



Australian
Competition &
Consumer
Commission

Australian Competition and Consumer Commission

Consultation Paper

Australian Rail Track Corporation's proposed variation of the Interstate Rail Network Access Undertaking to include Southern Sydney Freight Line Indicative Access Charges

18 September 2012



© Commonwealth of Australia 2012

This work is copyright. Apart from any use permitted by the *Copyright Act 1968*, no part may be reproduced without permission of the Australian Competition and Consumer Commission. Requests and inquiries concerning reproduction and rights should be addressed to the Director Publishing, Australian Competition and Consumer Commission, GPO Box 3131 Canberra ACT 2601.

Contents

Contents	1
1 Introduction	2
1.1 Proposed effect of the application.....	2
1.2 Background	3
1.2.1 Industry context	3
1.2.2 ARTC's Interstate Access Undertaking.....	3
1.2.3 The Southern Sydney Freight Line	3
1.2.4 Variation of ARTC's Interstate Access Undertaking	4
1.3 ACCC assessment.....	5
1.4 Indicative timeline for assessment	5
1.5 Consultation	6
1.6 Making a submission	6
1.6.1 Due date for submissions	6
1.6.2 Confidentiality	7
1.7 Further Information.....	7
2 The Proposed Variation	8
2.1 The Indicative Access Charge	8
2.1.1 Factors taken into account by ARTC.....	9
2.1.2 Regulatory revenue floor and ceiling limits.....	9
2.1.3 Other factors taken into account by ARTC.....	10
2.2 Drafting amendments.....	12
3 Legal test for accepting an access undertaking variation.....	13

1 Introduction

On 4 September 2012 the Australian Rail Track Corporation Limited (**ARTC**) submitted its proposed Indicative Access Charge for the Southern Sydney Freight Line (**SSFL**) to the Australian Competition and Consumer Commission (**ACCC**) as envisaged under clause 2.4(b) of the Interstate Rail Network Access Undertaking accepted by the ACCC on 30 July 2008 (**the Interstate Access Undertaking**).¹ ARTC has also proposed a number of drafting amendments to the Interstate Access Undertaking.

Subsection 44ZZA(7) of the *Competition and Consumer Act 2010* (Cth) (**the Act**) allows an access provider to vary an access undertaking with the consent of the ACCC. Including an Indicative Access Charge in the Interstate Access Undertaking will have the effect of varying the access undertaking (**Proposed Variation**).

Details of the Proposed Variation are discussed in section 2 of this consultation paper.

The ACCC is consulting with interested parties as part of its assessment of the Proposed Variation, and seeks submissions by 16 October 2012.

1.1 Proposed effect of the application

If the ACCC accepts ARTC's Proposed Variation:

- the scope of the Interstate Access Undertaking will extend to include coverage of the SSFL – that is the Network as defined in Schedule E will include the SSFL
- the terms and conditions contained in the Interstate Access Undertaking will apply to those access seekers negotiating access to the SSFL with ARTC
- the Indicative Access Charge will apply to the SSFL and
- ARTC will be able to annually vary the Indicative Access Charge in accordance with clause 4.6(d) in its Interstate Access Undertaking.

Access charges for non-indicative services are not subject to formal ACCC approval as part of the Proposed Variation. Access charges for non-indicative services would be determined with reference to (i) the Indicative Access Charge if it is endorsed by the ACCC and (ii) the Pricing Principles in the Interstate Access Undertaking. Although non-indicative access charges are negotiated between ARTC and the access seeker, access seekers are protected by the dispute resolution provisions in the Interstate Access Undertaking if a dispute arises.

¹ See the ACCC website at <http://www.accc.gov.au/content/index.phtml?itemId=789738> for further information.

1.2 Background

1.2.1 Industry context

ARTC is a Commonwealth Government owned corporation, established in 1998 for the purpose of managing and providing access to the National Interstate Rail Network. ARTC is vertically separated, providing ‘below-rail’ track access services and not ‘above-rail’ services such as haulage.

