Submission by FreightCorp concerning the Australian Competition and Consumer Commission's Draft Decision in respect of the Australian Rail Track Corporation Access Undertaking

February, 2002

Contents

1 Background

The Australian Rail Track Corporation Ltd (**ARTC**) has lodged with the Australian Competition and Consumer Commission (**ACCC**) two versions of an access undertaking for a non-declared service. The second version was lodged, amongst other things, to respond to issues raised at the public forum hosted by the ACCC on August 16, 2001 at the offices of the ACCC in Melbourne. (For the purposes of this submission, references to the **Access Undertaking** are references to the original version as amended by the second version.)

The ACCC sought, and Freight Rail Corporation (**FreightCorp**) made, submissions on both versions of the access undertaking.

The ACCC issued its Draft Decision in respect of the Access Undertaking in November 2001 (**Draft Decision**).

On Friday February 1, 2002, the Further Revised Access Undertaking (**Further Revised Access Undertaking**) was made available on the ACCC's web site. This was communicated to interested parties late on January 31, 2002 the date by which the ACCC had requested submissions in respect of its Draft Decision.

FreightCorp notes that ARTC wrote to the ACCC on December 5, 2001 responding to some to the recommendations made by the ACCC in the Draft Decision. In that letter ARTC indicated that it did not intend to lodge an amended Access Undertaking until it had the opportunity to meet with the ACCC to discuss how concerns raised by the ACCC could be addressed. FreightCorp notes that it is not apparent from the table accompanying the Further Revised Access Undertaking (the **Commentary**) whether any discussions have taken place. If discussions have taken place it would be helpful to understand the substance of them.

FreightCorp further notes that ARTC wrote to it on December 12, 2001 in respect of the reservations that ARTC has with the Dispute Resolution process canvassed by the ACCC in the Draft Decision. ARTC sought the specific views of FreightCorp on the matters raised in ARTC's letter. FreightCorp did not respond to ARTC's letter, preferring to respond to the issue raised in the letter and other issues in within the process provided for. FreightCorp notes that ARTC states on the Commentary:

> "…….no further material concerns were raised by interested parties, nor was strong support demonstrated for the mechanism proposed taking:"

FreightCorp notes that it did not respond, preferring to respond through the process devised by the ACCC.

FreightCorp had prepared a submission in respect of the Draft Decision for delivery on January 3, 2002. This submission has been amended in the intervening two weeks so that it responds to both the Draft Decision and the Further Revised Access Undertaking.

2 Summary

General comments on the Draft Decision

FreightCorp made a full submission in respect of the initial Access Undertaking (**Initial Submission**) canvassing a wide range of issues with a view to achieving a commercially balanced Access Undertaking and identifying a number of technical errors and drafting improvements. FreightCorp considers that significant progress has

been made on a number of issues raised in the Initial Submission, but remains concerned that commercial balance has not been achieved.

FreightCorp does not agree with every recommendation suggested by the ACCC in the Draft Decision, nor does FreightCorp agree with the analysis or conclusions of the ACCC in respect of a number of issues raised by FreightCorp. FreightCorp does not consider however that there is merit in revisiting issues that have been canvassed by it previously and in relation to which the ACCC has expressed a view to the contrary. FreightCorp, in common it believes with other access seekers, has decided to comment on:

1. issues that it regards as fundamental, and
2. issues on which the ACCC has sought comment. (For a summary on these issues, see **Specific Comments** below.)

As a general comment, however, FreightCorp notes that section 44ZZA (3) of the *Trade Practices Act 1974* allows the ACCC to accept the Access Undertaking:

> " … if it thinks it is appropriate to do so having regard to the following matters:
>
> (a) the legitimate business interests of the provider;
>
> (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
>
> (c) the interests of persons who might want access to the service;
>
> (d) whether the access to the service is already the subject of an access regime;
>
> (da) whether the undertaking is in accordance with an access code that applies to the service;
>
> (e) any other matters that the Commission thinks are relevant."

FreightCorp notes that on a number of points made by FreightCorp the ACCC has relied on what may be described as the commercial imperative of ARTC to ensure that ARTC will not act in a particular way. Whilst FreightCorp notes that this may be regarded as a sound approach, it does not necessarily provide persons who might want access with a level of comfort that could be provided were the Access Undertaking to be prescriptive on those issues. FreightCorp does not see any inconsistency with the achievement of legitimate business interests of the access provider and the interests of a person who might want access arising from prescription of this kind.

Further FreightCorp notes that the ACCC's publication "Access Undertakings" states that:

> "As a starting point for negotiations undertakings should:
>
> - clearly specify what services are subject to the undertaking;
> - **specify what terms and conditions are open for negotiation**;
> - provide a framework for negotiations including clearly defined boundaries for the negotiations;
> - provide relevant information necessary for meaningful negotiations;
> - **include effective provisions for dispute resolution**;

- **provide for potential third party users to be fully informed about non- negotiable terms and conditions;** and
- specify an expiry date for the undertaking."

