



AUSTRALIAN RAIL TRACK CORPORATION LTD

ARTC SUBMISSION: 27 February 2009

**Annual Review of Regulatory Burdens on Business:
Social and Economic Infrastructure Services**



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KEY POINT SUMMARY

Rail Safety

ARTC strongly advocates that a single national safety regulator is the only option that will deliver the required benefits for the national rail network.

Economic

ARTC believes that access arrangements should continue to be resolved through commercial negotiation underpinned by economic regulation.

ARTC sees the existence of only one body, the ACCC as the regulator of national infrastructure, as being the most beneficial to the successful implementation of competition reform in Australia.

OH&S

National consistency is the key for any reform in this area, and in ARTC's view there should be single national OH&S legislation.

Environmental

ARTC believes harmonisation of environmental legislation is critical, whereby the Commonwealth, state, and Territory regulators facilitate and ensure national consistency for both existing and any new legislation.

Also, ARTC should be excluded from the definition of "Commonwealth agency" under section 528 of the EPBC Act which would significantly reduce the overlap of Commonwealth and State/Territory project approval laws for ARTC.

INTRODUCTION

The Productivity Commission has been asked to conduct ongoing annual reviews of the burdens on business arising from the stock of Government regulation. This submission outlines the major issues that the Australian Rail Track Corporation (ARTC) sees arising from the current regulatory arrangements in the areas of economic, rail safety, environment and occupational health and safety regulation.

It is ARTC's view that multiple regulators in each state in the areas of safety and OH&S adds significant cost and complexity (through inconsistent treatment) to all parts of the national transport logistics chain, and ARTC supports the creation of a



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national approach to rail safety, and the addressing of the overlaps between rail safety, OH&S and environmental and economic regulation in Australia.

ARTC BACKGROUND

The Australian Rail Track Corporation Ltd. (ARTC) is a company under the Corporations Act whose shares are owned by the Commonwealth and is overseen by the Minister for Infrastructure, Transport, Regional Development and Local Government, and Minister for Finance and Deregulation.

ARTC commenced operations on 1 July 1998, and currently has responsibility for the management of over 10,000 route kilometres of standard gauge track in South Australia, Victoria, Western Australia and New South Wales. ARTC has an agreement with WestNet Rail to provide a one-stop shop for interstate network access from Kalgoorlie to Perth, and is four years into a 60-year lease of the interstate and Hunter Valley rail networks in NSW.

ARTC's corporate strategy is to:

- Provide seamless and efficient access to users of the interstate rail network;
- Pursue a growth strategy for interstate rail through improved efficiency and competitiveness;
- Improve interstate rail infrastructure through better asset management and coordination of capital investment;
- Encourage uniformity in access, technical, operating and safe working procedures; and
- Operate the business on commercially sound principles.

At current access pricing levels, utilisation of the interstate rail network does not generate sufficient revenue to recover full economic cost of long term asset sustainability (measured on an optimised replacement basis commonly recognised under economic regulation models).

This largely results from the bulk of ARTC's revenue on the interstate rail network being derived from the intermodal freight transport market, where rail competes with other transport modes, particularly road freight transport. Rail is generally a price-taker in these markets, and its access prices must remain low to keep rail competitive. Hence any distortions in pricing of transport infrastructure impacts both on rail, and ARTC's profitability and sustainability.

ARTC aims to increase utilisation of its network by assisting to maintain and improve rail's competitive position in both national and regional logistics markets. Through targeted investment, pricing, network management, and applying low cost maintenance practices in order to improve rail's reliability, transit time and yield, ARTC has contributed to the increase in rail's share of the East-West intermodal land transport market to 80%. ARTC aims to maintain this position, and apply a similar strategy to obtain an improved rail transport outcome on the North-South (Melbourne-Sydney-Brisbane) interstate corridors.



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RAIL SAFETY REGULATION

Overview

Consistent with the COAG reform agenda, ARTC supports reducing the costs of regulation and enhancing productivity and workforce mobility in areas of shared Commonwealth and State responsibility.