The interstate network covers the mainline standard gauge track linking Kalgoorlie in Western Australia; Adelaide, Wolseley and Crystal Brook in South Australia; Melbourne and Wodonga in Victoria; Cootamundra, Albury, Macarthur, Moss Vale, Unanderra, Newcastle (to the Queensland border) and Parkes in New South Wales. The Access Undertaking does not cover access to the rail network in the Hunter Valley, which is covered by the Hunter Valley Access Undertaking accepted by the ACCC on 29 June 2011.

The interstate network is used by both general freight services (such as manufactured goods) and bulk freight services (such as mining and agricultural products), as well as long distance and regional passenger services.

1.2.2 ARTC’s Interstate Access Undertaking

The ACCC accepted ARTC’s Interstate Access Undertaking under Part IIIA of the then *Trade Practices Act 1974* (now known as the *Competition and Consumer Act 2010* (Cth)) on 30 July 2008. The Interstate Access Undertaking came into operation on 20 August 2008.

During the assessment of the Interstate Access Undertaking, the ACCC considered that including provisions² for the future coverage of the SSFL in the Interstate Access Undertaking was ‘reasonable as they provided certainty for access seekers about the process for covering the line, and do not protect the SSFL against declaration unless the ACCC is satisfied that the charges proposed for the line are appropriate’.³

The ACCC also considered that the inclusion of the SSFL in the scope of the Interstate Access Undertaking was appropriate ‘given that the SSFL was already under construction at the time the Undertaking was submitted and that ARTC will own and control the SSFL upon its completion.’⁴

1.2.3 The Southern Sydney Freight Line

The SSFL will be a bi-directional, non-electrified, dedicated freight line for a distance of 35 kilometres between Sefton and Macarthur in southern Sydney.⁵ The SSFL will

² The relevant provisions in the Undertaking are clauses 2.1(c) and 2.4(b), outlined at section 1.2.4 below.

³ ACCC, *Final Decision – Australian Rail Track Corporation Access Undertaking – Interstate Rail Network*, July 2008, p. 22.

⁴ ACCC, *Final Decision – Australian Rail Track Corporation Access Undertaking – Interstate Rail Network*, July 2008, pp. 22-23.

⁵ In a Community liaison background paper ARTC stated that the SSFL extends from south of Macarthur through to Ingleburn Railway Station where it connects into an existing six kilometre freight passing loop and continues north to Glenfield Railway Station. The new track starts again

be adjacent to the current Main South Line and provide a third track in the rail corridor specifically for freight services.

The SSFL will connect with the Sydney Metropolitan Freight Network⁶ at Sefton and provide direct freight only access to intermodal terminals along the line (including the proposed Moorebank terminal) and to and from Port Botany.

The SSFL is being constructed by ARTC to alleviate the major bottleneck in the rail freight network in Sydney. The bottleneck is caused by freight trains currently sharing the existing rail lines with the Sydney metropolitan passenger services operated by RailCorp. The Main South Line curfews do not permit freight trains to run during morning and afternoon peak periods due to passenger priority which restrict the efficiency and cost-effectiveness of freight services in and out of Sydney.

The ACCC understands that potential users of the SSFL include those that service the intermodal terminals in Greater Sydney, such as:

- QUBE logistics
- Pacific National
- Freightliner Australia.⁷

ARTC is currently forecasting the final cost of the SSFL project to be around \$1.04 billion.⁸ ARTC has informed the ACCC that it is anticipating that the SSFL will be completed and commissioned for rail operations around the end of February 2013.

1.2.4 Variation of ARTC's Interstate Access Undertaking

Clause 2.1(c) of the Interstate Access Undertaking states:

the Undertaking will extend to include the Southern Sydney Freight Line when (i) the line is completed and commissioned for rail operations and (ii) the applicable Indicative Access Charge has been accepted by the ACCC in accordance with clause 2.4(b).