In respect of the bullet point emboldened FreightCorp notes that the Access Undertaking is deficient. FreightCorp makes submissions in respect of the provisions for dispute resolution in section 3 below.

In relation to a statement of which terms are and are not negotiable, FreightCorp notes the Access Undertaking does not deal with these issues expressly. FreightCorp notes that the ACCC and ARTC may consider that these issues are dealt with by implication; impliedly if no statement is made on the issue all the terms are negotiable. If this is the intention, FreightCorp considers that it is appropriate for the Access Undertaking to acknowledge that this is the case. Further, if this is the intention, it would be helpful if the Access Undertaking could state how this approach is reconciled with clause 3.11(b) of the Access Undertaking that provides:

> "The Access Agreement must, unless otherwise agreed between ARTC and the Applicant, be consistent with the principles outlined in the Indicative Access Agreement and must address at least the matters set out in Schedule C. The details in Schedule C do not provide an exhaustive list of the issues that may be included in an Access Agreement."

Reconciliation is possible, but as things stand the words "…the principles outlined in the Indicative Access Agreement …" are ambiguous. One could infer that clause 3.10 (b) is a statement that the terms of the Indicative Access Agreement are not negotiable.

Recommendation 1: The Access Undertaking should state which terms and conditions in the Indicative Access Agreement are not negotiable, if any.

3 Specific comments on the Draft Decision

FreightCorp has decided to make specific comments on five issues:

- Pricing Principles (see 3.1);
- Performance Indicators (see 3.2)
- Dispute Resolution (see 3.3);
- Indemnity and insurance (see 3.4); and
- Track condition (see 3.5).

General Comments on Further Revised Access Undertaking and the Commentary

FreightCorp notes that the Further Revised Access Undertaking and the Commentary, whilst they do not address flaws and fundamental issues that FreightCorp has raised with the Access Undertaking, does achieve a workable balance, in general terms, on dispute resolution and arbitration, although greater detail is required in this area.

3.1 Pricing Principles

As the gap between the floor and ceiling charges allowable under the regime are so broad and the current indicative access rates are so far below the ceiling rates the ceiling price limits provide no effective limit on access rates at all.

While some market segments (eg North-South corridor movements) are under extreme competition from road and other segments (eg East - West movements) due to their length are naturally suited to rail. This is reflected in the modal share for rail on East – West movements being in the order of approximately 80%. It is with access rates on these movements that ARTC has some latitude to behave in a monopolistic manner. It needs to be repeated that the floor/ceiling price limits will not provide any protection against monopolistic pricing.

The price cap approach gives ARTC the opportunity to raise their rates each year. This is despite the fact that as a business with a high fixed cost base ARTC benefits greatly by operator's increase of volume hauled on the network. This increase is largely exogenous to any actions by ARTC and is basically a windfall for the access provider. In the last published figures (FY99/00) growth in Gross Tonne Kilometres (GTKs) was 3.5% on the previous year.[1] The impact on ARTC's profit margin of this volume increase due to the fixed cost nature of the business is (all other things being equal) significantly higher than 3.5%.

Recommendation 2: FreightCorp recommends the price cap should be modified by having a CPI minus GTK growth formula or alternatively the prices should be limited to the *lesser* of CPI-2 or 2/3 of CPI.

The proposed undertaking proposes that the term "Floor Limit" equates to "incremental costs" and that:-

> "*incremental costs* means the costs that could have been avoided if a Segment was removed from the Network."[2]

This is fundamentally at odds with the Baulmol pricing methodology and with other established regimes in Australia. The NSW Rail Access Regime for example defines Full Economic Costs as:-

> *"all costs which could be avoided if a Sector was removed from the system."*[3]

Therefore we can see that ARTC is proposing to define the Floor Test in the way that NSW's Regime defines Full Economic Costs. Under the NSW Regime's Floor Test access seeker revenue must at least meet the Direct Cost imposed by the access seeker and Direct Cost is defined as:-

> *"the efficient and forward looking costs which vary with the usage of a single operator within a 12 month period, plus a levelised charge for variable MPM costs, but excluding depreciation."*[4]

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[1] ARTC Annual Report 2000, p6

[2] Proposed Undertaking , Clause 4.4 Revenue Limits (b), p17

[3] Aspects of the NSW Rail Access Regime – Final Report 28 April 1999, p 84

[4] Aspects of the NSW Rail Access Regime – Final Report 28 April 1999, p 84

This definition which complies with the Baulmol model will produce a lower figure than that which would result using ARTC's proposed Floor Test.