The National Transport Commission (NTC) recently published its draft Regulatory Impact Statement (RIS) for the national Regulator and Investigator proposals, with the Australian Transport Council (ATC) to consider the RIS in early 2009.

ARTC endorses NTC's rationale that the current institutional arrangements for administering rail safety regulation in Australia potentially hinders the capacity of governments and industry to deliver the same high standard of rail safety across the board. Current arrangements also impact on the ability of the industry to operate efficiently, and therefore compete with other modes of transport. As the NTC stated in its March 2008 National Transport Plan, "the rail industry is now essentially national. Given that model legislation is being implemented to reflect this, institutional structures must also be amended."

ARTC endorses NTC's recommendation that a single national rail safety regulator be created and concludes that a single national regulator will deliver improvements to rail safety and industry efficiency.

ARTC advocates for a single national rail safety investigator with the combined resources of the existing investigatory bodies, based on a multi-modal transport investigation capability. This approach ensures economies of scale and a broader perspective can be maintained.

Background

The Industry is currently governed by 7 State and Territory rail safety regulators, and 3 Independent Investigatory bodies that undertake "no-blame" investigations. Compliance investigation is undertaken by all 7 Regulators. ARTC is currently accredited in 4 States and works with all 3 Investigatory bodies, in addition to regulators in the OHS and environmental fields.

Progress towards national uniformity of rail safety laws has been slow and inconsistent. Each jurisdiction is exercising its right to modify the Model Rail Safety Bill to reflect its own agenda, with the result that ARTC now has serious doubts that the foreshadowed benefits of the Model Bill will eventuate.

The on-going variances between jurisdictions limit the ability of the current rail safety regulators to further improve regulatory safety performance and may even encourage further local variances in future. Only a single national rail safety regulatory system will provide the opportunity to provide safety performance improvements in a harmonised manner across Australia.

Proposal for single national regulator and investigator

Moving to a single national rail safety regulator has the obvious benefits of efficiency, flexibility and cost savings to the industry in:



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- interpretation of legislation and regulation;
- timeliness (from elimination of the need to coordinate state and territory based organisations);
- reduction in regulatory administration staff and associated costs; and
- the ability for the regulator to more effectively regulate within the co-regulatory framework in an organisation that has critical mass, access to a greater pool of qualified people from which to select staff, and capacity to employ more specialist staff.

Quantification of the savings that would flow to ARTC and the rail transport industry if there was single national rail safety regulation framework is difficult in the absence of a clear model and certainty as to how States will work with or through a national regulator. ARTC forecasts that significant savings would be achieved in comparison to the current costs incurred.

ARTC's view is that jurisdictional differences in rail safety regulation should be confined to urban public transport system issues, as it is these high risk, high profile operations that continue to drive State legislatures and regulators away from adoption of the national model.

The opportunity exists to establish a single national regulator, with options for each jurisdiction to provide additional, State based regulation in the key areas of safeworking rules management and incident investigation for its urban passenger networks. Such an approach would be consistent with the findings of McInerney QC in the final Waterfall Inquiry report, and would enable appropriate Ministerial involvement in State issues while delivering the required improvements in interstate transport.

ARTC therefore supports the limited retention of regional investigator organisations to work with a national investigator, to address respective jurisdictional needs as follows:

- In major metropolitan areas the State Government could retain an investigation group which the national regulator would accredit to undertake investigation of incidents in those metropolitan areas. The accredited investigation group would be required to comply with national regulator accreditation and report to the national regulator and to the State Minister;
- This would ensure initiation of investigations when requested by relevant Transport Ministers, and provision of appropriate and timely Ministerial advice ahead of the release of incident investigation findings, notwithstanding resource constraints and other priorities within the national investigator;
- Importantly, the national investigator would retain the independence and jurisdiction to conduct its own investigation into any incident, and would have access to any reports generated at State level. In this way the performance of the regulator/s would continue to be subject to independent scrutiny.

