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ABN 76 082 664 220

Level 4, 179 Queen St MELBOURNE Vic 3000
(GPO Box 1114 MELBOURNE Vic 3001)
DX 305 Melbourne Tel:(03) 9672-5608 Fax:(03) 9670-8883

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AUSTRALIAN COMPETITION

AND CONSUMER COMMISSION

MR J. MARTIN, Chairman
MR R. VIGLIANTI

ACCC FORUM - AUSTRALIAN RAIL TRACK CORPORATION UNDERTAKING

MELBOURNE

1.08 PM, MONDAY, 17 DECEMBER 2001

THE CHAIRMAN: Good afternoon everyone. Welcome to the workshop on the ARTC undertaking. We are going to try to make this as informal as we can but I think in that guise I might sit down at the table and as we go along I will be calling on David Marchant and others to speak and they may want to come up to the lectern and to it, but I will generally speak from the table. So today we will be discussing the Commission's draft decision on the undertaking from the Australian Rail Track Corporation in respect of the access to rail infrastructure under its control in South Australia and Victoria.

My name is John Martin. I am a Commissioner with the Australian Competition and Consumer Commission. I think I have met most of you before at the August session. Included in my responsibilities are being Chairman of the Commission's Transport Committee. The ARTC undertaking is an important step forward in the development of access arrangements in the interstate network. It is also significant because it is the first undertaking submitted to the Commission in respect of rail infrastructure.

I would like to give you a brief run-down of the processes the Commission has gone through in the preparation of the draft decision and to talk to you about the processes that we see working this afternoon in the discussion on our draft decision. The ARTC submitted its draft access undertaking to the Commission in February. It doesn't seem that long ago but it was back in February. The undertaking was submitted pursuant to the provisions of Part IIIA of the Trade Practices Act and the legislative criteria in Part IIIA impose an obligation on the Commission to ensure that the undertaking, amongst other things, achieves an appropriate balance between the interests of the infrastructure owner, access seekers and the public interest.

The Commission undertook a public consultation process to assist it in assessing the undertaking against these legislative criteria. The Commission released an issues paper on the draft undertaking in March and submissions were received by mid-year and issues surrounding the undertaking were discussed at a public discussion forum held at this office on 16 August when I think I met most of you sitting around this room. Partly as a result of the issues discussed at this public forum the ARTC proposed a number of amendments to its draft undertaking on 14 and 21 September.

The Commission invited comments on these amendments to assist in assessing the ARTC's undertaking and the submissions from interested parties. We also sought consultancy advice from RESOLVE advisers on dispute resolution processes and from Curry and Brown on the asset valuation methodology used by the ARTC. Submissions received from

interested parties, consultants reports as well as the discussion at the public forum have all assisted the Commission to assess the ARTC's undertaking. The decision reached in the draft decision is that the Commission proposes to accept the ARTC's undertaking subject to the ARTC addressing certain concerns we have raised.

Primarily these concerns relate to the principles and processes for negotiating access and resolution of disputes and rather than prices charged for access. This forum is part of the Commission's public consultation process on the ARTC undertaking. The purpose of today is to discuss the Commission's draft decision and I would remind you that we would welcome any submissions that individuals/interested parties may have on the draft decision and these are due by 31 January 2001. The Commission will consider the issues raised here today in submissions and it aims to release its final decision in March next year.

We have structured today's forum around two broad sessions. In the first, we will look at the negotiation provisions and the dispute resolution processes. We will then break for afternoon coffee at around 3 o'clock. That may or may not be a generous time scale and we will play it by ear as we go along in terms of the time that it takes for those two sessions. Following the coffee break or earlier than the coffee break, we will turn our attention to access pricing and service standards. We should also have time towards the latter part of the afternoon to consider any other issues such as capacity management and network extensions.

We are aiming to conclude proceedings at the latest by 5.15. I never like to predict these things so I won't say we may well be able to do it earlier, but at the Chairman I will be on the lookout for keeping things moving. In terms of format, I am intending to kick off each session with a brief overview of the key issues arising from the Commission's assessment of the undertaking. I will then call on the ARTC and I think David will be presenting a brief response to the Commission's recommendations and any context that ARTC likes to put that in.