Furthermore under the proposed ARTC Floor Test there may be unintended consequences that have anomalous results. For example two operators could be operating over a segment and they are both paying at or near the floor because that is what the market can bear. If one of those operator's for whatever reason withdraws its operations and the tonnage it hauled from that segment then under the proposed ARTC Floor Test the remaining operator will have to pay 100% of the incremental costs of that segment. This sudden large increase in the Floor Test will then most likely result in the remaining operator's haulage becoming uneconomic and it too having to withdraw from operating over the segment leaving a stranded asset.

The Floor Test as it is applied in NSW avoids the potential of such a counter-productive outcome.

Recommendation 3: The Access Undertaking should define the Floor Test as "*the efficient and forward looking costs which vary with the usage of a single operator within a 12 month period, plus a levelised charge for variable MPM costs, but excluding depreciation"* as under the NSW Rail Access Regime**.**

There appears to be an omission in the process proposed for the calculation of the ceiling limit in Clause 4.4 (d). Under part (ii) of this clause the ceiling limit is to be adjusted upwards by CPI each year however it does not mention the need to adjust the DORC downwards by depreciation each year. This is despite the fact that depreciation is being included as a component of Economic Cost in Clause 4.4 (e)(v). Again it is instructive to examine the NSW Rail Access Regime and the Queensland Rail Access Regime where this adjustment apply.

Recommendation 4: ARTC should amend clause 4.4 (e) to account for DORC being depreciated each year.

3.2 Performance Indicators

It is FreightCorp's view that the Performance Indicators (PI's) for Reliability and Transit Time need to be based on the principle that it is the Rail Operator's responsibility to present its train on time and it is then ARTC's responsibility for the train to transit and exit on time (notwithstanding force majeure events). To do otherwise is to require a costly and bureaucratic blame apportionment system that loses sight of the aims of performance measurement.

Therefore it is FreightCorp's view that the PI's which have "Both" parties responsible in "Table 1- Service Quality Performance Reporting" should have their responsibility designated based on this principle.

One of the PI's listed is "Number and percentage of Services which are operated in a healthy manner". FreightCorp does not understand the meaning of the term "in a healthy manner" and believes it again relies on a subjective blame apportionment system which is unwieldy and unnecessary.

FreightCorp notes that the "Commitment by ARTC" has changed from maintaining the Network "in a fit for purpose condition" to a "good and safe operational condition". This appears to be a downgrading of commitment to a legally ill defined level. In FreightCorp's view the original commitment should be reinstated.

Recommendation 5: FreightCorp recommends that the obligation on ARTC concerning infrastructure condition should be defined as maintaining the network "in a fit for purpose condition".

3.3 Dispute Resolution

General comment

FreightCorp notes the finding of the ACCC that:

> "The Commission considers that it is appropriate that the negotiation period should have a specific termination date to deal with the possibility of negotiations simply being allowed to go on for an unacceptably long time. The expiry of the negotiation period should signal the end of negotiations. To avoid this, an applicant has the option of referring the matter to dispute resolution or to the Commission for possible breach of the undertaking just prior to the expiration of the three month negotiation period if it feels ARTC is not meeting its obligations to negotiate in good faith."

FreightCorp considers that of itself this statement gives rise to a number of points of clarification. FreightCorp considers however that there is a point of principle that needs to be restated. In the FreightCorp submission on the initial Access Undertaking FreightCorp noted that:

> "In the ordinary and usual course, three months might be regarded as the time that parties must negotiate in good faith in order to proceed to arbitration … [**Note:** this is consistent with the point made below that proceeding to arbitration must not be precipitous] … and if agreement is not reached for … [either party to trigger] the dispute provisions."[5]

FreightCorp's view is that an access regime should not force either party to trigger dispute provisions, rather it must restrict the ability of the parties to trigger those provisions unless they have sought to reach agreement. From experience, FreightCorp notes that, if anything, access seekers may be regarded as erring on negotiating for too long before initiating dispute resolution, rather than proceeding to dispute resolution at the first opportunity. Again, from experience, negotiations lasting three months may, in some circumstances, be regarded as perfunctory. In this regard, it is critical to note that the three month period is not a continuous period of negotiation, day after day. It may involve a series of long initial meetings at which all issues will be discussed, and distilled over time.

The inclusion of clause 3.10 (b) (iii) in the Further Revised Access Undertaking will force access seekers to trigger the dispute provisions or **face having to start the negotiation period again**. In FreightCorp's view this is entirely inappropriate, and in no way promotes negotiated outcomes at variance from the terms presented by the access provider. For those involved in negotiation of access at variance from the terms presented by the access provider, FreightCorp notes that clause 3.10 (b) (iii) provides

[5] Submission by Freight Rail Corporation and Toll Rail concerning the Australian Rail Track Corporation Access Undertaking, Section 3.3, p.18

for the access seeker and the access provider to agree to extend the period of negotiation, but this is in the gift of ARTC. Further, FreightCorp does not consider that is appropriate to rely, as the ACCC does elsewhere in the Draft Decision, on the assumption that the commercial imperative of ARTC (of increasing usage of the network) will mean that ARTC will extend the negotiation period. If clause 3.10 (b) (iii) remains as drafted, access seekers may be forgiven from concluding that the message from ARTC is "put up, or shut up".

