



6 July 2018

Mr Jacob Campbell  
General Manager, Adjudication  
Australian Competition and Consumer  
Commission  
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cc: Hannah Ransom  
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Dear Mr Campbell

## Response to ACCC questions regarding authorisation

We refer to:

- the application for authorisation made by Genesee & Wyoming Australia, Australia, Manildra Group, Pacific National, Qube, SCT Logistics, Southern Shorthaul Railroad, Sydney Rail Services, Linx Rail Pty Ltd, and Aurizon (**Application** and **Applicants** respectively);
- the letter from Transport for NSW (**TfNSW**) to Jacob Campbell dated 2 July 2018 (**TfNSW Letter**);
- the Applicants response to questions from the ACCC dated 2 July 2018 (**Applicants' Response**); and
- the email from Hannah Ransom to Justin McGuire, Anna Kaplan and Polly Lawson on 3 July 2018 (**ACCC Email**).

As set out in the TfNSW Letter, TfNSW has concerns regarding the application for authorisation and the application for interim authorisation made by the Applicants. This letter responds to the questions asked by the ACCC Email and also addresses matters set out in the Applicants' Response.

### 1. Impact of collective negotiation on competition between rail operators

The standard track access agreement (**STAA**) sets out the key terms for access to the Country Regional Network (CRN) (owned by TfNSW) and the Sydney metropolitan rail network (where TfNSW acts as agent of the network owner, RailCorp) (together the **Networks**). The STAA includes terms dealing with:

- the grant of access rights;
- operational requirements relating to train paths including their variation;
- payment terms;
- environmental and safety requirements;
- network management
- performance management;
- security; and

- standard commercial matters such as liability, indemnity, insurance, dispute resolution and force majeure.

Because the STAA sets out the core commercial terms between TfNSW and rail operators, they will by definition influence competition for the transport of commodities using the Networks. The use of the Networks is a key input for the rail operators in their commercial offerings to their customers, such as freight forwarders.

The STAA is the starting point from which negotiations with individual rail operators can commence. TfNSW has accepted variations to previous versions of standard access agreements that have been negotiated individually with rail operators.

**Confidential:** [REDACTED]

The amendments that TfNSW has previously agreed and expects to negotiate going forward, and the associated differences between the final agreements entered into by rail operators, are likely to encourage diversity in price and service offering for the customers of the rail operators.

TfNSW considers that the limitation of an authorisation to non-price terms may nonetheless have an impact on pricing. Changes to the STAA negotiated with rail operators, even though they relate to non-price terms, can impact the risk position of TfNSW and the relevant rail operator. This may have pricing consequences for the rail operator, which will have further competitive impacts on the market for the transport of commodities by rail in New South Wales.

While TfNSW seeks to enter into terms that are broadly similar with each rail operator for access to the Networks, TfNSW has been, and remains, open to the negotiation of the terms of the STAA upon request by an individual rail operator. Each suggestion is assessed by TfNSW on a case by case basis. Of course, TfNSW may be unwilling or unable to change certain terms (such as those relating to train control) or the requirement for reasonable passenger priority to be given because these terms reflect the operational systems currently in place on the Networks (and which would be expensive to change) and its statutory obligations under the *Transport Administration Act 1988* (NSW).

TfNSW considers that the collective negotiation of the STAA would result in a standardisation of the terms actually entered into by the rail operators and would be likely to discourage rail operators from seeking to individually negotiate the terms of the STAA. This standardisation of terms, which form a key input into the service provided by rail operators to their customers, is likely to result in a reduction in competition in the markets in which rail operators compete.

Furthermore, TfNSW considers that there is a real risk that operational information that has competitive value may be shared between the Applicants in any collective negotiation despite the competition law protocol put in place by the Applicants. In particular, the potential sharing of information on individual performance 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.

## **2. STAA**

TfNSW disagrees with the comments in the Applicants' Response in relation to the STAA.

The terms and conditions of the STAA are largely based on those contained in the current standard track access agreements that the rail operators hold for the CRN and the Sydney metropolitan rail network. It is therefore unclear to TfNSW whether the criticisms raised in the Applicants' Response are related to the proposed STAA or the current access agreements in place.

In particular, TfNSW considers that the STAA has a broadly similar risk allocation to that included in the current agreements. TfNSW notes that there are some differences, but some of these are for the benefit of rail operators and improve their risk position vis-à-vis the current access agreements, for example a less extensive environmental indemnity to be provided by rail operators. Some new

concepts have also been proposed, such as 'seasonal paths', primarily to address the operational requirements of rail operators.

When drafting the STAA TfNSW has also had regard to other standard access agreements used in Australia, which are indicative of the terms and conditions on which access will be granted, but are still negotiated between the relevant network owner and individual rail operators.

Accordingly, TfNSW does not consider the STAA raises issues to the extent identified in the Applicants' Response. The Applicants will be familiar with, and likely have entered into, similar agreements for access to rail networks in Australia.

### **3. Negotiations**

TfNSW does not consider that its approach to negotiations with the Applicants over the STAA was on a 'take it or leave it' basis.

TfNSW has engaged with rail operators regularly in relation to the STAA and is ready to continue to do so.

TfNSW has kept rail operators informed of the development of the STAA at freight rail operators' forums and on a more informal basis in its regular meetings with individual freight rail operators.

On 21 March 2018 TfNSW sent the draft STAA to all rail operators for review. A high level presentation was made on the key terms of the STAA at a freight rail operator's forum on 6 April 2018. TfNSW met with freight rail operators individually following the release of the draft STAA to discuss feedback on the STAA and they were invited to provide written feedback to TfNSW on the STAA.

TfNSW then prepared a log of comments received from rail operators and responses to them and made a number of amendments to the STAA based on the feedback received.

TfNSW understands that the Applicants have concerns with the STAA that they consider were not addressed during this process. TfNSW intends to engage with all rail operators to address these and any other concerns and has rolled over the current access agreements for 12 months to allow time for this to occur.

### **4. Application for interim authorisation**

As described above, TfNSW is committed to actively negotiating track access agreements with individual rail operators so that they can be entered into prior to the expiry of the current agreements on 30 June 2019. TfNSW is ready to continue this process with rail operators now.

TfNSW does not consider that an interim authorisation is necessary for this negotiation process to continue. Furthermore, for the reasons set out in the TfNSW Letter, it is clear to TfNSW that the Applicants have the bargaining power, negotiating experience, available resources and available time to enable negotiations to continue with TfNSW.

### **5. Authorisation sought**

TfNSW does not consider an interim authorisation or authorisation is required for the reasons described above and in the TfNSW Letter.

However, if the ACCC were to grant an authorisation, TfNSW requests that the conduct authorised be limited to the conduct described in the ACCC Email and that the language of the authorisation expressly exclude collective boycott and the negotiation of price terms from its scope.

### **6. Confidentiality**

TfNSW has marked the information in this letter that it considers to be confidential. The information describes the terms of access agreements that TfNSW has previously amended following a request by a rail operator and some of those that may be negotiated in the future. The release of this information would jeopardise TfNSW's negotiating position with rail operators (both individually and collectively).

TfNSW has provided with this letter a public version with the information identified as confidential redacted. TfNSW requests that only the public version of this letter is published on the ACCC's authorisation register.

Please contact Justin McGuire, Associate Director, Freight Access and Performance on 02 8202 2591 or Anna Kaplan, Deputy General Counsel on 02 8202 3753 if you wish to discuss this matter further.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'J. Karaboulis', written in a cursive style.

**John Karaboulis**  
**Executive Director**  
**Service Delivery and Asset Management**  
**Transport for NSW**