



Decision

Australian Rail Track Corporation Amendment of Access Undertaking

May 2003

Commissioners:

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Decision

The proposed amendment to the ARTC Undertaking seeks to change the definition of one segment in the rail network. This is required because ARTC is not a provider of access under Part IIIA of the Trade Practices Act 1974 (TPA) in respect of all tracks in that particular segment.

The Commission's decision is to accept the proposed amendment to the ARTC Undertaking.

1 Introduction

On 4 March 2003, Australian Rail Track Corporation (ARTC) applied for a variation to the access undertaking approved by the Commission in May 2002. The Undertaking sets out a framework for negotiations between ARTC and train service operators for access to the interstate rail network in Victoria, South Australia and linking with Kalgoorlie in WA and Broken Hill in NSW.

The proposed amendment to the ARTC Undertaking seeks to change the definition of one segment in the rail network. This is required because ARTC does not meet the definition of a provider of access under Part IIIA of the TPA in respect of all tracks in that particular segment.

2 Commission Assessment Process

In assessing this amendment, the Commission has carried out a public consultation process, as required by the provisions in section 44ZZA(4) of the TPA. Accordingly, the Commission wrote to interested parties on 2 April 2003 seeking comments on the proposed changes. Submissions were received from four organisations.

The Commission took into account comments received in its assessment of the proposed amendment pursuant to the criteria in section 44ZZA(3) of the TPA. Section 44ZZA(3) of the TPA provides that in assessing an undertaking the Commission will take account of the following:

- the legitimate business interests of the provider;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who might want access to the service;
- whether access to the service is already the subject of an access regime;
- whether the undertaking is in accordance with an access code that applies to the service; and

- any other matters that the Commission thinks are relevant.

This report is the Commission's final decision.

3 ARTC's Rail Access Undertaking

The ARTC Undertaking was submitted pursuant to the provisions of Part IIIA of the TPA. The Undertaking commits ARTC to specific principles and processes for negotiating access and actual terms and conditions that will form the basis for access to its network.

The ARTC rail network (the Network) comprises standard gauge tracks linking Wodonga, Melbourne, Adelaide, Broken Hill (in New South Wales), Tarcoola (in South Australia) and Kalgoorlie (in Western Australia). The Network is part of the larger standard gauge network linking all capital cities from Brisbane to Perth, as well as Broken Hill in New South Wales and Alice Springs in the Northern Territory. The Network is utilised by both passenger and freight operators.

The Commission accepted the Undertaking pursuant to the criteria in Part IIIA of the TPA. Section 44ZZA(3) of the TPA requires the Commission to assess an access undertaking having regard to, among other things, the interests of the infrastructure owner, the interests of access seekers and the broader public interest. The Commission's decision followed an extensive public consultation process which included negotiations with ARTC, a number of revisions to the original undertaking, a draft decision and a public forum.

In response to the Commission's draft decision and comments made by interested parties, ARTC revised a number of provisions in the Undertaking which the Commission considered did not meet the legislative criteria in Part IIIA.

The Commission found that the final Undertaking satisfied the legislative criteria pursuant to which the assessment was carried out and represented an adequate basis for negotiating access to ARTC's rail network.

4 Proposed Amendment to ARTC Undertaking

On 4 March 2003, the Commission was notified by ARTC that a provision in the Access Undertaking approved in May 2002 required amendment.

ARTC advised that there is a small section of one segment in the Network for which it does not meet the definition of an access provider under Part IIIA of the TPA. The tracks which are proposed to be excluded from the definition of the Network are owned

by TransAdelaide and are about 3 kilometres in length. The tracks in question are part of the intra-state network used by TransAdelaide, which is the government-owned operator of the Adelaide metropolitan commuter train service. The tracks provide a link to the port facilities at Port Adelaide.

As a result, the definition of the relevant segment in the Network must be altered. Specifically, it is proposed that clause 6.2 in Schedule E of the Undertaking be deleted and the following clauses inserted:

- 6.1 From dry Creek including all tracks, points and signals forming the Dry Creek triangle to Port Adelaide Junction (signal 1155).
- 6.2 From Glanville (signal 1456) to Pelican Point/Outer Harbour.

A copy of ARTC's application for amendment of the Undertaking, together with a map of the relevant section of the Network is attached.

5 Assessment of Amendment

Definition of Provider

The proposed amendment seeks to ensure that ARTC complies with the definition of access provider in Part IIIA of the TPA. Section 44ZZA(1) of the TPA states that an access undertaking can be lodged under Part IIIA by "a person who is, or expects to be, the provider of a service". A provider is defined as "the owner or operator of the facility" (section 44B).

In essence, ARTC cannot make commitments under the Access Undertaking in respect of infrastructure it does not own or control. To this extent the amendment to the undertaking is a technical correction imposed by the legal requirements of Part IIIA.

Comments by Operators

The Commission received responses from four parties to the invitation to comment on the proposed changes: State Rail Authority in NSW; Essential Services Commission of South Australia; NSW Minerals Council; and Victorian Department of Infrastructure. Only the Essential Services Commission of SA (ESCOSA) raised a possible issue, relating to the interface between the track that is being excluded from the definition of the Network and the rest of the ARTC Network. ESCOSA argue that if the track is not brought under the jurisdiction of an undertaking under Part IIIA, then it would be covered by the regime in the Railways (Operations and Access) Act 1997 (SA).