Adopting the approach suggested by FreightCorp avoids any sense of "put up, or shut up" whilst at the same time as allowing ARTC to achieve its commercial objectives.

Recommendation 6: The Access Undertaking should not provide for the cessation of the negotiation period if agreement is not reached within 3 months, rather the Access Undertaking should provide that neither party may seek to refer matters to dispute resolution or to arbitration until the negotiation period exceeds 3 months.

FreightCorp notes above the letter to the ACCC from ARTC dated December 5 responding to some to the recommendations made by the ACCC in the Draft Decision, but noting that it would help to discuss with the ACCC how ARTC intends to address various concerns contained within the Draft Decision. FreightCorp considers that this is one area where discussion would be most helpful. Further, FreightCorp considered drafting and sharing in this submission a dispute resolution and determination process consistent with its views. FreightCorp decided against this, given its view that clarity is required on a number of matters and final views need to be reached by the ACCC and ARTC. FreightCorp considers that it is appropriate for ARTC to provide an amended draft Access Undertaking to reflect this clarification and the views and for access seekers to be given an opportunity to comment on the detailed wording. At the moment, detailed wording does not exist upon which it is possible to comment. FreightCorp considers that this point should not be overlooked given that the dispute resolution and determination provisions require a thorough redraft.

Recommendation 7: ARTC should provide an amended draft Access Undertaking reflecting the clarification obtained from the ACCC on various concerns contained in the Draft Decision.

Identity of the arbitrator

In common with other access seekers that made submissions in respect of the initial Access Undertaking, FreightCorp expressed the view that ACCC should be the arbitrator. FreightCorp continues to be strongly supportive of a dispute resolution regime that provides for the ACCC as the arbitrator.

In this regard, FreightCorp notes the finding of Resolve that the ACCC "is a more appropriate arbitrator than commercial arbitrators". [6]

Recommendation 8: The Access Undertaking should provide for one arbitrator, and that the arbitrator should be the ACCC.

Form of the dispute resolution and determination process

As a general comment, FreightCorp is in favour of a dispute resolution and determination process[7] that is quick. As noted in the submission in respect of the initial Access Undertaking FreightCorp stated that:

[6] Draft Decision, Section D4.3, p. 72.

> "It is not in the best interests of access seekers to proceed to dispute resolution at all; it is in the best interests of an access seeker to negotiate an access agreement, on reasonable terms, as quickly as possible and to start running trains. It is only if an access seeker does not consider that it is able to get reasonable terms that it will proceed to dispute resolution [or determination], because of its nature it is an expensive process with an uncertain outcome. An access seeker never wants to proceed to arbitration … but if an access seeker initiates the dispute resolution [or determination] process it is most likely that it will have determined that it is prepared to arbitrate, and it wants to see resolution of that dispute as quickly as possible."[8]

The quicker the dispute resolution and determination the lower cost for access seekers (and the access provider).

What this means in practice is that whilst the dispute resolution and determination process must not be precipitous, it must not prevent an access seeker from proceeding as quickly as possible to a determination of the arbitrator. Accordingly, FreightCorp is not, as such, concerned about the number of tiers in any process, rather FreightCorp is concerned to ensure that if an access seeker decides to arbitrate it may do so.

Recommendation 9: The Access Undertaking should allow an access seeker to proceed to arbitration unless it decides to avail itself of any tier of the dispute resolution process.

FreightCorp accepted in its submission in respect of the initial Access Undertaking that compulsory referral of a dispute to CEO's before an arbitration notice may be given. FreightCorp accepted this on the basis that if agreement was not reached by the CEO's within seven days either party to the dispute could refer the matter to arbitration.[9] In this regard, FreightCorp noted that:

> "From experience, FreightCorp and Toll know that they would not proceed to arbitration without senior management, probably CEO to CEO, meeting.[10]

FreightCorp notes that Resolve holds a consistent view:

> " … Resolve considers it unnecessary to explicitly specify negotiation as a separate step, as substantial negotiation is likely to have already occurred prior to the lodgment of a dispute notice."

Whilst FreightCorp agrees that it is not necessary to state that CEO's should have met before an arbitration notice may be served, FreightCorp maintains that it does not consider that it is inappropriate for the Access Undertaking to provide for compulsory negotiation. This is a pragmatic rather than a principled position.

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[7] FreightCorp has adopted the distinction made by Resolve as described by the ACCC - Draft Decision, Section D4.3, p.71.

