



**One Rail Australia (FLA) Pty Ltd and Ors –
Application for revocation of AA1000425 and the substitution of
authorisation AA1000644
Interim authorisation decision
12 October 2023**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has decided to suspend the operation of authorisation AA1000425 and grant an interim authorisation in substitution for the authorisation suspended.
2. Interim authorisation is granted with a condition to enable the Applicants,¹ and other current and future rail operators using the relevant rail networks (the **Rail Operators**), to collectively negotiate with Transport for New South Wales, the Transport Asset Holding Entity of New South Wales and the Australian Rail Track Corporation (the **Rail Network Owners**²) in relation to the terms and conditions on which they acquire below rail access to certain parts of the Rail Network Owners' respective networks, as described and defined as the Authorised Interim Conduct in paragraphs 17-19 below. The condition requires that any new agreements entered into provide for their immediate termination if the Interim Authorised Conduct ceases to be authorised (as set out in paragraph 20).
3. Interim authorisation is granted in respect of Division 1 of Part IV and section 45 of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
4. Interim authorisation commences immediately and remains in place until it is revoked, the application for revocation and substitution is withdrawn or the date the ACCC's final determination comes into effect.

The application for authorisation

5. On 16 June 2023, the following Rail Operators and suppliers of rail freight services on various rail networks across Australia lodged application for revocation of authorisation AA1000425 and substitution of authorisation AA1000644 (the **Application**) with the ACCC:
 - One Rail Australia (FLA) Pty Ltd (**One Rail Australia**)
 - Manildra Flour Mills Pty Ltd (**Manildra Group**)
 - Pacific National Pty Ltd (**Pacific National**)
 - Qube Logistics (Rail) Pty Ltd (**Qube**)
 - Holdco Holdings Pty Ltd trading as Southern Shorthaul Railroad (**Southern Shorthaul Railroad**)

¹ As listed in paragraph 5, and including the successors, assigns, related bodies corporate, associated entities, agencies and joint venture partners and equity partners of each listed applicant: see Application [2.1].

² In respect of each Rail Network Owner, authorisation extends to their 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 to the relevant track access agreement: see Application [2.2].

- Sydney Rail Services Pty Ltd (**Sydney Rail Services**)
- LINX Rail Pty Ltd (**Linx**)
- Aurizon Ltd

(together, the **Applicants**).

6. The Applicants offer a variety of rail freight and logistics services for a range of products including food and bulk commodities such as coal, grain, steel and minerals.
7. Under the existing authorisation AA1000425 the Applicants are authorised to collectively negotiate with Transport for New South Wales (**Transport for NSW**) in relation to the non-price terms and conditions on which they acquire below rail access to parts of Transport for NSW's Sydney Metropolitan Passenger Network and Country Regional Network for the purposes of freight transportation by rail. This authorisation does not extend to engaging in collective boycott activity, or sharing information regarding pricing or individual performance measures.
8. The existing authorisation AA1000425 is due to expire on 13 October 2023. The Applicants now seek authorisation for 10 years for broader conduct. In summary, the Applicants seek to collectively bargain with certain rail network owners³ on:
 - the non-price terms and conditions on which they will acquire track access
 - the broad pricing principles that will apply for access to, and use of, their respective networks, but not the actual prices that will apply as between the rail network owners and individual Applicant
 - to enter into and give effect to bilateral contracts, arrangements or understandings between the Applicants and the relevant rail network owners which contain common terms and conditions relating to the track access arrangements.
9. The Applicants have requested interim authorisation for a subset of the conduct.⁴

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 benefit to the public from the conduct outweighs any 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.
11. Section 91 of the Act relevantly allows the ACCC, where it considers it appropriate to do for the purpose of enabling due consideration to be given to an application for revocation and substitution, or for any other reason, to grant an interim authorisation. Interim authorisation allows the parties to engage in specified conduct while the ACCC is considering the substantive application.

The request for interim authorisation

12. On 7 September 2023, the Applicants requested interim authorisation to:
 - collectively discuss and negotiate with Transport for NSW and the Transport Asset Holding Entity of New South Wales (**TAHE**) the broad pricing principles that

³ These include Transport for NSW, TAHE, VicTrack, Metro Train Melbourne, V/Line, Public Transport Authority of Western Australia, Queensland Rail, ARTC, Aurizon, Arc Infrastructure: see Application [2.2].