ARTC also supports the need for State involvement in urban system oversight, and proposes that:



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- the National Regulator should be required to gain State Ministerial endorsement to safety rules which apply in the specific metropolitan passenger network; and
- the National Regulator should establish an advisory body for urban rail issues whose membership would include a representative of each jurisdiction's Ministry / Department of Transport.

Cost benefit analysis – efficiency and effectiveness

An important factor in any rail industry reform initiative is the societal benefits accruing from increased utilisation of rail assets, and the corresponding easing of pressure on the road networks to accommodate demand growth. These include cheaper unit rates for consignees, as well as savings in road maintenance and investment, reduction in road accidents, and environmental benefits such as reduced carbon emissions.

In relation to cost recovery options, ARTC advocates for fair recovery of the costs of proper regulator activity, without industry subsidisation of either government policy expenditure or taxpayer supported activities such as heritage rail operations. ARTC would like to see more analysis done on a model for the national regulator, to establish staffing requirements. At this stage, ARTC would not necessarily endorse a 'no fewer resources for States' approach as assumed in the NTC's RIS.

ARTC anticipates that multiple safety efficiency and effectiveness benefits will accrue through the achievement of a single national rail safety regulator and single national rail safety investigator. These will now be discussed.

Improved regulatory effectiveness

More effective leadership – utilisation of the best leaders and managers around the nation in the most critical roles leads to more effective staff performance in safety regulatory duties, utilising 1 agenda, 1 philosophy, 1 system and 1 information database. In a national model the attraction and retention of good candidates to the regulator's office is enhanced through eliminating competition for sparse resources and enhancing career opportunities within the entity by achievement of critical mass.

Speed of safety improvements – national organisations enable rapid introduction of new and improved standards and methods. There is only one internal approval process to be followed, and hence consultation is streamlined.

Improved staff skills and knowledge – shared national resources will provide access to best skill sets in the nation, and the ability to then share accumulated knowledge and skills. Correct placement of resources will ensure local knowledge continues and local issues are not overlooked.

Consistent and higher quality training – national organisations will be able to enhance training packages available across each jurisdiction and ensure consistent standards are achieved. Exposure to a larger numbers of investigations will enhance the investigatory skills and competence of staff.

Data Capture - there will be a consistent source of data available for safety reporting and improvement. This is a long standing issue of frustration to ARTC and operators, with each jurisdiction having its own approach to data management and



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with no effective national information coming out of the expensive and time consuming reporting frameworks that are in place.

Improved regulatory and industry efficiency

Economic Effectiveness - better use of resources will be made possible by reduction in overall management structures and systems, which will release more resources to address targeted operational issues. Too much of the cost of rail safety regulation is currently absorbed into duplicating management structures and systems within the regulators' offices.

Increased uniformity – leads to cost savings in delivery of regulatory services and more effective knowledge transfer.

Simpler fees management - harmonised formulation and collection of rail safety accreditation fees. ARTC notes that the cost-recovery model for fees varies across jurisdictions, and so the future accreditation cost to ARTC could be higher or lower depending on the model adopted by a national regulator. However, a single system that results in a single invoice and a single validation process will greatly reduce the administrative burden of fees management that presently exists for multi-jurisdictional operators. The present cost of accreditation to ARTC varies markedly between jurisdictions, and ARTC does not consider these variances are reflective of the nature of our business in these jurisdictions, but rather arise through variations in policy between the jurisdictions. In 2008, accreditation fees were as follows:

- Victoria - \$19k
- WA - \$28k
- SA - \$124k
- NSW - \$233k

Simplified reporting - centralised “one stop shop” safety incident reporting and normalising data. The present situation whereby ARTC is expected to notify regulators of different types of incidents in different jurisdictions is plainly unacceptable in the context of a national business as it is confusing, time consuming and leads to no discernable benefit to ARTC. Regulators have attempted over many years to standardise reporting requirements, but ARTC submits that only a national regulator will achieve uniformity.

Improved consistency of risk management application - consistency of methodology and application in regulator applied human factor and risk management principles (currently varies between jurisdictions). While some progress appears to have been made recently amongst regulators on this front, it remains clear that ARTC is expected to apply very different thinking on risk management across jurisdictions, and that regulators have very different expectations of ARTC in documenting that thinking. A single national regulator will be instrumental in bedding down regulatory thinking on this issue.

