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ACCC draft Part IIIA access undertaking guidelines

The Hunter Rail Access Task Force (**HRATF**) welcomes this opportunity to provide comment on the ACCC's *Draft Part IIIA Access Undertaking Guidelines (Guidelines)*.

HRATF operates as the collective group for Hunter Valley coal producers who access the Australian Rail Track Corporation (**ARTC**) Hunter Valley Coal Network (**HVCN**) in their engagement with ARTC and the ACCC in respect of ARTC's Hunter Valley Coal Network Access Undertaking (**HVAU**).

The HRATF coordinated joint industry engagement during the development process for the first HVAU, accepted by the ACCC in 2011, and we are again participating in negotiations on behalf of the large majority of the NSW coal industry in respect of the draft HVAU lodged by ARTC on 23 December 2015.

Part IIIA access undertakings are valuable – but limited both by their statutory context as 'voluntary' and the weakening of the Part IIIA declaration criteria

The HRATF supports the use of access undertakings as a flexible and effective tool to provide "up front" clarity (and a degree of regulatory certainty) around a range of issues, including the negotiation framework and access dispute processes which will apply in relation to a facility as well as operational arrangements. To that end, HRATF hopes that the development of clear and comprehensive Guidelines by the ACCC will encourage more infrastructure service providers to submit access undertakings.

However, at present, the HRATF is concerned that this is unlikely to occur because of the "voluntary" nature of the regime. While Part IIIA access undertakings are intended to operate as voluntary instruments – in practice all of the access undertakings lodged with the ACCC to date have, in fact, been mandated by governments:

- (a) the ARTC Interstate Access Undertaking and HVAU were both prepared and submitted pursuant to a condition of ARTC's lease of NSW rail assets;¹ and
- (b) the wheat port access undertakings, prepared and submitted to satisfy the access test under section 24 of the *Wheat Export Marketing Act 2008*.

¹ See Memorandum between the Commonwealth of Australia & the State of New South Wales & Australian Rail Track Corporation Ltd in Relation to the Lease of the NSW Interstate and Hunter Valley rail assets to Australian Rail Track Corporation Ltd and associated arrangements, 4 June 2004, cl 12.

While we acknowledge that the Guidelines are not able to modify the character of access undertakings under Part IIIA, we see it as important to highlight this policy shortcoming – which is likely to limit the practical role that the Guidelines will be able to play in the future.

The problem has been exacerbated by recent decisions in relation to declaration of multi-user assets under Part IIIA. We see it as important to highlight that privately developed single-user infrastructure should not be subject to the Part IIIA declaration regime. In contrast, the use of access undertakings in the context of multi-user infrastructure typically constructed by Government and privatised may be warranted where there is a real threat of monopoly pricing. The ACCC Guidelines should note this distinction.

The recent refusal by the Commonwealth Treasurer to declare the shipping channel service at the privatised Port of Newcastle highlights the continuing challenge faced by access seekers in satisfying the declaration criteria under Part IIIA in relation to multi-user infrastructure. Although we note that the Newcastle decision has very recently been overturned by the Australian Competition Tribunal² and remains subject to the prospect of further legal challenge.

Very few, if any, access providers would submit to oversight of their commercial terms by the ACCC by lodging an access undertaking, unless they had strong incentives to do so. Given that the main advantage of submitting a voluntary access undertaking is to avoid the uncertainty of possible declaration, this advantage appears to have been steadily eroded over the last decade (since the Federal Court decision in *Sydney Airport v Australian Competition Tribunal*) and the incentives to lodge a voluntary access undertaking have therefore been reduced. It is too early to know whether the recent Tribunal decision in the Port of Newcastle, including the outcome of any further legal challenge, will ultimately influence this trend.

Recent recommendations of both the Productivity Commission and the Harper Review would further weaken the declaration criteria, and therefore the incentives for access undertakings.³

The ACCC has itself recently acknowledged that more could be done to directly address the exercise of monopoly power by non-vertically-integrated infrastructure service providers⁴ and has recommended changes to the coverage criteria in the National Gas Law, which are currently consistent with the Part IIIA criteria, to focus the test on sustained market power.⁵

HRATF considers that the issues identified by the ACCC persist under the Part IIIA framework and are a reason that truly voluntary access undertakings have not, to date, been a feature of that framework.

