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Essential Services Commission
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ADELAIDE SA 5001



One Rail Australia's response to ESCOSA's Rail Access Regime Review – Draft Report

One Rail Australia welcomes the opportunity to respond to ESCOSA's Draft Report on the Rail Access Regime Review (June 2020). This document sets out our Access department's response to specific issues raised in the Draft Report.

Overall, One Rail Australia supports the draft finding to continue the access regime in its existing form. We agree with ESCOSA that:

- Any market power that One Rail Australia does hold (noting strong competition from road transport) has not been used for an improper purpose.
- If the regime expired this could affect the operation of, and investment in, the intrastate network.

As previously stated, One Rail Australia's position on the effectiveness of the current regime is based on market fundamentals whereby rail faces strong and increasing competitive pressure from road transport. In this environment, it is imperative that the regulatory approach in South Australia is cost-effective and also provides protection to both access seekers and access providers.

It is also critical that the low volume nature of the South Australian market is supported by a low-cost regime. Increased complexity or regulatory burden will lead to an increase in compliance costs that One Rail Australia believes is unnecessary and counterproductive. A cost-effective regime is crucial in supporting the competitiveness of rail.

For One Rail Australia, the greatest strength of the existing regime is its efficient negotiation and arbitration framework. There have been no access requests that have required arbitration in the five years since the last ESCOSA review. Despite this, the negotiation and arbitration processes under the regime protects both access seekers and providers from undue market power. In addition, the existing access regime enables efficient negotiation in response to changes in demand. For instance, in recent years, the existing regime has supported the quick establishment of feedstock services (including grain) running from South Australia to drought affected states.

Given the draft report's support for continuing the existing regime, this submission focusses on responding to specific matters raised in the Draft Report as possible improvements to the regime:

- Transparency and online access to the information brochure
- Protections for end-users
- Mechanism for seeking declaration of rail infrastructure services
- Greater provision of information to stakeholders
- Standard access conditions and prices
- Changes to the negotiate-arbitrate framework.

Beyond these points the only matter that we wish to raise relates to the returns assessment carried out by ESCOSA. The returns assessment used in the Draft Report to evaluate profitability is based on operating profit margins and does not account for finance costs or capital expenditure. For instance, it is not uncommon for single customer line contracts to incorporate specific terms on capital expenditure. This expenditure is often made early in the contract lifecycle. In these years cash flows can be negative.

For further information on One Rail Australia's views on the South Australian Rail market in general, please refer to our submissions in response to the Issues Paper ([available on ESCOSA's website](#)).

Response to Possible Improvements

This section sets out specific responses to matters raised by ESCOSA in the Draft Report.

Transparency and online access to the information brochure

As noted by ESCOSA, stakeholders have expressed a preference for a web-based approach for the sharing and accessing of the information brochure. This is different from the current requirements under the Act for One Rail Australia to issue physical brochures to potential customers.

One Rail Australia supports the provision of information via its website and recognises the benefits for all rail industry participants with improved access to the information brochure. These benefits include better access to information for access seekers and a reduction in administrative costs for One Rail Australia. Additionally, the distribution of the information brochure in digital form will enable more timely updates to occur.

One Rail Australia is comfortable with the concept of introducing prescribed time limits on updating the information brochure as long as these limits are reasonable, and they allow for sufficient time for internal decision-making processes and do not result in prioritisation of speed over accuracy.

Protections for end-users

In this proposed improvement, ESCOSA suggests an ability for end-users to access protections under the regime without being required to engage with an accredited rail operator as an intermediary. In practice, this would broaden the notion of a rail 'access seeker'.

Although One Rail Australia cannot speak to the legal interpretation of the Act, we are, in general, comfortable with dealing directly with end users as access seekers. We note that, historically, there has been some confusion around this and agree that clarification would benefit both One Rail Australia and access seekers.

Moving forward, One Rail Australia is open to dealing directly with any party who is a "genuine access seeker" provided an accredited rail operator is involved at some point during the discussions, or, the party is genuinely seeking to become an accredited rail operator. This is important to ensure One Rail Australia receives the correct technical and rail safety information to allow details of the access arrangement to be determined, particularly for greenfield operations.

It may be helpful to define the features of a genuine access seeker in order to facilitate an efficient access negotiation process for all parties. In some instances, it may be more appropriate for users to

seek access via an accredited rail operator rather than directly with One Rail Australia. It is difficult to pre-determine a precise cut-off for this and we consider that some discretion should be provided to One Rail Australia, perhaps in conjunction with the regulator.

We would be happy to work with ESCOSA and the above rail industry to further define this aspect of the regime.

Mechanism for seeking declaration of rail infrastructure services

The regime in its current state does not allow for a legislative or regulatory mechanism for an access seeker or other interested party to seek that a rail service that is not covered by the regime to be covered (and vice versa). Consequently, ESCOSA suggested that the regime could be enhanced through the introduction of a consultative mechanism and process for amending coverage including or excluding certain assets.

We note that this issue has been identified since at least 2011 and consider this to be an appropriate time to introduce such a mechanism to ensure that the regime aligns with best practice nationally.