Clause 2.4(b) of the Interstate Access Undertaking states:

north of Glenfield Railway Station. The SSFL will cross from the western to the eastern side of the corridor on an overpass (or flyover) just north of RailCorp's Glenfield junction where the East Hills line joins the Main South Line. The SSFL continues on the eastern side of the rail corridor through Cabramatta and then on the southern side through to Sefton Park Junction. At the Sefton Park Junction the SSFL crosses in an underpass (or deep cutting) to enable connection with the existing Metropolitan Freight Network. For further information see:

http://www.ssfl.artc.com.au/_docs/cc/general/Southern%20Sydney%20Freight%20Line%20Background%20Doc.pdf.

⁶ The lease for the Sydney Metropolitan Freight Network was transferred to ARTC management and operation from RailCorp on 5 August 2012. ARTC has acquired the lease until 2064. For further information see: <http://www.artc.com.au/Article/Detail.aspx?p=6&id=367>

⁷ http://www.sydneyports.com.au/port_development/landside_improvement/rail_reforms

⁸ ARTC, *Supporting Submission, Variation to incorporate the Southern Sydney Freight Line and applicable Indicative Access Charges (Supporting Submission)*, p. 9.

at least six (6) months prior to commissioning for operations of the Southern Sydney Freight Line, ARTC intends to develop and submit to the ACCC the Indicative Access Charge that will apply to the Southern Sydney Freight Line.

In line with clause 2.4(b), ARTC lodged an application to vary the Interstate Access Undertaking to include an Indicative Access Charge for the SSFL on 4 September 2012. The Proposed Variation also includes a number of drafting amendments.

1.3 ACCC assessment

The test the ACCC applies in deciding whether to consent to a variation of an accepted access undertaking is set out in subsections 44ZZA(7) and 44ZZA(3) of the Act. Essentially, the ACCC may accept the Proposed Variation if it thinks it appropriate to do so, having regard to various matters set out in the Act, such as:

- the legitimate business interests of the provider of the service
- the public interest, including the public interest in having competition in markets, and
- the interest of persons who might want to access the service.

The full test is set out in section 3 of this document.

The ACCC is calling for submissions by interested parties and has not yet formed a view on the appropriateness of ARTC's Proposed Variation.

1.4 Indicative timeline for assessment

Under subsection 44ZZBC(1) of the Act, the ACCC must make a decision in relation to an access undertaking application within the period of 180 days starting at the start of the day the application was received (referred to as 'the expected period').⁹

ARTC formally lodged the Proposed Variation with the ACCC on 4 September 2012.

The Act provides for 'clock-stoppers', meaning that some days will not count towards the 180 days of the expected period in certain circumstances. In particular, the clock is stopped where:

- the ACCC publishes a notice inviting public submissions in relation to an undertaking application (subsection 44ZZBD(1));
- the ACCC gives a notice requesting information in relation to an application (subsection 44ZZBCA(1)); or

⁹ Under subsection 44ZZA(7) of the Act, a request made to the ACCC for a variation of an access undertaking is an access undertaking application.

- the ACCC and the access provider agree in writing that certain days are to be disregarded for the purposes of calculating the expected period (subsection 44ZZBC(4)).¹⁰

The ACCC is requesting submissions on the Proposed Variation by **16 October 2012**. Under subsection 44ZZBD(1), this has the effect of extending the timeframe by which the ACCC is required to make a decision on the Proposed Variation.

In the absence of the need for further ‘clock-stoppers’, the ACCC will be required to make a decision on the Proposed Variation by **31 March 2013**. However, ARTC expects the SSFL to be completed by the end of February 2013. In light of this, the ACCC will endeavour to make its decision prior to this date to enable the Indicative Access Charge, if approved, to apply from 1 March 2013.

1.5 Consultation

The ACCC published the Proposed Variation on its website for stakeholder consideration on 6 September 2012.