Single regulatory advice - development and communication of one single set of Australian rail safety regulation advice and guideline documents. Progress by the regulators' panel on this is stymied by differences of opinion and by conflicting priorities, and a single national regulator will bring a sharper focus and cross jurisdictional perspective to this critical area of co-regulation.



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Single point of contact - provision of single regulator and investigator contacts for rail operators that operate in multiple jurisdictions simplifies regulatory interaction and reduces inefficiency through miscommunication.

Improved reporting efficiency - industry notification of significant safety issues to a single regulator-industry interface and communication system rather than the current multi-jurisdictional and communication system model. ARTC is working through a current issue wherein ITSRR has required much broader reporting of incidents than is wanted in any other jurisdiction. This raises obvious workload issues as well as the possibility of errors and inconsistent reporting. Similarly, notification of change proposals and applications to vary accreditation currently take different forms across different jurisdictions with similar workload and consistency problems.

Improved consistency – a single governance structure facilitates delivery of more consistent regulatory and investigatory outcomes across the nation thereby ensuring a higher standard of safety. ARTC presently deals with 4 State regulators and each has their own methods and priorities. Attempts to work through a single 'principal' regulator is frustrating for all, as agreements reached to close out or move forward on issues are rarely universally endorsed by the other regulators.

Improved safety outcomes

The regulator's focus is to work with industry to ensure accredited operators' safety management performance is achieved and optimised. The more effective and efficient the regulator's operations, the more effective and efficient is the regulatory oversight of the accredited operator, which should provide safer operational outputs.

The national regulator's core business should include key functions such as:

- Assessment of Safety Management Systems and accreditation
- Incident investigation and follow-up
- Policy, legislation and regulation development
- Analysis of incident data and trends
- Data collation and reporting
- Safety alert communication
- Administration

Examples of efficiency and effectiveness improvements that lead to safer "on the ground" operational outcomes (and thereby safer industry operations) include the following:

Safety Management Systems enhancement – shared best practice will facilitate optimal identification of measures to enhance safety management systems, with flow on improvements such as identification of needs to improve standards, incident investigation and improved targeting of risk. A single regulator would be best placed to monitor developments in best practice across the country and pass information on to all operators.

Combined skills and knowledge – national collaboration within the regulator's staff will lead to more efficient identification of safety management system (SMS) failures,



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releasing resources to focus on more sophisticated analysis of causation of deeper system failures, and the development of corrective measures for national application.

Administration – improved administration systems and processes will lead to more efficient administration thus providing more staffing resources to address operational safety issues.

Enhanced communication between the rail industry and the safety regulatory system – at present each jurisdiction has its own priorities and pursues its own improvement strategies, albeit with limited peer input via the regulators' panel. A single regulator would not only collect broader information about safety management issues than each State regulator can presently do, but would be better able to share this information with industry. The current regime involves many separate committees and regulatory interface opportunities, with the result that significant industry resources are tied up in consultation processes that could be better employed in improving safety outcomes.

Industry costs of complying with regulatory requirements

As Synergies found when preparing their September 2008 paper 'The Costs of Rail Safety Regulation', measurement of direct and indirect costs to industry from rail safety regulation is inherently difficult. It becomes necessary to identify what functions are presently being carried out by industry that would be avoided under a single national regulator, and then quantifying how that elimination of unnecessary work translates into dollars saved to the industry. They consider their estimated whole-of-industry total compliance cost of \$42 million per annum to be conservative.

ARTC's view as discussed above is that there are significant efficiencies to be gained, in addition to the obvious improvements in the effectiveness of rail safety regulation under a national model. However, ARTC does not propose to achieve significant dollar savings through staff reduction under a national model. Rather, inefficiently applied resources would be released to better address their key function of improving safety outcomes through continuously improving ARTC's design, management and review of its safety management systems.