After that, the floor will be open to interested parties to come forward with any comments and those who wish to, in particular areas, if they could note that to us. Some organisations I understand, have already indicated their intention to present views on issues and I will ask them to come forward and then we can have a general discussion on each of the areas. To formally start the afternoon's proceedings, then, I will just make a brief overview on the Commission's recommendations on negotiating provisions.

The concerns raised with the terms and conditions of access led to the Commission making a number of recommendations encompassing new

provisions or amendments to existing provisions. These recommendations are intended to achieve a more appropriate balancing of interest among stakeholders, where the Commission considered that the existing provisions of the undertaking could provide scope for ARTC to exercise discretion. The key amendments suggested are:

(1) the creation of a new provision obliging ARTC to take all reasonable steps to comply with requests for information that facilitates negotiation;

(2) obliging ARTC to explain in writing, reasons for refusing to negotiate;

(3) obliging ARTC to disclose certain information rather than subjecting this information to the confidentiality provisions;

(4) imposing a time limit within which ARTC is to revise an indicative access proposal;

(5) obliging ARTC to give notice of intention to end negotiations rather than just advising applicants of the end of the negotiating period;

(6) deletion of certain exemptions on ARTC from obligations under the undertaking; and

(7) introducing a greater level of consistency between the undertaking and the indicative access agreement.

So that is the summary of the sort of issues that the Commission sees and, David, I will ask you to respond and put any remarks that you wish to make, and then we will open the floor to people who wish to make any presentations. Thanks.

MR MARCHANT: John, thanks for the opportunity again, to meet with the Commission and the operators on the access undertaking. We always look forward to these meetings. I know the operators do, and I expect this one won't be any different from the previous ones. There were 30-odd recommendations in the draft report suggesting changes to the draft undertaking submitted by ARTC. ARTC, in an attempt to help facilitate today's exercise and given the comments in the last few weeks, submitted on Friday a draft response to those to try and actually give some detail today, so operators could at least have something to consider without necessarily concluding a view, including ARTC concluding a view.

We are actually looking forward to today to hear the comments, not only on those 30 items, but on a couple of the items that we have left the jury verdict vacant on, particularly with regard to dispute resolution, because we are mindful that at the previous seminar here where we had initially proposed a process of CEO negotiations, compulsory attempt at mediation and the compulsory arbitration. The operators overwhelmingly indicated that that was too voluminous a period and could in fact be played out over 90 to 160 days or whatever.

In response to that operator request, we amended the undertaking in the next round to delete mediation as being a compulsory process and suggested it be voluntary on the parties so that you go from a dispute - from an attempted CEO resolution, and then immediately either into voluntary mediation or into compulsory arbitration. The Commission's draft report on the advice of independent consulting firm, RESOLVE, has brought up a variation to the mediation option in the form of a conflict manager. Although ARTC is not necessarily averse to that concept, we actually see a conflict manager and a mediator actually being a very similar concept, depending on how the mediator approaches the task and what the parties before the mediator would seek the mediator to try and help resolve them.

So we saw the conflict manager as more of a tactical exercise with regard to a form of mediation than necessarily an exercise which was a separate formula for attempting to mediate a solution. ARTC's preference is always to try and mediate if possible, voluntary, and to leave arbitration as a point of last resort. However, in response to the industry operators concern with regard to the time period and how that could be gamed by going through a long mediation process and then still not resolving it probably because in their view of a track manager.

But let us say just hypothetically, it might have been a track and an access seeker, which I am sure would never be the case. Then effectively you could go through the mediation process and then still end up in arbitration and therefore spread their application out to nearly a year. So we relinquished the mediation and really went to a simply process of dispute notification, CEO meeting and in the event that that doesn't resolve it, and the parties don't voluntarily want to go to a mediator, and I indicated that ARTC would normally voluntarily commit itself to one, so we are really in the hands of the applicant there, but to cut it short, you go straight to arbitration.