[8] Submission by Freight Rail Corporation and Toll Rail concerning the Australian Rail Track Corporation Access Undertaking, Section 3.3, pp. 20 and 21

[9] Submission by Freight Rail Corporation and Toll Rail concerning the Australian Rail Track Corporation Access Undertaking, Section 3.3, p. 21

[10] Submission by Freight Rail Corporation and Toll Rail concerning the Australian Rail Track Corporation Access Undertaking, Section 3.3, p. 21

Recommendation 10: The Access Undertaking may provide for compulsory negotiation between CEO's within a period of 7 days after the dispute notice is issued and after 14 days which either party may refer a dispute to arbitration.

FreightCorp notes that the Further Revised Access Undertaking is consistent with this Recommendation.

Conflict managers and mediators

FreightCorp notes that there is a suggestion that a "suitably skilled, independent conflict management body" may be involved. It is not clear to FreightCorp at which tier of the dispute resolution process such a body would become involved. FreightCorp considers that this needs to be stated clearly. The recommendation of the ACCC on the point[11] could be read as requiring involvement of the conflict manager in the CEO negotiation. FreightCorp considers that the involvement of a conflict manager at any stage should be on a consensual basis. Accordingly, the parties to an access dispute would be free to involve a conflict manager, but that involvement, and the role of the manager, would be determined upon by the parties.

Recommendation 11: The Access Undertaking may provide for referral of a dispute to a conflict manager by agreement, but the basis of that referral should be left to the parties to the dispute at the time.

FreightCorp notes that the Further Revised Access Undertaking is consistent with this Recommendation.

FreightCorp considers that for these purposes it would be helpful to have a standing panel of conflict managers and mediators. Conflict managers and mediators would be drawn from the panel, and if the parties do not agree on the identity of a person, the ACCC would pick a person. On this basis, FreightCorp is in broad agreement with the approach suggested by the ACCC in its recommendation[12].

Recommendation 12: If the Access Undertaking is to provide for referral of a dispute to a conflict manager or mediation the Access Undertaking may provide for a standing panel of conflict managers and mediators.

One element of that recommendation requires further clarification, and that is the basis upon which the arbitrator may refer a dispute to "another party". Further, FreightCorp considers that terms of appointment (including any indemnity) of any conflict manager or mediator should be determined at the time the parties determine to engage a conflict manager or mediator. On this basis, FreightCorp does not agree with the observation of the ACCC:

> " … that ARTC should undertake that it will indemnify the person providing dispute resolution services, and that operators be required to do the same before ARTC's obligations to submit to dispute resolution apply in respect of a particular dispute."[13]

Those appointed to the standing panel will have given their consent to appointment to the standing panel. The terms of their appointment, consistent with the parties

[11] Draft Decision, Section D.4.4.2, p. 75

[12] Draft Decision, Section D.4.4.2, p. 77

[13] Draft Decision, Section D.4.4.2, p. 77

involving a conflict manager or mediator if they consider it would help resolve the dispute, should be determined at the time that the person it appointed. Given the role of a conflict manager or mediator (to manage a consensual process), FreightCorp does not consider that there is any sustainable argument that liability may arise. Accordingly, FreightCorp considers that an indemnity is inappropriate.

Recommendation 13: The Access Undertaking should not provide for the provision of an indemnity to a conflict manager or a mediator.

FreightCorp notes that the Further Revised Access Undertaking is not inconsistent with this Recommendation; clause 3.12.4(b) of the Further Revised Access Undertaking provides for the parties to agree, amongst other things, the payment of the costs of the conflict manager.

Number of stages before arbitration

FreightCorp considers that it would be helpful for the ACCC to clarify what it means by:

> "In the event that a party to negotiation is unable to satisfactorily resolve a dispute through the ***earlier stages*** of the formal dispute resolution process, the matter may be referred to arbitration … As such, the Commission considers the inclusion of arbitration provisions appropriate, provided the process can be initiated in a timely fashion."[14]

Given what FreightCorp states above (if CEO's do not reach agreement on a dispute, either party may refer the dispute to arbitration), FreightCorp considers that the dispute resolution and determination provisions must make it clear that the only pre-condition to proceeding to arbitration is negotiation by CEO's, after which either party may refer the matter to an arbitrator. The use of the word ***earlier stages*** indicate that the ACCC has more than one stage in mind as a pre-condition. FreightCorp considers that more than one stage, would slow down considerably the dispute resolution and determination process and as such undermine the need for a quick process.

Recommendation 14: The Access Undertaking should state expressly that after a period of 7 days for compulsory negotiation between CEO's (if this requirement is included), either party may refer the matter in dispute to arbitration.

The Further Revised Access Undertaking is consistent with this Recommendation.