These avoidable costs include:

Duplicated regulatory audit and inspection time – a single regulator could satisfy itself that ARTC's safety management system is operating effectively through a much less repetitive and onerous audit process.

Incident notification and reporting – as discussed above, inconsistencies exist in the approach taken by State regulators that lead to inefficient outcomes for ARTC. A single regulator would have the benefit to ARTC of simplified reporting requirements and centralisation of relevant data for trend analysis and identification of preventative actions.

Change notification – ARTC appreciates the need for variation to its accreditation when moving into activities outside the scope of the existing accreditation. It is more difficult to justify the onerous documentation required for notifying regulators of matters ARTC undertakes that are not variations to accreditation. The situation is further compounded by the different approaches to notification taken in each jurisdiction. Some regulators require substantial background documentation while others are content with a brief overview of the notifiable activity. While the extent of



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benefit to ARTC in time saved in such notification processes depends on the model adopted by a national regulator, moving to a single regime will provide predictability and consistency across ARTC's business. Despite attempts to adopt consistent practices in this regard, the regulators continue to disagree on implementation of a consistent process and ARTC continues to have difficulty managing the regulatory aspects of its change management. For example, ARTC made a single presentation to all regulators in relation to its national communications (train radio) project, and had expectations that a single process for regulatory interface could follow, with ARTC's lead regulator (DTEI) managing any issues and communicating on behalf of the regulators. This has not been the case, and various regulators have subsequently sought to engage directly with ARTC in an unconnected and inconsistent way.

Exercise of discretionary authority - significant variations exist in each jurisdiction in the approach of officers of the regulator in relation to issues of perceived State interest. While ARTC supports the maintenance of local knowledge and experience within a national regulator, much more discipline is required going forward to ensure issues arising between regulator and accredited operator relate to matters that reflect the risk profile of the individual operator and are within the legislative mandate of the regulator. A single regulator will have the dual benefit for ARTC of reducing the potential breadth and/or duplication of matters raised and better reflecting ARTC's risk profile as a national operator operating within a broad range of risk environments.

Conclusion

ARTC strongly advocates that a single national safety regulator is the only option that will deliver the required benefits for the national rail network.

ECONOMIC REGULATION

Rail Access

It is ARTC's view that differences (inconsistencies) in access regulation in most jurisdictions in Australia, and well as different approaches to management of the rail network in each jurisdiction, is a significant impediment to efficient rail transport operations, constrains market entry and new investment, and creates complexities at interfaces.

Currently there are five state-based regulatory regimes which are overseen by five different regulators. The interstate network connecting Brisbane and Perth is currently covered by four regulatory jurisdictions. All of these regimes are based on the negotiation and arbitration framework. This multiple regime arrangement results in complexity and inconsistency, with some of the major corridors being regulated under different regimes. Rail's main competitor (road transport) has no such issues to deal with.

ARTC has actively sought to create greater consistency between access regimes and arbitration covering the interstate network in order to create greater efficiency and certainty for network users. Currently above rail operators are required to deal



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with a number of different regulatory regimes which is both time consuming and costly, and can be a disincentive and/or barrier to enter the market.

As part of this drive for consistency, ARTC submitted a new access undertaking to the ACCC covering the interstate network in NSW which is largely consistent with that already approved by the ACCC for other parts of ARTC's network. The ACCC approved this Interstate Access Undertaking in July 2008.

ARTC considers that the current framework of having two separate national regulatory bodies adjudicating on access regimes (the ACCC and the NCC) as being inefficient and contrary to the principle of having an even playing field in the industry sectors. The assessment of all access regimes involving industries whose operation has national implications should solely be a matter for the ACCC. Having a single regulator would enable:

- the application of a consistent set of competitive principles across all regimes;
- the provision of a more coherent framework for the identification of markets; and
- the provision of a consistent framework for the application of access principles with like sectors regardless of ownership of the access provider.

With the current Part IIIA process there is inconsistency between the role of the State and Commonwealth Ministers. It is ARTC's view that the responsible Minister with regard to declarations should be the Commonwealth Minister, regardless of infrastructure ownership.

