations taking place in the lead up to that date), or end dates for agreed access terms and conditions (with negotiations taking place in the lead up to the expiry of those terms). In other lighter-handed regulatory regimes, RNOs typically implement periodic processes to update, and engage with rail operators on, their standard terms of access. Authorisation of the Proposed Conduct would enable the Applicants to engage with RNOs as part of these processes.

As set out in the Application, both regulatory processes and negotiations with RNOs can, in practice, be very protracted. In fact, concerns about significant delays in obtaining any improvements to RNOs' standard access terms is the key reason why the ROG was created in the first place, and a key reason why the Applicants are seeking ACCC authorisation for the Proposed Conduct (i.e. to seek to reduce the delays in negotiating important improvements to RNOs' standard terms).<sup>5</sup>

---

<sup>3</sup> ACCC, [Final Determination - Dalrymple Bay Coal Producers collective negotiation with DBCT Management](#), June 2021.

<sup>4</sup> IPART draft report, [Review of the NSW Rail Access Undertaking](#), p 41. See also Queensland Competition Authority, [Final decision: DBCT 2019 draft access undertaking](#), March 2021.

<sup>5</sup> A number of existing track access agreements have been 'rolled over' or have not been updated despite expiring some time ago. These include New South Wales (where negotiations started with TfNSW in 2018 and are likely to go through to 2026), Victoria (where the Access Agreement has been with the Department of Transport for at least 8 years with no draft being provided), and the ARTC Interstate Access Undertaking (which has been rolled over since 2008).



While negotiations with RNOs (and consultation processes with regulators) may extend over a number of years, the purpose of those negotiations is to set reasonable, fair and efficient standard terms, as a 'baseline'. It does not preclude access seekers from undertaking individual negotiations with RNOs at any time, and the ROG will not have any involvement in any individual negotiations.

## 2 The authorisation will cover discussions about pricing principles but not actual prices

As set out in the Application, the Applicants will, as part of any collective negotiation process, potentially discuss pricing principles and pricing parameters that may be applied by RNOs. However, those discussions and collective negotiations will not extend to the actual prices charged by RNOs, or the actual prices individually negotiated between RNOs and access seekers.

The table below sets out examples of the types of pricing information that will and will not form part of any collective negotiation process.

POTENTIALLY WILL DISCUSS	WILL NOT DISCUSS
Key inputs and assumptions in pricing models, including reference services and non-reference services	Outcomes of model for individual access seekers, or individually negotiated prices with access seekers
Pricing bands (e.g. types of pricing bands and metrics for determining those bands)	The pricing bands made available to individual users
Form of and metrics for charging (e.g. dollars per kilometre, dollars per gross tonne kilometre, dollars per net tonne kilometre, fixed charge components, other metrics etc.)	The actual prices to be charged to individual access seekers
Metrics for potential efficiency incentives	Actual incentives or discounts provided to individual access seekers
Types of discounts that may be available	Actual incentives or discounts provided to individual access seekers
Charging or reconciliation methodologies (e.g. "unders and overs" accounting)	Amounts to be charged to individual users

As set out in the Application, discussions in relation to these types of issues is consistent with the public process that is typically undertaken in relation to Rail Access Undertakings (RAUs) and other regulatory processes relating to rail network access, and will not involve the exchange of confidential or competitively sensitive information.

Importantly, discussion of these matters will not give any insight into the **actual** prices negotiated between individual rail operators and RNOs.

None of the Applicants currently has any insight into either the full range of services acquired by other Applicants from RNOs, or prices they may have negotiated with individual RNOs for those services. This will not change as a result of the Proposed Conduct. This is particularly the case as:

- not all services offered by RNOs involve standard prices. Services such as coal carrying trains operating on the ARTC Interstate network are typically not 'reference services' and are negotiated individually with RNOs. They are also not directly based on the types of pricing principles or parameters that may be included as part of any collective negotiations;
- standard pricing published by, or negotiated with, RNOs frequently involve a large range between the 'floor' and the 'ceiling' price for the relevant service (e.g. freight trains that comply with certain train types and descriptions);



- rail operators will not have any insight into discounts, rebates or incentives that other rail operators may negotiate individually with different RNOs;
- as set out in ARTC’s submission dated 28 July 2023, ARTC (and other RNOs) frequently engage with customers on a confidential basis. Arc Infrastructure’s submission dated 31 July 2023 also states that ‘Arc routinely engages with its customers and their nominated above rail operators in negotiations for access to the Arc network... It is Arc’s experience that customers frequently have differing economic, commercial, and operational preferences, which in turn, necessitates bespoke contracting solutions’; and
- access agreements negotiated and executed by individual rail operators are not published under any regime. Only standard or template access agreements are published.