ACCC as arbitrator

FreightCorp notes that the ACCC states:

> "There ***may*** be sound reasons for having a single arbitration body rather than allowing a variety of arbitrators, as would be the case under the undertaking originally submitted by ARTC."

The ACCC goes on to state a number of advantages and additional advantages. Consistent with FreightCorp's submission in respect of the initial draft Access Undertaking [15], FreightCorp considers that each advantage is reason enough to justify a single arbitration body.

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[14] Draft Decision, Section D.4.4.3, p. 77

[15] see Submission by Freight Rail Corporation and Toll Rail concerning the Australian Rail Track Corporation Access Undertaking, Section 3.3, pp. 20 to 24

Transparency of arbitration determinations

Consistent with FreightCorp's submission in respect of the initial draft Access Undertaking [16], FreightCorp agrees with the conclusion of the ACCC that non-publication of determinations " … would be inappropriate …"[17]. Further, again consistent with FreightCorp's submission in respect of the initial draft Access Undertaking, FreightCorp agrees that the arbitrator should have the discretion not to publish, as part of the determination, information that is confidential and proprietorial in nature.

Recommendation 15: The Access Undertaking should allow the arbitrator not to publish information that is confidential and proprietorial.

FreightCorp notes that the recommendation of the ACCC in respect of publication of determinations [18] is that the arbitrator should have discretion to publish. FreightCorp considers that the recommendation should go further. All determinations should be published, but the arbitrator will have the discretion not to publish as part of the determination information that is confidential and proprietorial in nature.

Recommendation 16: The Access Undertaking should require the arbitrator to publish its determination other than those parts of its determination that contain information that is confidential and proprietorial.

FreightCorp notes that clause 3.12.5(b)(viii) of the Further Revised Access Undertaking is not inconsistent with this Recommendation.

Joining parties

FreightCorp considers that there is merit in providing for the joining of parties to arbitration. In this regard, FreightCorp notes that the recommendation of the ACCC[19], whilst allowing the arbitrator discretion to join related arbitrations, does not state that the consent of the parties to otherwise separate arbitrations is required. FreightCorp considers that consent should be required. It is important that no one loses sight of the objective of arbitration - to provide a means by which a dispute may be determined upon quickly. If arbitrations are joined there is a risk that different interests of the different parties and the time taken for those interests to be presented will undermine the key objective.

Recommendation 17: The Access Undertaking should allow the joining of parties to an arbitration but only with the consent of the parties to the arbitration.

FreightCorp notes that ARTC anticipates that its consent, not that of the Applicant, is required. [20]

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[16] see Submission by Freight Rail Corporation and Toll Rail concerning the Australian Rail Track Corporation Access Undertaking, Section 3.3, pp. 21 to 22

[17] Draft Decision, Section D.4.45, p78

[18] Draft Decision, Section D.4.4.5, p. 79

[19] Draft Decision, Section D.4.5, p. 79

[20] Clause 3.12.5(b)(ix) of the further revised Access Undertaking

It follows from what FreightCorp states above that FreightCorp considers this to be inappropriate.

Recommendation 18: Clause 3.12.5(b)(ix) of the Access Undertaking must provide for the consent of all parties to joining of arbitrations and parties to arbitrators.

Notification

FreightCorp considers that there is merit in allowing the arbitrator discretion to give notice to interested parties.

FreightCorp considers that the suggestions made by Resolve[21] may go too far if they are to require joining, and in some ways may be regarded as a hang over from another regime where industry wide issues are being resolved. Accordingly, FreightCorp does not agree that the arbitrator should have the power to join unless both parties to a dispute agree.

Recommendation 19: The Access Undertaking should not allow the arbitrator to join without the consent of the parties to the arbitration and the party to be joined.

This Recommendation is consistent with Recommendation 16 above.

Criteria for arbitration

FreightCorp notes what is stated in respect of the criteria for arbitration.[22] FreightCorp considers that it is appropriate to state expressly that the interests of access seekers, as well as those who have rights to use the service, should be taken into account by the arbitrator. This is of particular importance if the determination of the arbitrator is to bind the access seeker. (See *Review of arbitration decisions* below.)

Review of arbitration decisions

FreightCorp agrees with the analysis of the ACCC on this issue as regards the recommendation made.[23]

FreightCorp notes the observation of the ACCC that:

> "Given the provisions of s.44V(2), in making an arbitration determination the Commission has the power, should it consider it appropriate, to enforce acquisition of the service. The Commission considers that, given it is the intention of Part IIIA of the TPA, such discretion is not inappropriate."