ARTC is not advocating that economic regulation should be uniform across all rail infrastructure, but consistent. Economic regulation of a rail network should depend on the specific nature and structure of the market primarily served, and the degree of market power that an owner of rail infrastructure may have in the market.

Conclusion

ARTC believes that access arrangements should continue to be resolved through commercial negotiation underpinned by economic regulation.

ARTC sees the existence of only one body, the ACCC as the regulator of national infrastructure, as being the most beneficial to the successful implementation of competition reform in Australia.

OCCUPATIONAL HEALTH & SAFETY REGULATION

For many years there has been an identified need for reform in the OH&S regulatory systems. The current system of regulation is complex, with fifteen Acts with powers over OH&S nationwide with respect to rail operations. There are two statutes at the Commonwealth level, state-based safety laws which are industry specific, plus, there are authorities in each of the states and territories administering their own versions of OH&S legislation. These state OH&S laws include:

- WorkCover ACT, SA, Tasmania, WA, QLD, and NSW
- WorkSafe NT, WA



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- SafeWork SA
- Victorian WorkCover Authority
- Queensland Department of Employment & Industrial Relations – Workplace Health & Safety

While these state and territory laws are consistent at a broad level, there are fundamental differences which are an issue for employers and employees. There is also some overlap with industry regulations, the degree of which varies across jurisdictions.

Current laws and regulations are both difficult to understand and hard to implement effectively. Complex regulation is self-defeating and the current system of OH&S law and policy needs a comprehensive overhaul, including the fact that current laws focus little on prevention. Dealing with multiple legislation requirements imposes significant compliance costs in the case of employers working across a number of jurisdictions.

What is needed is a robust and consistent national OH&S system that assists both employers and employees achieve a safer workplace and promotes a safety culture.

Conclusion

National consistency is the key for any reform in this area, and in ARTC's view there should be single national OH&S legislation.

ENVIRONMENTAL REGULATION

Summary

As with other forms of regulation, there are environmental regulators in each of the Australian States and Territories. There are numerous areas of regulation applied to the rail industry over multiple jurisdictions, resulting in inefficiencies which include additional costs to the industry due to repetitive approvals, administrative work, and reporting. The Cooperative Research Centre for Rail Innovation completed an inventory of environmental regulations pertaining to the rail industry, a process which identified 151 pieces of environmental legislation.

The multitude of legislation leads to overlaps, duplication and inconsistencies, and ultimately, inefficient environmental regulation, including additional costs to the rail industry through repetitive administrative processes across jurisdictions.

ARTC believes harmonisation of environmental legislation is critical, whereby the Commonwealth, State, and Territory regulators facilitate and ensure national consistency for both existing and any new legislation.

ARTC Example

In complying with the State/Territory laws, ARTC is subject to an unusually high degree of overlapping project assessment and approval processes under the



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Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act). This is due primarily to the following:

- Even though it is a *Corporations Act* company, ARTC is deemed to be a "Commonwealth agency" under the EPBC Act because its shares are owned by the Commonwealth Government;
- ARTC is required to operate in line with the many State/Territory environment and planning laws for its projects, for example, NSW project approvals laws; and
- Unusually, for a Commonwealth agency, infrastructure investment and upgrade activities are a significant part of ARTC's agenda for the time being, so ARTC experiences the overlaps in practice more often.

Project Approval Under the EPBC Act

Under the EPBC Act, the Commonwealth Minister for the Environment, Heritage and the Arts must approve:

- A project that has, will have or is likely to have a significant impact with respect to one of several specified "matters of national environmental significance";
- an action by the Commonwealth or a "Commonwealth agency", or an action on "Commonwealth land" which has, will have or is likely to have a significant impact on the "environment" generally; or
- an action which has, will have or is likely to have a significant impact on the "environment" on "Commonwealth land", no matter where it is to be carried out.

Consequently, ARTC must obtain the approval of the Commonwealth Minister for all development proposals which are likely to have a significant impact on the environment generally.