### **3 The protection conferred by the authorisation will extend to TAHE**

The Applicants confirm that, as set out in section 2.2 of the Application, the benefit of any ACCC authorisation is intended to extend to TAHE to the extent it engages in or is involved in the Proposed Conduct.

Section 2.2 of the Application provides that:

*"The RNOs in each state and territory referred to in Section 2 will also engage in the Proposed Conduct as counterparties. For completeness, this includes TfNSW, TAHE,<sup>3</sup> VicTrack, Metro Trains Melbourne, V/line, PTA, Queensland Rail, ARTC, Aurizon and Arc Infrastructure.*

*As such, an RNO includes its respective successors, assigns, related bodies corporate, associated entities, agencies and joint venture partners, or whichever entities own and operate the network which is the subject of the relevant track access agreement."*

The RNO’s referred to in section 2.1 expressly include “*the rail networks in NSW which are owned by TAHE and operated by TfNSW*”. TAHE’s role is also further described in footnote 3.

For the avoidance of doubt, the benefit of any ACCC authorisation should also extend to the Victorian Department of Transport (DOT), given its key role in relation to the Victorian rail access regime (including the development of guidelines) and the likely collective engagement by ROG members with DOT in relation to these issues.

### **4 ROG Membership is open to all access seekers and users**

The Applicants confirm that the membership of the ROG is open to any rail operator. The only requirement is that they agree to pay their respective share of ROG’s costs.

Any rail operator that wishes to become a member of ROG can contact John McArthur, Chief Executive and Managing Director at One Rail Australia (FLA) Pty Ltd.

Attachment 1<sup>6</sup> - Overview of regulatory regimes<sup>7</sup>

	<i>National</i>	<i>South Australia</i>	<i>Western Australia</i>	<i>New South Wales</i>	<i>Queensland</i>	<i>Victoria</i>
<b>Management of below-rail</b>	Australian government - ARTC	Private - Aurizon	Private - Arc Infrastructure (SouthWest freight) Private -TPI/FMG & Roy Hill in Pilbara	NSW government - Transport Asset Holding Entity Australian government - ARTC	Private - Aurizon Queensland government - Queensland Rail	Victorian government - V/Line
<b>Legislation</b>	<i>Competition and Consumer Act 2010 (Cth)</i>	<i>Railways (Operations and Access) Act 1997 (SA) for intrastate</i> <i>AustralAsia Railway (Third Party Access) Act 1999 for Tarcoola-Darwin</i>	<i>Railways (Access) Act 1998 (WA)</i>	<i>Transport Administration Act 1988 (NSW)</i>	<i>Queensland Competition Authority Act 1997</i>	<i>Rail Management Act 1996 (Vic)</i>
<b>Certification<sup>8</sup></b>	n/a	Yes	No	No	Yes	No
<b>Regulatory approach</b>	ARTC offers voluntary undertakings under the National Access Regime (NAR) for its interstate and	No undertakings. Negotiate/arbitrate model with access agreements for determining terms	Negotiate/arbitrate framework with all terms of access agreements negotiated between parties. Disputes in	Parties make access agreements which must be consistent with NSW Rail Access Undertaking (RAU). IPART assesses each arrangement for	Negotiate/arbitrate framework with both voluntary and mandatory undertakings. Declared services (that satisfy the	Declared rail managers must have access arrangements assessed and approved by the ESCV.

<sup>6</sup> The table in Attachment 1 is taken from the ACCC, [Issues Paper: The Regulatory Framework for ARTC's Interstate Network](#), 25 August 2021, p 21 (Appendix A). The Applicants have made minor amendments to the table to reflect changes since 2021.

<sup>7</sup> Sources: PwC Consulting, [Review of rail access regimes for Department of Infrastructure, Regional Development and Cities](#), May 2018, Figure 3; and Petersen, Bull & Dermody, [Access Regulation in Australia](#), Lawbook Co, 2016.

<sup>8</sup> Certified as effective State regime under Part IIIA of the Competition and Consumer Act 2010 (Cth) which requires consistency with principles set out in clause 6 of the Competition Principles Agreement; and objects of Part IIIA.