FreightCorp notes that over time those involved in the framing of open access regimes having developed regimes have had the opportunity to develop thinking on the issue of whether the determination of any arbitrator should bind an access seeker. The recent regimes for the AustralAsian Railway and Western Australia do not bind the access seeker. This recognises a key issue - if the determination of the arbitrator does not allow the access seeker to obtain an appropriate return on its investment, the access seeker should not be obliged to contract. Less directly this recognises the key dynamic - access seekers do not arbitrate lightly. The time and expense of arbitrating is such

[21] Draft Decision, Section D.4.4.5, pp. 79 and 80

[22] Draft Decision, Section D.4.4.6, pp.80 and 81

[23] Draft Decision, Section D.4.4.8, p85

that access seekers undertake it as a last resort, including taking account of the expense involved in arbitrating for the purposes of determining the rate of return on its investment. As noted above, arbitration, by its very nature has an uncertain outcome. To require an access seeker to contract or as the ACCC states "enforce acquisition of the service" is in FreightCorp's view inappropriate.

Recommendation 20: The Access Undertaking should provide that the determination of an arbitrator is not binding on an access seeker.

It follows from this that FreightCorp considers that the determination of the arbitrator should not be binding on the access seeker in such a way that the access seeker can be required to contract.

This said, FreightCorp notes that it would be within the discretion of the ACCC, as arbitrator, to require an access seeker to contract. If in exercising such a discretion the ACCC has regard to the legitimate business interests of access seekers then it is unlikely that a problem will arise. Nevertheless FreightCorp considers that requiring an access seeker to contract is inappropriate.

FreightCorp notes that the Further Revised Access Undertaking provides that:

> "The determination of the arbitrator shall be final and binding, subject to any rights of appeal."

Further FreightCorp notes that clause 3.2.15(b)(xiv) of the Further Revised Access Undertaking provides that:

> "Except where the determination or direction by the arbitrator has been appealed by ARTC, ARTC will comply with the lawful directions or determinations of the arbitrator".

Two issues arise from this: first, as noted above, FreightCorp considers that it is inappropriate for a determination to bind an access seeker to contract, and repeats Recommendation 18 in this regard; and secondly, there is a lack of clarity as to the basis upon which a determination of the ACCC may be appealed.

Recommendation 21: The Access Undertaking must state clearly the basis upon which a determination of the ACCC, as arbitrator, may be appealed.

Compliance with arbitration

FreightCorp agrees with the recommendation of the ACCC that the Access Undertaking should contain an express provision requiring ARTC to comply with directions of the arbitrator.[24]

In relation to the inclusion of a provision that allows ARTC to cease negotiations if an access seeker does not comply with directions or a determination of the arbitrator requires further detail. In many ways, the appropriateness or otherwise of this provision will depend on the nature of the directions that the arbitrator may give.

FreightCorp agrees wholeheartedly that it is appropriate for the arbitrator to have the ability to suspend and, ultimately, to cease arbitration if an access seeker does not comply with a direction of the arbitrator.

Suspension or cessation in other circumstances would have to be clearly stated and not provide for "hair-trigger" operation for them to be appropriate.

[24] Draft Decision, Section 4.4.9, p.86

Recommendation 22: The Access Undertaking should provide for suspension and cessation of arbitration.

Costs of arbitration

FreightCorp agrees that the Access Undertaking should provide for the fees of the ACCC as arbitrator and that it is appropriate for them to be based on the Trade Practices Regulations.

Recommendation 23: The Access Undertaking should provide for the payment of the costs of the ACCC as arbitrator.

Indemnity and insurance

FreightCorp notes that the ACCC provides comments in relation to some, but not all of the issues raised in submissions.

Two of the issues that the ACCC consider are those of indemnities and insurances.

Indemnity

The concern of FreightCorp is that the indemnity proposed by ARTC is a no-fault indemnity and the indemnity is drafted in such a way that damage includes normal wear and tear to the Network caused by the use by the Operator of the Network. This is an unusual approach. Whether this is the intention of ARTC is unclear.

The issue of whether or not the indemnity should be no fault or not, is a commercial issue, and to FreightCorp's recollection has been an issue since the Australian National days.

Essentially, this goes to the economics of the contractual relationship and what the Operator gets for the charges under the Indicative Access Agreement. Is the Operator to be obliged to be liable for an indeterminate amount, and to have to effect insurance to cover that indeterminate liability, or is ARTC better placed to maintain its Network and to effect property insurance to cover the risk of damage to the Network?

As a matter of detail and risk, FreightCorp noted in its mark-up (as part of the Submission by Freight Rail Corporation and Toll Rail concerning the Australian Rail Track Corporation Access Undertaking in respect of the initial Access Undertaking) that the definition of indirect or consequential loss is not appropriate for the purposes of limiting liability to direct loss to property only and to injury or death of individuals. In FreightCorp's view this should be the extent of the indemnity. This is a more usual approach taken with indemnities, not least because these are liabilities that typically are covered by public liability policies.

Recommendation 24: The Indicative Access Agreement should not include a no fault indemnity, and the liability of the Operator under the indemnity should relate to damage to person or property only.