Section 2 of the Consultation Paper highlights the main aspects of the Proposed Variation.

The ACCC requests that any submissions address the extent to which the proposed Indicative Access Charge conforms with the Pricing Principles in section 44ZZCA of the Act and Part 4 of the Interstate Access Undertaking. The ACCC also encourages interested parties to consider and address the matters listed in subsection 44ZZA(3) of the Act. Submissions may also address any other matters relevant to the Proposed Variation.

1.6 Making a submission

Submissions on ARTC’s Proposed Variation should be addressed to:

Matthew Schroder
General Manager
Fuel, Transport & Prices Oversight Branch
Australian Competition and Consumer Commission

GPO Box 520
Melbourne Vic 3001

Email: transport@acc.gov.au

1.6.1 Due date for submissions

Submissions **must** be received by **16 October 2012**. It is in your interest that the submission be lodged by this date, as section 44ZZBD of the Act allows the ACCC to disregard any submission made after this date.

¹⁰ See section 3 of this Consultation Paper for further information on these provisions of the Act.

1.6.2 Confidentiality

The ACCC strongly encourages public submissions. Unless a submission, or part of a submission, is marked confidential, it will be published on the ACCC's website and may be made available to any person or organisation upon request.

Sections of submissions that are claimed to be confidential should be clearly identified. The ACCC will consider each claim of confidentiality on a case by case basis. If the ACCC refuses a request for confidentiality, the submitting party will be given the opportunity to withdraw the submission in whole or in part.

For further information about the collection, use and disclosure of information provided to the ACCC, please refer to the ACCC publication "*Australian Competition and Consumer Commission / Australian Energy Regulator Information Policy – the collection, use and disclosure of information*" available on the ACCC website.

1.7 Further Information

The Proposed Variation and other relevant material, including supporting submissions from ARTC and the currently accepted Interstate Access Undertaking, are available on the ACCC's website at the following link:

<http://www.accc.gov.au/content/index.phtml?itemId=1077623>

Alternatively, go to the ACCC's homepage at www.accc.gov.au and follow the links to 'For regulated industries' and 'Rail' and 'ARTC Interstate Rail Access Undertaking 2008.'

Public submissions made during the current process will also be posted at this location.

If you have any queries about any matters raised in this document, please contact:

Dijana Cremona
Assistant Director
Fuel, Transport & Prices Oversight Branch
Phone: +61 3 9290 1805
Email: dijana.cremona@acc.gov.au
Fax: +61 3 9663 3699

2 The Proposed Variation

The Proposed Variation sets out the proposed Indicative Access Charge for the SSFL as envisaged in clause 2.4(b) of the Interstate Access Undertaking.

2.1 The Indicative Access Charge

In the Proposed Variation, ARTC has proposed that the charges in the table below will form the Indicative Access Charge for the SSFL.

Table 1: Indicative Access Charge for SSFL

Variable	Flagfall
\$/kgtkm¹¹ (exclusive of GST)	\$/km (exclusive of GST)
8.564	3.426

The Indicative Access Charge will be based on the following characteristics:

1. maximum axle load of 21 tonnes
2. maximum speed of 110 km/h and
3. length not exceeding 1800m.¹²

Clause 4.5 of the Interstate Access Undertaking currently requires that access charges need to comprise a variable component (a function of distance and gross mass), a flagfall component (\$/km) and an excess network occupancy component (a function of time).

As shown in Table 1 above, ARTC has not included an excess network occupancy component for the SSFL Indicative Access Charge. The ARTC submits that it does not propose to include such a component at this time because an excess network occupancy component already applies to the Melbourne – Macarthur Segment. ARTC submits that an inclusion of this component for the SSFL is unlikely to result in any significant intended incentives, and that there is little opportunity or reason for spending excess time on this part of the network.¹³

ARTC has proposed for the Indicative Access Charge to apply from 1 March 2013.