⁴ See request for interim authorisation, dated 7 September 2023, page 2. For the complete description of the conduct, see section 1.5 of the Application for revocation and substitution of Authorisation AA1000425-1 'Collective negotiations with Rail Network Operators' available on the ACCC's [public register](#).

will apply to use of the Sydney Metropolitan Passenger Network and Country Regional Network

- collectively discuss and negotiate non-price terms and broad pricing principles with the Australian Rail Track Corporation (**ARTC**) prior to ARTC submitting its draft undertaking to the ACCC
- continue to engage in the conduct currently authorised under AA1000425 (collective negotiations of non-price terms of access to Transport for NSW's relevant rail networks) in the event the current authorisation expires before the ACCC issues a final determination in relation to the Application dated 16 June 2023

(the **Proposed Interim Conduct**).

13. The Applicants request interim authorisation on the basis that:

- TAHE and ARTC have provided information about the proposed timelines for progressing discussions on their respective access arrangements:
 - on 10 August 2023, TAHE contacted all of the Applicants (as well as other industry stakeholders) seeking feedback on broad pricing structures for the proposed new NSW track access agreement. TAHE has proposed a consultation process which involves:
 - rail operators providing feedback to TAHE by 7 September 2023
 - reserving time for one-on-one discussions with TAHE in relation to that feedback in the week commencing 11 September 2023
 - a pricing information session in October 2023
 - rail operators providing any further feedback to TAHE by 27 November 2023
 - in July 2023, ARTC contacted some of the Applicants to progress discussions in relation to the interstate access undertaking and related track access agreements, and the Applicants understand that ARTC is seeking further engagement over the coming month with a view to ARTC submitting its new interstate rail network access undertaking to the ACCC, under Part IIIA of the Act, in Quarter 4 of 2023.

14. The Applicants submit that interim authorisation will enable them to engage effectively with Transport for NSW and TAHE in relation to the broad pricing principles that will apply under the proposed new NSW track access agreement, and will also enable them to commence collective discussions with ARTC in relation to the interstate access undertaking. The Applicants submit that interim authorisation will therefore bring forward the benefits described in the Application by a number of months, and will not result in any public detriments. In particular, the Applicants submit that:

- they are only seeking interim authorisation to enable collective discussions and negotiations with Transport for NSW, TAHE and ARTC. The Applicants are not seeking interim authorisation in respect of discussions or negotiations with any other rail network owners as the Applicants do not anticipate that any negotiations with those other rail network owners will occur prior to the ACCC's final determination
- the Proposed Interim Conduct will not involve collective negotiations in relation to the actual prices or price terms available to individual Applicants

- even if the ACCC grants interim authorisation, participation in any collective negotiations by Transport for NSW, TAHE and/or ARTC remains entirely voluntary
 - the Proposed Interim Conduct relates only to collective negotiations and discussions to progress Transport for NSW, TAHE and ARTC's proposed standard access arrangements. The Applicants do not anticipate that any agreements will be entered into during that time (although this remains a matter for each individual access seeker)
 - the Proposed Interim Conduct can cease at any time and there will be no permanent changes to market structure or competitive dynamics, nor any conduct that cannot be 'unwound' if authorisation is not ultimately granted
 - the Proposed Interim Conduct spans a limited timeframe
 - the Proposed Interim Conduct is referable to a narrow set of circumstances (e.g. where TAHE has sought feedback on pricing options and structures as part of its industry engagement process, and ARTC is requesting industry input to progress its draft access undertaking before it is submitted to the ACCC).
15. The Applicants submit that the ability to engage collectively with TAHE in line with its proposed timeline will enable the collective bargaining group to identify issues earlier, consider a common position, and discuss key issues with TAHE. Without interim authorisation, the Applicants submit that TAHE would need to engage repeatedly and individually with each Applicant (and other customers) to obtain their views, analyse and consolidate those views, and provide feedback. Collective discussions will expedite the process and lead to a better-informed information session in October 2023. The one-on-one discussions will also remain available if any Applicant or TAHE wishes to take that option (in addition to, or instead of, collective discussions via the Rail Operator Group, which is the collective bargaining group formed by the Applicants in 2018).
16. In relation to ARTC, the Applicants submit that there will be substantial benefits in engaging collectively with ARTC before it submits the draft replacement undertaking to the ACCC (which may happen any time from October 2023). The Applicants consider that prior and proactive consultation is more likely to ensure that the draft undertaking appropriately takes into consideration the Applicants' collective views and addresses any concerns as early as possible.