If the intention is that the indemnity should only cover direct loss to property or people, then the issue between FreightCorp and ARTC is essentially one of drafting in respect of the definition of indirect or consequential loss. If the intention is to allow recovery beyond direct loss to property or people, then this is an issue of principle, essentially commercial, and as such one that the ACCC may arbitrate in respect of in the future.

FreightCorp notes that the ACCC comments:

> "The Commission considers that it would be contrary to the public interest in having injuries compensated or damage repaired for the terms of an access

agreement to lead to dispute about who is responsible for that compensation or damages. The Commission considers that on the whole the relevant clauses meet this test."

FreightCorp would welcome clarification from the ACCC as to what this means.

Recommendation 25: FreightCorp would welcome clarification of the decision of the ACCC on this key point.

From the FreightCorp perspective, any indemnity, will lead to dispute, first, as to whether liability falls within the general ambit of the indemnity (clause 15.1 (a) of the Indicative Access Agreement) and, if it does, secondly, whether liability is excused by one of the exclusions in the indemnity (clause 15.1 (b)).

FreightCorp notes that the Indicative Access Agreement (attached as Schedule D to the Further Revised Access Undertaking) includes amendments to clause 15. None of the changes address the threshold issues that concern FreightCorp.

The inclusion of a limitation of liability clause along the following lines would be appropriate:

"Limitation of liability

Notwithstanding any other provision in this agreement and to the extent permitted by law, each party agrees that neither party will be liable to the other party in respect of any breach of this agreement (including any implied term) or any other obligation or, any duty (including any duty of care for the purposes of the tort of negligence) for any damage or loss (other than for death or personal injury or physical damage to property) including:

a) any financial or economic loss, including loss of profit, loss of revenue, loss of use, loss of agreement, loss of goodwill, or increased cost of working; or

b) any indirect or consequential loss; or

c) loss resulting from liability of the other party to any third person howsoever and whensoever arising."

Insurance

As a matter of construction, ARTC envisages two policies of insurance; see the use of the plural in the heading and throughout the provisions.

The first is the public liability insurance policy referred to in clause 16. 1 (a) (i). FreightCorp accepts it is appropriate for Operators to be obliged to effect public liability insurance; as noted above indemnities in contract typically relate to damage to person and property because public liability insurances cover these liabilities.

The second is the insurance referred to clause 16. 1 (a) (ii). In the mark-up provided by FreightCorp, FreightCorp was asking, and maybe FreightCorp should have put the question more clearly, whether the insurance policy referred to in clause 16. 1 (a) (ii) had been costed, and how much it added in addition to the public liability policy. As noted above, the answer to this question will to some extent at least turn on what ARTC intends the indemnity itself to cover.

By way of editorial comment, FreightCorp considers that there are a number of issues raised by it, and points made by it, that perhaps have not come across clearly in the written word, and were not emphasised on August 16, 2001 at the public forum hosted by the ACCC because the intention of that forum was not to go into the detail.

From the FreightCorp perspective this is one example of where a round table point by point clarification session might be of great benefit to the whole industry.

On this issue for example there is a very strong case for ARTC to effect property insurance, and for the cost of that insurance to be reflected in the charges payable by Operators, rather than for each Operator to seek to comply with insurance obligations that at best look costly, and of marginal utility, and at worst may be too costly for some Operators.

From the FreightCorp perspective, it is not necessarily clear what position the ACCC has taken on this issue. This may be one of the issues that ARTC wants to discuss with the ACCC per its letter dated December 5, 2001.

Condition of track

As noted in the Submission by Freight Rail Corporation and Toll Rail concerning the Australian Rail Track Corporation Access Undertaking June 13, 2001, there is no clear statement that the Network must be maintained to a standard that allows it to provide the services it contracts to provide to Operators.

FreightCorp notes that the issue for track condition remains at large; in particular the ACCC is requiring ARTC to define "fit for purpose" in a manner acceptable to the ACCC. The resolution of this issue, and the form of the obligation imposed on ARTC, is key; the standard to which the Network is maintained is relevant for the purposes of the pricing principles, and unless an appropriate standard is settled, the pricing principles should be revisited.

These standards could be measured for each track segment in terms of Track Condition Index (TCI) and minutes delay caused by Temporary Speed Restrictions.

FreightCorp notes that the commitment of ARTC reflected in the Access Undertaking should be mirrored in the Indicative Access Agreement so as to allow each Operator the ability to proceed against ARTC for non-compliance.

FreightCorp notes the form of warranty in the revised clause 6.1 of the Indicative Access Agreement. FreightCorp further notes that this clause provides less comfort than previously was the case.

Recommendation 26: FreightCorp recommends infrastructure standards be measured for each track segment in terms of Track Condition Index (TCI) and minutes delay caused by Temporary Speed Restrictions