The proposal in this draft report has a tandem exercise between a conflict manager which in tactical terms is very similar to a mediator and have that run in tandem with an arbitration. ARTC's concern with that is that, in

fact, it is so easily gamed and it is so easy to game between the conflict manager time and then when you go to arbitration and to someone who is attempting to game that, could in fact play it out both ways and actually get to the extended period of time that was in the original application.

What we would like to see is a fast, efficient method and an effective method to resolve disputes quickly. We are interested in seeing what the industry says about those processes and therefore we have reserved any comment in our draft response last Friday on this issue because we are actually interested to see what the operators would like to see done and we will try and live within that. As the Commission is aware, we have written to each of the operators saying we are concerned about this section, and would be interested to see what their views are and seeing if we can get a consensus out of that which is acceptable to the industry and to the track manager so that people feel that there is something of integrity out of it.

So we are a little bit like yourselves at this point. We would be interested to know what the operators' views of a process would be as much as a consensus can be built, where they would have confidence that the track manager won't game them out and play for time and therefore frustrate them by the effluction of time. So a quick resolution is an early one. So we are interested in the industry's comment on that. There have been a number of suggestions in different applications that in fact a panel be established up front for people to act as either mediators or conflict resolvers.

If I read one of the submissions it says that the panel should be:

(1)where it is agreed up front and the attributes of the persons who would be the mediator or arbitrator would be appropriately qualified to determine the most appropriate means of determining and calculating fees for access -

Well, not all disputes are about fees for access.

(2)not be an interested party to any access agreement with either the operator or the ARTC;

(3)have a detailed understanding of and experience in dispute resolution practice and procedures; and

(4)have an understanding of the rail industry in Australia.

With respect to those characteristics, if there are many people who actually comply with those, either the operator or ourselves would have employed

them already. This is not a mature industry with regard to economic assessment. Most of it was in government integrated hands only until five or six years ago, and actually getting people who are both skilfully qualified in a technical area, but also have eminent experience in access undertakings and also have detailed understanding and experience in dispute resolution and lastly, have an understanding of the rail industry, is a characteristic that if there are many people follow that formula, I would like to employ them as fast as I could.

I am sure that anybody who fits within those, and there are a couple of consultants around that do, has either been employed by us at one time or employed by an operator at one time, so it is really hard to get that independence. What we were seeking and do seek is that in the event that panels that are set up now can change - people die or move on or become conflicted by being contracted to one party or another, then in the event that we can not agree in a period of 14 days to independent people that both sides are happy with, that someone independently choose someone who has actually the skills nad attributes to understand an issue and help the parties move through an issue.

Where that is a lawyer, a judge, an economist or whatever, we are happy for an independent party to choose who they be in the event that we can't agree. I must say our experience so far in the couple of mediations we have had is that we have actually agreed with each other about who that should be in a matter of days. So it is not one that we have had a lot of experience of conflict on, but I am aware that in some jurisdictions there have been conflicts on those things.

Our proposal was that maybe the President of the Law Society or the President of the Institute of Commercial Disputes or the President of the Australian Dispute Resolution Centre or someone, could actually choose an independent person quickly if the parties can't choose it themselves. The difficulty with a panel approach is it is really difficult to have five or six people on a panel that will fit all of those qualifications and will not be compromised in one form or another.

The other difficulty is this. Heaven forbid that you put someone onto a panel and for one reason or another, a nefarious track manager or a nefarious train operator may therefore see if they can approach members of the panel to do different consulting work with them outside this conflicting area and therefore actually comprise them if possible. I am not even certain that I as a track manager wouldn't do that. I would probably be half tempted to do that to just give us half a leg in to understand the person and therefore to understand how they think.