However, the introduction of this mechanism raises key points that will need to be considered and appropriately addressed before One Rail Australia would support the implementation of such a mechanism:

- The mechanism should be balanced to allow for both declaration and exclusion of relevant infrastructure and services. In our initial submission to this review, we identified the need to account for exclusion of infrastructure and services where future potential use of the network is highly unlikely. We would agree that it would be beneficial for there to be some mechanism to respond to these cases in a periodic review process.
- The mechanism should consider the costs and benefits of changes in declaration status. One Rail Australia would be concerned if the mechanism could lead to some or all of the intrastate rail assets being excluded from the South Australian regime and then redeclared under the national regime. This would give rise to significant transaction costs in transferring across regimes, lead to higher ongoing costs, and would cause confusion for access seekers. As such, consideration should be given to whether the benefits of a change in declaration outweigh the costs associated with maintaining the status quo for a particular section of the network.

Greater provision of information to stakeholders

In this proposed improvement, ESCOSA identified that some market participants have raised concerns around lack of transparency over which infrastructure is covered or not covered by the South Australian regime. As a result, ESCOSA suggested that this lack of transparency can increase the cost of access negotiations and that a public register of what rail infrastructure services are 'in' or 'out' of the regime could reduce the cost of commercial negotiations.

One Rail Australia is sympathetic to concerns raised by above rail operators that, at times, and particularly with mainline yards and sidings, it can be unclear which network operator is responsible for which asset. This also has implications for the regulatory regime, pricing and access terms for the above rail operator.

In general, One Rail Australia is willing to provide further information to help clarify what rail infrastructure and services are 'in' or 'out' of the regime and would be pleased to work with ESCOSA and access seekers to progress this.

We do note that One Rail Australia is already providing a significant amount of information that could clarify some confusion and which may not be being used to the fullest extent possible. For example, One Rail Australia makes available detailed information in the National Operating Guides that are available on our website as well as a more general map of the network.

Our main consideration in taking this improvement forward is to agree on the best format and level of detail. This is necessary as the format of the information could be in the form of tables, maps, schematics or detailed descriptions. The format also needs to account for what is most efficient for One Rail Australia to provide and any legal or technical restrictions on provision of information.

Based on feedback received, it is our understanding that a suitable format for the additional information could be a table listing railway tracks and sidings, the access regime they come under and some additional information (such as contacts and documentation). If this approach was acceptable to ESCOSA and above rail operators, then One Rail Australia would consider this to be an efficient and effective solution.

Standard access conditions and prices

ESCOSA noted that some rail access regimes in Australia allow the regulator to approve standard access conditions and prices. However, ESCOSA also noted that, given the low usage of intrastate rail lines, and the varying types of below-rail services involved at yards and sidings, the proposal would be unlikely to lead to much benefit for the intrastate railway, but at the same time would likely increase costs.

One Rail Australia agrees with ESCOSA's conclusions on this matter.

Improve the negotiate-arbitrate framework

ESCOSA noted that costs and timeframes under the conciliation and arbitration mechanisms have not been tested and raised the possibility that the time and uncertainty of the process may be discouraging arbitration activities.

To address this, ESCOSA suggested it may be worth considering allowing an arbitrator to make an interim order on access prices, terms and conditions if parties are renegotiating an agreement that is soon to expire.

In general, One Rail Australia considers that the current framework, which enables conciliation and arbitration if negotiations are unsuccessful, is effective. There is no need to make adjustments and no evidence base to indicate what adjustments would be beneficial.

As a matter of commercial principle, One Rail Australia does not seek to influence the timing of contract negotiations in order to achieve better short-term commercial outcomes for itself. Given the long-term relationship between One Rail Australia and our above rail operators, the significant co-investments made in making rail transport operationally efficient and the strong competition from road transport, such a negotiation approach would be detrimental to both parties' interests.

Specifically, One Rail Australia does not support a broad power allowing an arbitrator to make an interim order if re-negotiations are underway but an existing agreement is close to expiry. One Rail Australia considers that such a power would create risks for both access providers and access and could lead to an order that is detrimental to either or both parties. Further, the basis on which an arbitrator would make such a decision is unclear and it could result in the arbitrator effectively becoming a de-facto price-setter, but without any of the checks and balances or protections for stakeholders that a proper regulatory process would provide. As ESCOSA itself notes in section 5.4 of the Draft Report, there is no value in a regulator setting a 'standard' price.

One Rail Australia is not aware of another regulatory regime that includes a similar mechanism. We also note that the regulatory framework requires parties to negotiate in good faith during the negotiation, and we consider that allowing reasonable time for negotiation prior to the expiry of an agreement is a natural part of negotiating in good faith.

If ESCOSA does wish to pursue the introduction of such a mechanism then we would consider a more appropriate approach could be that, if the existing agreement is set to expire, there is an automatic rollover of existing access prices, terms and conditions, for, say, 6 months or until conclusion of any arbitration process. This roll-over could also incorporate an adjustment in prices in line with a relevant price index.

Conclusion

One Rail Australia is supportive of the draft finding to continue the existing access regime. One Rail Australia considers that the existing regime is a cost-effective way to provide protection to both access seekers and access providers in South Australia. We are also broadly supportive of most of the suggested improvements to the regime subject to the specific items noted above.

One Rail Australia again thanks ESCOSA for the invitation and opportunity to respond to its Draft Report.

Please contact Paul Hollitt on 8343 5441 if you wish to discuss this submission further.