¹¹ kgtkm refers to ‘one thousand gross tonne kilometres’.

¹² ARTC *Application by ARTC to vary the ARTC Interstate Access Undertaking to include the Southern Sydney Freight Line (SSFL)*, section 2.2.

¹³ ARTC, *Application by ARTC to vary the ARTC Interstate Access Undertaking to include the Southern Sydney Freight Line (SSFL)*, section 2.3(a).

The Indicative Access Charge will be able to be revised annually by ARTC in accordance with clause 4.6(d) of the Interstate Access Undertaking.¹⁴

2.1.1 Factors taken into account by ARTC

ARTC states that, in setting the Indicative Access Charge, it has taken into account a number of factors, such as:¹⁵

- the Pricing Principles set out at section 4 of the Interstate Access Undertaking
- views expressed by the ACCC in its decision to accept the Interstate Access Undertaking
- the benefits accruing to users of the SSFL in terms of improved competitive position
- existing Indicative Access Charges applicable to other relevant parts of the Network; and
- ARTC's understanding of applicable markets and intermodal competition.

2.1.2 Regulatory revenue floor and ceiling limits

ARTC outlines the key aspects of its modelling and forecasts in section 3.6 of its Supporting Submission.

Modelling and forecasts are necessary to determine regulatory floor and ceiling limits for revenue. Under the Pricing Principles in the Interstate Access Undertaking, the floor limit of the SSFL is provided by the incremental operating cost associated with the SSFL. The ceiling limit provided by the ARTC is its current best estimate of the economic cost of the SSFL.¹⁶

ARTC submits that the revenue generated by the Indicative Access Charge applicable to the SSFL will be significantly lower than the applicable revenue ceiling established by the Undertaking, but it is above the applicable revenue floor limit.

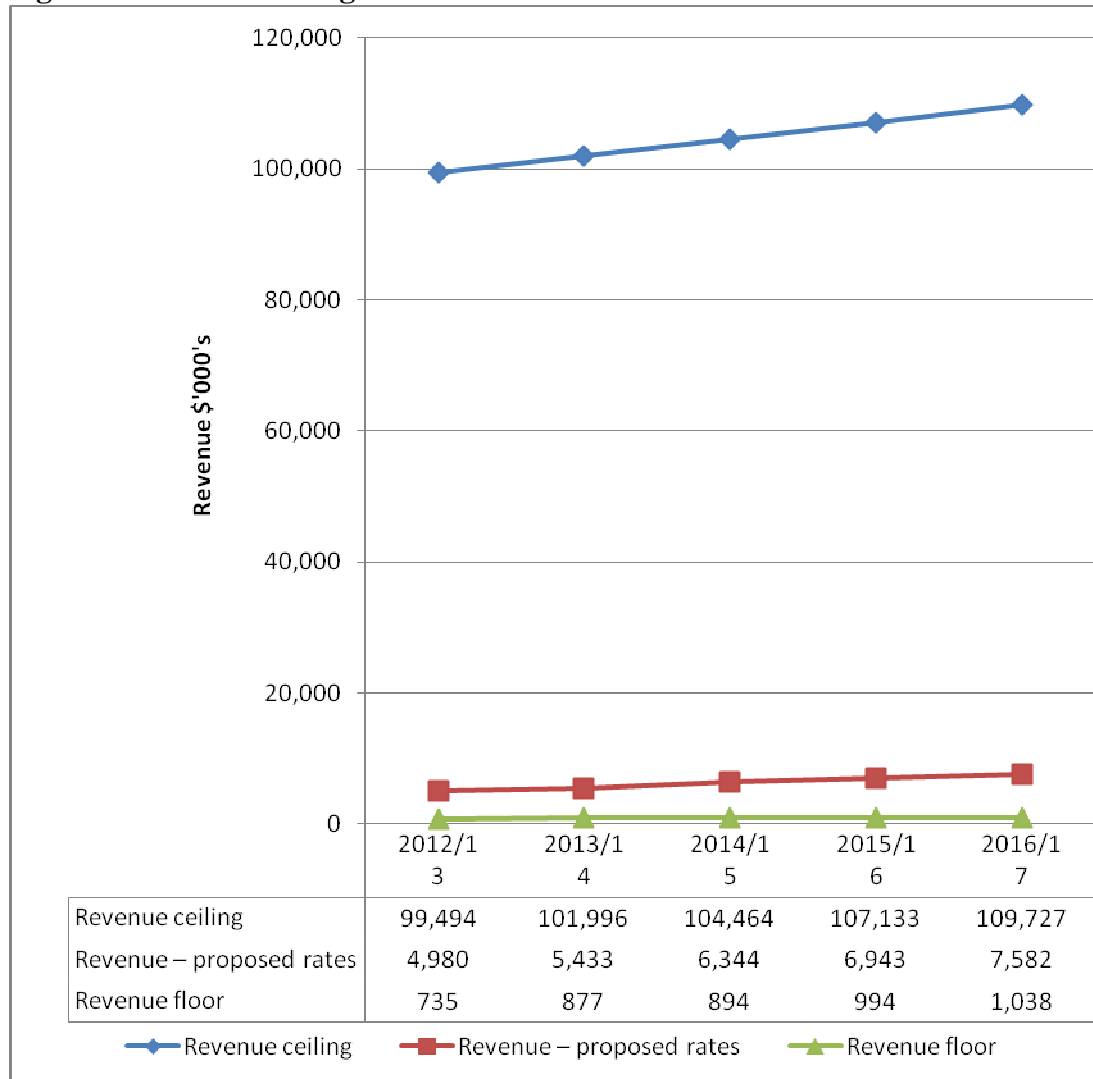
Figure 1 below demonstrates the revenue expected to be generated by ARTC through its proposed Indicative Access Charge for the SSFL, with reference to the revenue floor limit and revenue ceiling limit provided in the Undertaking.