Conduct for which the ACCC grants interim authorisation

17. The **Authorised Interim Conduct** is specified in paragraph 18, subject to the limitations set out in paragraph 19.
18. The ACCC grants interim authorisation to enable the Rail Operators to:
- (a) collectively discuss and negotiate the broad pricing principles with Transport for NSW and TAHE that will apply to use of the Sydney Metropolitan Passenger Network and Country Regional Network
 - (b) collectively discuss and negotiate non-price terms and broad pricing principles with ARTC in respect of its interstate rail network, prior to ARTC submitting its draft undertaking to the ACCC
 - (c) continue to collectively:
 - (i) discuss and negotiate the non-price terms and conditions of access to Transport for NSW's Sydney Metropolitan Passenger Network and the Country Regional Network with Transport for NSW for the purpose of freight transportation by rail
 - (ii) enter into and give effect to contracts, arrangements or understandings, regarding the access arrangements to Transport for NSW's Sydney

Metropolitan Passenger Network and the Country Regional Network with Transport for NSW, in the form of the Standard Track Access Agreement.

19. Interim authorisation does not extend to:

- (a) any collective boycott activity
- (b) the Rail Operators sharing information, discussing or negotiating in relation to any past, current, forecast or proposed:
 - (i) individual performance measures as between each individual Rail Operator and the respective Rail Network Owner, including individual performance targets, assessments or penalties
 - (ii) individual pricing for the acquisition of below rail access, including:
 - A. outcomes of pricing models for individual Rail Operators, or individually negotiated prices with Rail Operators
 - B. pricing bands made available to individual Rail Operators
 - C. actual prices, volume discounts or other price terms to be charged to individual Rail Operators
 - D. actual incentives or discounts provided to individual Rail Operators
 - E. amounts charged to individual Rail Operators as an outcome of charging or reconciliation methodologies
 - (iii) prices, volumes or costs relating to the provision of rail freight services to Rail Operators' customers.

20. Interim authorisation is granted with the following condition: any new contract, arrangement or understanding entered into in reliance on ACCC authorisation must provide for its immediate termination if that conduct is no longer authorised by interim authorisation or final authorisation, and all conduct giving effect to any such contract, arrangement or understanding must cease upon termination.

Reasons for decision

21. The ACCC considers that it is appropriate to grant interim authorisation, noting that:

- Interim authorisation suspends the operation of existing authorisation AA1000425 so that the ACCC can continue to consider the Application, in circumstances where AA1000425 would otherwise expire before the ACCC's final determination is made.
- There is a current opportunity for the Applicants to have input on both Transport for NSW's and ARTC's proposed access terms and conditions.
- While the ACCC's assessment of the Application is ongoing, based on current information, the ACCC considers that the Authorised Interim 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 Rail Network Owners' proposed standard access arrangements. The ACCC notes that Transport for NSW and TAHE have made submissions generally supporting the substantive application for revocation and substitution, and ARTC has made a submission that does not oppose it as the conduct is voluntary.
- If the Application for revocation and substitution is ultimately denied, granting interim authorisation is unlikely to permanently change the relevant market structure. While the Applicants will likely have collectively discussed and negotiated some aspects of the terms under which they will access the rail networks of TAHE, Transport for NSW and ARTC, the ACCC considers that the

information that can be shared under this interim authorisation is limited in nature, and will likely become outdated as market circumstances change over time.

- The ACCC also notes that if the Application for revocation and substitution is ultimately denied, any new contracts the Applicants have entered into will automatically be terminated.
- The ACCC notes that the Applicants have not sought, and have not been granted, authorisation for any collective boycott activity and that the Authorised Interim Conduct is voluntary for both the Applicants and the Rail Network Owners. It also does not extend to the discussion of actual individual prices or performance measures.

Reconsideration of interim authorisation

22. The ACCC may revoke 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.