So I am not exactly certain that these ready made, instant solutions actually well in advance of the issue actually do achieve the independence and the framework that people would like. So we are very interested today and in the course of the written submissions over this next month to see what the operators think. We are happy to meet with the operators through IROG or whatever else and talk through options to see if we can get to a consensus that people feel comfortable with and one which they think will safeguard their commercial interests and of which will overcome potential for either side to game.

Recognising that it is fine if you are the innocent victim to a bad decision by a track manager to think that you would like a process which is all independent, but in the end the bottom commercial framework is you want one that is fast and which you can move through quickly in the event that that track manager or, in fact, the train operator, had been unreasonable and is, in fact, gaming it through. So both sides need to be careful that they get a situation that is not as easily gamed by one party because they feel they have got a major tactical advantage.

And that tactical advantage may be time. One party or another may have a lot of time compared to the other party. So we are interested in trying to work through a framework on that, whether it be the RESOLVE framework, the original framework or this framework. We are not exactly that worried about which of the frameworks. We just want one that has a lot of industry, at least, feeling of support and one in which the industry players themselves can feel comfortable with. In the other matters on request for information, we have outlined amendments to clause 3 providing information as at the time of the application.

This goes down to path length, capacity, availability, axle load limitations, maximal allowable speeds, breakdown of the infrastructure characteristics by the area in which the application deals with it, applicable safe working requirements, segment run times, the DORC values floor and ceiling for that part of the corridor which is affected by the application, the floor and ceiling amounts for that corridor itself and any other capacity or operational information reasonably required by the applicant, and any other additional information which is an attempt to actually get information up at the very beginning of the process rather than later on. The rest of our letters go through a little bit more detail than that, and I take it everybody has received a copy of the letter.

THE CHAIRMAN: Yes, if anyone hasn't, we do have copies.

MR MARCHANT: Again, that was only to help some informed discussion today. So on the information requirements, we have certainly

hopefully defined those through reasonably well, compared to the access undertaking regimes in Queensland, Western Australia and the rest. They basically mirror very similar requirements and matters. The issue that we are most interested in having a good dialogue on, whether today or in the near future, is on the dispute resolution mechanism to see if we can get something that people have confidence in.

On nearly all the other recommendations on negotiation and dispute resolution, we have actually indicated acceptance of the Commission's recommendation for changes and have outlined in the letter how we would draft those changes dealing with that section of negotiation for access and dispute resolution. With regard to pricing and standards, I will leave that material till later, but effectively all except for the dispute resolution process is the only one we have left open in this section.

[1.32pm]

THE CHAIRMAN: Well thanks, David. We have, sort of, breached both the negotiating for access and dispute resolution in - from David's comments. So I might suggest that - and from the Commission's point of view I think David probably gave a fairly good indication of where we were coming from in terms of the dispute resolution side. What I would like to do in terms of the discussion though, before going on to that area that they have - that ARTC have indicated that they have still either got to, sort of, some misgivings or an open mind, that we go over any comments anyone has on the various amendments which ARTC are saying they are largely happy with in terms of the information and other negotiating issues. Do we have anyone wants to make any comments on that area. Thanks
- - -

MR FULLERTON: Could I just make some general comments to start with. Is that appropriate, Commissioner?

THE CHAIRMAN: Yes. Yes. Okay. And maybe if we could - if everyone could identify themselves.

MR FULLERTON: All right. John Fullerton, National Rail Corporation. I am just going to make - I have got some general comments on the process to date, and Martin Svikis will be also making some comments. Do you want me to do it - - -

THE CHAIRMAN: Yes. If we can move you, probably to the lectern, is probably the easiest.

MR FULLERTON: Okay.

THE CHAIRMAN: You will feel better facing them than facing me.

MR FULLERTON: Yes. If I could just make some general comments on the process to date, and I guess, for those that don't know me I am John Fullerton, National Rail Chief Operating Officer. I am also Chairman of the IROB group, Interstate Rail Operators. Just some background. I think it is fair to say, I think which was also explained at the last forum we had here a few months ago, that the reality is there is very few access regimes in place, or signed access agreements in place. And that still remains a frustration, not just for operators, but I presume it is also a frustration to the track owners in trying to get to a point of having signed agreements in place.