	<i>National</i>	<i>South Australia</i>	<i>Western Australia</i>	<i>New South Wales</i>	<i>Queensland</i>	<i>Victoria</i>
	<p>Hunter Valley networks.</p> <p>ARTC’s undertakings may reflect negotiation with users. The ACCC may approve an undertaking if it meets criteria in NAR.</p> <p>Undertakings can cover terms of access, capacity management, dispute resolution, pricing, and so on.</p>	<p>of access to declared services.</p> <p>Access agreements are negotiated under a framework set by Act or Code, with a legal obligation to negotiate with access seekers and provide information.</p> <p>ESCOSA guidelines shape access agreements and arbitration.</p> <p>ESCOSA is responsible for monitoring and enforcing the regime.</p>	<p>negotiations are subject to commercial arbitration.</p> <p>Regulatory documents are established under a Code and must be approved by the regulator (ERA) based on a set of broad criteria.</p>	<p>compliance with RAU and conducts annual assessments to ensure compliance.</p> <p>RAU provides for right of access; method of negotiation for access; matters to be addressed in access agreements; pricing principles; arbitration of disputes; and information requirements.</p>	<p>relevant criteria) can be required to participate in a mandatory undertaking process for consideration and approval.</p> <p>QCA approves undertakings and enforces compliance.</p> <p>The regime provides for a negotiating framework, information requirements, pricing principles, capacity management rules and network planning provisions.</p> <p>QCA may arbitrate disputes and make access determination.</p>	<p>Arrangements must be consistent with the ESCV’s pricing methodology, account keeping rules, ring fencing rules, capacity use rules, network management rules, negotiation guidelines information requirements, and the passenger priority principle.<sup>9</sup></p> <p>The regime has a dispute resolution mechanism in which the ESCV is a last resort arbitrator.</p>

<sup>9</sup> ESCV reviewed the regime in February 2010, and recommended a lighter-handed regime with negotiate/arbitrate approach. Responsibility was transferred from ESCV to the Victorian Department of Transport in 2018 but we have no information on any change in approach.

	<i>National</i>	<i>South Australia</i>	<i>Western Australia</i>	<i>New South Wales</i>	<i>Queensland</i>	<i>Victoria</i>
<b>Access charges</b>	<p>ARTC's undertakings set floor and ceiling revenue limits, and prices for reference services. The ACCC checks that these are consistent with pricing principles in NAR.</p> <p>For the Interstate network, actual prices are between floor and ceiling.<sup>10</sup></p> <p>For the Hunter Valley network, actual prices are at ceiling, with process to reimburse any under/ or over recovery after end of year.</p>	<p>Charges are determined by commercial negotiation.</p> <p>Access charges are only set (within floor and ceiling limits based on costs) in the event of an arbitrated dispute.</p> <p>DORC is used to value the initial asset base.</p> <p>Tarcoola-Darwin regime may base the ceiling on 'competitive sustainable price' if there is a competitive alternative to rail.</p>	<p>Charges are determined by commercial negotiation, within floor and ceiling limits set by ERA. ERA is not required to establish a reference tariff.</p> <p>Ceiling cost is based on Gross Replacement Value (GRV) method of valuing the rail assets (currently under review, possible change to more prescriptive DORC-based approach).</p> <p>GRV sets the widest reasonable range for floor and ceiling costs.</p>	<p>Pricing principles in RAU provide for floor and ceiling revenue, with initial asset base using DORC, then rolled forward.</p>	<p>Charges are determined by commercial negotiation within pricing principles set out in an undertaking.</p> <p>Access undertakings can include reference tariffs, which assists in negotiation of access charges.</p> <p>More detailed principles are in undertaking.</p>	<p>Access charges are subject to revenue cap regulation.</p> <p>Access arrangements must conform to a Government Pricing Order, which prescribes the pricing principles.</p>

<sup>10</sup> ARTC is currently consulting on a new Interstate Access Undertaking that will (among other things) involve a shift away from published floor and ceiling limits.

## **Northern Territory**

ESCOSA is also the regulator for the Northern Territory portion of the Tarcoola-Darwin Rail access regime, as set out in the AustralAsia Railway (Third Party Access) Act 1999 and the AustralAsia Railway (Third Party Access) Code (which have been enacted by both the Northern Territory and South Australian governments).

The Access Code sets out key principles for access pricing and negotiating access. Aurizon manages access to the track between Tarcoola and Darwin through a concession agreement with the Australasia Railway Corporation, which gives all rail operators an opportunity to negotiate access to the railway infrastructure.