On the other hand, private sector companies and State government agencies would only require approval for proposals which are likely to have a significant impact with respect to one of several prescribed "matters of national environmental significance", or proposals whose location or environmental impacts have the requisite impact and the requisite nexus to Commonwealth land.

Project Approval Under State/Territory Laws

ARTC is also subject to the approval requirements of various State and Territory laws. While similar issues may arise in all states and Territories in which ARTC operates, let us take NSW laws as an example, as ARTC is undertaking a substantial amount of infrastructure development work in NSW.

As a *Corporations Act* company, ARTC operates in accordance with the many NSW environment and planning laws which apply to its various projects. The primary law is the *Environmental Planning and Assessment Act 1979* (Planning Act).

Almost all of ARTC infrastructure development projects in NSW require either:

- an environmental assessment in accordance with the requirements of Part 5 of the Planning Act, and an Environmental Impact Assessment Code of Practice which the NSW Minister for Planning approved specifically for ARTC; or



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- an approval from the Minister for Planning under Part 3A of the Planning Act.

The Planning Act regime for ARTC is very similar to the Planning Act regime for other rail infrastructure development agencies in NSW, except that those other agencies are not required to have an Environmental Impact Assessment Code of Practice, which is a requirement that was imposed on ARTC as part of a package of amendments to NSW laws, made as part of the process for ARTC's take up of the NSW network in 2004.

Overlap of EPBC Act and State/Territory Laws

There is a high degree of overlap in environmental assessment and approval requirements for ARTC, due to its status under the EPBC Act and the requirements on it also to comply with State/Territory laws.

To illustrate the point further, one of the criteria for NSW Ministerial approval Part 3A of the Planning Act is a project which is "likely to significantly affect the environment".

This requirement is very similar to the criteria for EPBC Act approval which applies to ARTC. Consequently, it is likely that an ARTC project which requires NSW Ministerial approval under the Planning Act will also require Commonwealth Ministerial approval under the EPBC Act. That is not the case for other rail infrastructure development agencies or private companies in NSW because they do not have the same "Commonwealth agency" status under the EPBC Act as ARTC does.

The extent of overlap of project approval requirements under the EPBC Act and State/Territory laws could be similar for other Commonwealth agencies, if those agencies were also subject to State/Territory laws, in the same way as ARTC is.

However, ARTC is in quite a unique position because:

- the EPBC Act deems ARTC to be a "Commonwealth agency"; and
- unlike almost all other Commonwealth agencies, ARTC has infrastructure investment and upgrade activities as one of its significant activities for the time being, so the overlap occurs for ARTC in practice more often.

As a result, ARTC is subject to an unusually high degree of overlapping project assessment and approval processes under the EPBC Act and State/Territory laws.

Overcoming the Overlap

The EPBC Act recognises the potential for overlap with State/Territory laws, and provides some mechanisms to address the potential for overlap, particularly for "Commonwealth agencies". One of these mechanisms may offer some relief to ARTC with respect to the bundle of overlapping laws, as discussed below.

The definition of "Commonwealth agency" in section 528 of the EPBC Act expressly provides for the exclusion of a particular entity from the definition by means of a regulation.

That regulation-making power has already been used to exclude Telstra Corporation from the definition in 2001 (see clause 19.02 of the *Environment Protection and Biodiversity Conservation Regulation 2000*).



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The effect of such a regulation would be to place ARTC in a position under the EPBC Act which is much the same as that of other rail infrastructure development entities (both public and private). This would significantly reduce the degree of overlap of Commonwealth and State/Territory project approval laws for ARTC.

The advantages of this option are that the relevant exception applies to all provisions of the EPBC Act (thereby removing duplication in other areas such as heritage management), and it is set out in a readily accessible public document (i.e. the regulation).

Conclusion

ARTC believes harmonisation of environmental legislation is critical, whereby the Commonwealth, state, and Territory regulators facilitate and ensure national consistency for both existing and any new legislation.

Also, ARTC should be excluded from the definition of "Commonwealth agency" under section 528 of the EPBC Act which would significantly reduce the overlap of Commonwealth and State/Territory project approval laws for ARTC.