¹⁴ Under clause 4.6(d) of the Undertaking, ARTC may annually vary the Indicative Access Charges by an amount not exceeding the CPI.

¹⁵ ARTC, *Application by ARTC to vary the ARTC Interstate Access Undertaking to include the Southern Sydney Freight Line (SSFL)*, section 2.3.

¹⁶ ARTC is not currently seeking a prudency assessment of the cost of the SSFL, because the costs associated with the project are not yet finalised (as the project has not been completed): refer ARTC, Supporting Submission, p. 18.

Figure 1: Revenue ceiling and floor limits for SSFL¹⁷



2.1.3 Other factors taken into account by ARTC

In addition to complying with the floor and ceiling revenue requirements as required by the Pricing Principles, ARTC provides its justification for the Indicative Access Charge in its Supporting Submission.

Particularly, in respect of the magnitude of the Indicative Access Charge, ARTC submits that it aims to set the Indicative Access Charge at a level so as not to impact on the competitiveness of rail with competing forms of freight transport. ARTC does not consider that the proposed Indicative Access Charge will erode rail's competitive position in the North-South corridor.¹⁸

ARTC notes that on the one hand the proposed Indicative Access Charge for the SSFL is approximately 20 per cent above its estimate of the current market price for access charges from Macarthur to Sefton Park East Junction (based on its

¹⁷ ARTC, *Supporting Submission*, pp. 21-22.

¹⁸ ARTC, *Supporting Submission*, p. 13.

understanding of Railcorp prices from general discussions with industry).¹⁹ However, ARTC submits that the current ARTC access charge would be substantially less than what the market is paying (based on the Superfreighter rate), because:

- Railcorp's pricing structure is premised on a rate per train km dependent on train length, but
- ARTC's own pricing structure aims to provide an incentive to utilise longer trains.²⁰

ARTC submits that its proposed charge is justified with reference to the benefits that the SSFL will provide in terms of the:

- removal of the curfew for freight in to Sydney
- reduction in transit times for the North South corridor
- improved reliability
- additional capacity, and
- more flexibility in timetabling.²¹

ARTC considers that there will be a further flow-on effect of these benefits to rail operators in the form of potentially reducing certain operating costs.²²

Questions for comment

The ACCC is interested in views on whether the proposed Indicative Access Charge for the SSFL is appropriate and justified.