While none of the above-rail operators provided submissions, staff nevertheless contacted SCT and Pacific National to confirm whether there were any issues of substance they would like to bring to the attention of the Commission. The comment from both operators was that the change was seen as a technical modification imposed by the legal definition of provider in Part IIIA. In SCT's case, it claims that it does not currently use the tracks in question (but could do so in the future).

Interface

ESCOSA claims that in the absence of an access undertaking under Part IIIA, access to the relevant tracks might come under the SA regime in which case the issue of interface with the ARTC regime would arise. A few points can be made in this context. First, access undertakings under Part IIIA are submitted on a voluntary basis. In the absence of the SA regime being found to be “effective” the tracks in question may be open to the possibility of an application for declaration. However, TransAdelaide is under no legal compulsion to lodge an undertaking with the Commission. It is noted that the SA regime arises from the Railways (Operations and Access) Act 1997 SA. The regime is administered by the SA Department of Transport and the regulator is the CEO of the Department of Transport. The regime has not been the subject of an application to the NCC for certification as an effective regime.

Secondly, the issue of interface can be considered from two perspectives: interface with parts of the interstate network not owned by ARTC, and interface with secondary segments or tracks which run-off the main interstate line. Interface with other parts of the interstate line is clearly an important issue as the ARTC Network is itself part of a larger railway network that connects major capital cities. The Commission noted in its Final Decision on the ARTC Undertaking that optimal interface could only be achieved by the collective efforts of all infrastructure owners to bring about true integration of all the components of the interstate line. The Commission considered that bearing in mind the constraints on ARTC to achieve this unilaterally, the ARTC Undertaking represented an adequate first step in moving towards a more seamless access and operational system.

As for interface with adjoining secondary line tracks, the fact that their owners may choose not to lodge an Undertaking under Part IIIA may not necessarily lead to any significant operational interface issues. The ARTC Network already interconnects with a number of small segments of track owned by other track owners. The Commission understands that in general there is an adequate level of interoperability between the ARTC network and connecting segments.

Clause 6.1 of the ARTC Undertaking deals with Network Connections, including arrangements for procedural and physical interface with the ARTC Network. Clause 6.1 of the ARTC Undertaking provides as follows:

6.1 Network Connections

- (a) In the event that other owners of track wish to connect such track to the Network, ARTC will consent to such a connection provided:
- (b)
 - (i) all relevant approvals from all relevant Government Authority have been obtained;

- (ii) the configuration of the connection to the Network is such that the connection will not, by virtue of its existence, reduce Capacity;
- (iii) procedural and physical interface arrangements are in compliance with ARTC's existing interface arrangements and there is no impact on the safety of all users of the Network;
- (iv) the other track owners ensures that all users of such track comply with the directions of ARTC's Train controllers regarding entry to and exit from the Network;
- (v) the connection meets ARTC's engineering and operational standards; and
- (vi) the other track owners meet the initial and continued costs associated with constructing and maintaining the connection.

The points of interface that will come into being where the relevant track connects to the ARTC Network should be subject to the provisions of clause 6.1 of the undertaking. Discussions with ARTC and key above-rail operators suggest that the proposed amendment is unlikely to have practical implications for existing users.

Finally, conditions of access to the 3 kilometres of tracks in question may change following the amendment if the tracks' owners do not enter into an arrangement with ARTC to permit the current situation to continue. ARTC has advised that it will seek to clarify such arrangements with TransAdelaide.

Other Issues

The proposed amendment does not affect other parts of the ARTC Undertaking. All other terms and conditions of the undertaking, including access prices, remain unchanged.

Commission's position

The Commission considers that in addition to ensuring consistency with the definition of provider in Part IIIA, the proposed amendment also satisfies the assessment criteria in Part IIIA of the TPA. Clearly, defining correctly the facility in respect of which ARTC makes commitments under Part IIIA is in the interests of ARTC and in the public interest. Also, by clarifying the nature of its status in respect of the relevant track, ARTC is removing a potential source of uncertainty and avoiding possible confusion and unnecessary delays in negotiating access. As such the proposed amendment also promotes the interests of access seekers. The interests of operators in having adequate physical and operational interface with the tracks being excluded from the ARTC Undertaking should be adequately dealt with by the provisions in clause 6.1 of the undertaking.

In brief, the proposed amendment represents a technical correction to the Network as defined in the ARTC Undertaking to ensure that ARTC meets the requirements of a provider as defined in Part IIIA. The Commission considers that the proposed

amendment satisfies the requirements of the assessment criteria in section 44ZZA(3) of the TPA.

6 Decision

The Commission's decision is to accept the proposed amendment to the ARTC Undertaking. Accordingly, the Commission accepts ARTC's proposal to delete clause 6.2 of the undertaking approved by the Commission in May 2002 and insert the following words:

- 6.1 From dry Creek including all tracks, points and signals forming the Dry Creek triangle to Port Adelaide Junction (signal 1155).
- 6.2 From Glanville (signal 1456) to Pelican Point/Outer Harbour.