The HRATF considers that there may be benefit in the Guidelines acknowledging that, to date, all access undertakings which have been submitted have been required by either government directions/agreement or legislation – and that there have not been any truly voluntary undertakings. The Guidelines process may also provide an opportunity for the ACCC to inform the development of policy in relation to infrastructure access at this important juncture, including by:

- promoting the use of mandatory or quasi-mandatory access undertakings in appropriate circumstances, particularly where infrastructure assets are privatised or where governments require access as part of providing support or approval for significant new infrastructure projects; and

² Application by Glencore Coal Pty Ltd [2016] A CompT 6

³ While the HRATF is pleased that the Commonwealth Government has not accepted the Harper Review's recommendation to require that declaration would promote a *substantial* increase in competition in a *nationally significant* dependent market and should further *promote* (and not simply be contrary to) the public interest, it notes that the Productivity Commission's recommendation that access on reasonable terms *through declaration*, and not simply access, has been accepted. This would make criterion (a) significantly more difficult to establish than the test set out by the Federal Court in the *Sydney Airport* case.

⁴ Port of Melbourne Select Committee, Inquiry into the Proposed Lease of the Port of Melbourne, 30 September 2015.

⁵ ACCC, Inquiry into the East Coast Gas Market, April 2016.

- highlighting that the current “voluntary” framework also places users and the ACCC at a significant disadvantage *vis* the service provider in relation to negotiating the terms of an access undertaking.

Performance incentives and accountability

The Guidelines acknowledge the concern of access seekers that a monopoly service provider may not experience competitive pressure to increase efficiency and, to the contrary, may be incentivised by price regulation to reduce service levels in order to increase profits.

While efficiency incentives, performance indicators and other accountability measures will vary by industry and circumstances, it would be useful if the Guidelines were to provide additional detail to infrastructure service providers of the kinds of mechanisms that have been used in different regulatory frameworks and the results they have achieved.

In particular, the Guidelines should address:

- ex-post and ex-ante approaches to assessing operating expenditure;
- approaches to forecasting and appropriate forecasting timescales;
- principles, criteria and objectives for assessing operating expenditure;
- the setting of efficiency targets; and
- carry-over of efficiency gain/loss allowances in subsequent regulatory periods.

It would be useful if the ACCC could indicate its view of these various options and the circumstances in which they are likely to be necessary in order to achieve the Part IIIA objective of efficient operation and use of infrastructure.

Variations

The Guidelines note that ACCC approval is required for the variation of an access undertaking and notes that the ACCC would expect an undertaking to include provisions specifying the potential for renewal or variation of that undertaking. The Guidelines could usefully provide additional detail relating to possible mechanisms for variation, including variations initiated by an access user or the ACCC. They should also set out the ACCC’s view of the extent to which an access undertaking may specify minor variations agreed between the parties that might not need ACCC approval.

Vertical and horizontal integration

The Guidelines note that a vertically integrated firm will have incentives to engage in self-preferential treatment when providing access to its own related business compared with its upstream or downstream competitors, and recommends robust non-discrimination requirements, capacity allocation systems and ring-fencing arrangements where structural separation is not pursued.

HRATF considers that the Guidelines could provide greater analysis of the challenges presented by both vertically and also horizontally integrated infrastructure providers, including for example operators who provide a number of infrastructure services, only some of which are subject to an access undertaking or other access regulation. In these circumstances an infrastructure service provider may have strong incentives to disproportionately allocate common costs such as overhead costs to a regulated service where it can be assured of recovering those costs.

The Guidelines could usefully explore the need to avoid cross-subsidies and cost-shifting between the various operations of the integrated provider, and the features of an appropriate cost-allocation

methodology and a sufficiently detailed costing manual – including the type of cost allocation principles that the ACCC would typically expect to see in any such manual.

User engagement

Appropriate user engagement and transparency (supported by appropriate dispute processes) are critical to the effective operation of an access framework – especially in relation to tariff and RAB roll forward issues.

The Guidelines recognise that access undertakings will often provide users to have input into operational and investment decisions. One area where the HRATF considers that the Guideline could be clearer is the importance or transparency and user involvement around setting tariffs and pricing principles and how the asset base is to be rolled forward.

We would be happy to provide any additional information that may help the ACCC in finalising the Guidelines.

Yours faithfully

A handwritten signature in black ink, appearing to be 'AS' or similar initials, written in a cursive style.

Alex Sundakov
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