In particular, the ACCC would be assisted by submissions on:

- whether the proposed 1 March 2013 implementation date for the Indicative Access Charge is appropriate
- whether the factors that ARTC has had regard to in determining the Indicative Access Charge are appropriate
- the expected flow-on benefits from the SSFL
- the reasonableness of ARTC's modelling assumptions
- whether the revenue expected to be generated by the Indicative Access Charge is appropriate

¹⁹ ARTC, *Supporting Submission*, pp. 3, 12.

²⁰ ARTC, *Supporting Submission*, p. 12.

²¹ ARTC, *Supporting Submission*, p. 4.

²² ARTC, *Supporting Submission*, p. 4.

- the likely impact of the Indicative Access Charge on the competitiveness of rail with other forms of freight transport and
- whether submitters agree with ARTC's reasons for not including an excess network occupancy component as part of the Indicative Access Charge

In considering this issue, interested parties are encouraged to refer to the matters listed in subsection 44ZZA(3) of the Act (see section 3 of this document) and the Pricing Principles in section 44ZZCA of the Act and Part 4 of the Interstate Access Undertaking.

2.2 Drafting amendments

ARTC proposes a number of drafting amendments to its Interstate Access Undertaking that are to apply if the ACCC accepts the Indicative Access Charge for the SSFL.

ARTC submits that the amendments to the Interstate Access Undertaking seek to:

- include the SSFL segment under the Interstate Access Undertaking
- include the Indicative Access Charge applicable to the SSFL, and
- address consequential matters including:
 - removing references to this variation
 - removing a separate definition of the SSFL
 - incorporating the SSFL in relevant illustrative maps, and
 - recognising the SSFL for the purposes of Performance Indicator reporting.²³

The proposed drafting amendments are attached to ARTC's Supporting Submission.²⁴

Questions for comment

The ACCC is interested in views on whether the proposed drafting amendments to the Interstate Access Undertaking are appropriate.

²³ ARTC, *Supporting Submission*, p. 5.

²⁴ ARTC, *Supporting Submission*, Appendix 2: Proposed Amendments to the 2008 IAU.

3 Legal test for accepting an access undertaking variation

Under paragraph 44ZZA(7)(b) of the Act, an access provider may withdraw or vary an access undertaking at any time after it has been accepted by the ACCC, but only with the consent of the ACCC.

If the ACCC consents to the variation, the provider is required to offer third party access in accordance with the varied access undertaking. An access undertaking is binding on the access provider and can be enforced in the Federal Court upon application by the ACCC.

Subsection 44ZZA(7) allows the ACCC to consent to a variation of an accepted access undertaking if it thinks it appropriate to do so, having regard to the matters contained in subsection 44ZZA(3), which are:

- the objects of Part IIIA of the Act, which are to:
 - promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
 - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry;
- the pricing principles specified in section 44ZZCA of the Act;
- the legitimate business interests of the provider of the service;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interest of persons who might want to access the service;
- whether the undertaking is in accordance with an access code that applies to the service; and
- any other matters that the ACCC thinks are relevant.

In relation to the pricing principles, section 44ZZCA of the Act provides that:

- regulated access prices should:
 - be set so as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - include a return on investment commensurate with the regulatory and commercial risks involved; and

- access price structure should:
 - allow multi-part pricing and price discrimination when it aids efficiency; and
 - not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of downstream operations, except to the extent that the cost of providing access to the other operators is higher; and
- access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.