I think 12 months ago we started this exercise, or participating in this - developing the ARTC access undertaking, and we saw this, certainly from an operator's point of view, as a vehicle to, I think, address some of the outstanding issues that we have as an industry. I think it is fair to say to date that, particularly with the draft decision, and the recommendations that have been made that there still remain some significant issues, remained - remaining outstanding. David has talked about the dispute resolution process, and that certainly is one of them. We still have some issues on pricing and escalation formulas that sit within that agreement, and also those issues relating to track standards and performance of the infrastructure. As well as insurance and indemnity issues. So we are still - they are still what I call threshold issues, that we still don't believe with progress to date has been appropriately addressed.

And I think going back to - going back to David's point a bit earlier is that unless we sought those issues out up front there will continue to be disputation. We will continue to have access agreements that, either won't be signed, or they will exist with residual aggravation between operators and track owners. And I think until we can fundamentally sort those issues out we are having - we are going to have some, I guess, difficulty trying to migrate to a position where those positions are being appropriately represented in an access undertaking.

And one of the suggestions we would like to make is that - with this process we are now going through, is to be able to sit down, whether it is with operators as a group, with the ARTC, with some assistance, whether it is from the ACCC or whether a facilitator, to try and resolve what I call those threshold issues, before we do move on. Because I think one of the things that has, as I said, been a frustration for all of us is the failure to set up access agreements that we believe are well balanced, give operators what they want, but recognising also what the track owner themselves need to achieve.

And I guess in overview comments this morning, and I will ask Martin to come up here shortly, is to - if in any way we can have some pause in the process to discuss those issues with the assistance of a facilitator so that it can then move forward, and I believe come up with a draft access agreement and an undertaking that can - best reflects the needs of industry. So just with those general comments, Martin, did you want to say a few words too? Thank you.

MR SVIKIS: Martin Svikis, SCT. If necessary, I have got some very specific statements to make about pricing and disputes, etcetera, etcetera. But they are probably more relevant to leave those to the body of the day. There is no doubt in our minds that we are dissatisfied with the process so far. I guess in some case when we look at the agenda and we talk about the finer points of how to step through a dispute process, we feel like saying in a sense what John is saying. Hit the brakes. Hang on a second. What about the real issues? You know, we can talk the finer points of a dispute process, but we are not talking about the finer points of indemnity, etcetera, etcetera, without going into detail.

So some of our comments are really about, with all due respect, criticising the ACCC about the process it has adopted. Not just about the undertaking itself, or how to get good access. We don't think that the interests of the access seekers have been taken up properly. We don't think therefore that we are getting certainty. We think that to be left with two broad threads of guidance in the undertaking relating to negotiation, sort it out through negotiation, or, don't worry about it. The freight won't go back to road. Those two very broad guidelines which are throughout the undertaken given as basically the reason why a non-prescriptive approach does not have to be taken is sufficient at all.

Coming back, that does not meet the test of certainty. That does not properly evaluate the interests of access seekers. We look at the word "access seeker". That is wrong too. We have been using access for six full years. I think - I would certainly take up David's comment about the industry is not mature enough maybe to yet, to properly yet economically value things. And that certainly has come out with the very broad sweeping valuations provided by the DORC analysis, still reigning largely incomprehensible by most of the access users, because of the technical nature.

But also we can't forget that we have had it for six good years, we have got a good access provider, we have got good access users, and we have got a great industry. We are ready now to get into the detail of it. We are ready now to take the final steps of the issues that John has outlined, and get into the nitty-gritty. But we have got a, sort of, a step in the process

that says well, we have got to have an undertaking. We, sort of, sometimes we feel, well, we don't want an undertaking. I think the access provider and the access seekers want access agreements. That is what is relevant to us now. Not this process.

We are concerned, if we don't object now and ask for a different tack to be taken that it is highly possible that an undertaking will be passed in March which will preclude us from properly addressing those issues, ever. So we ask for some discussion of the whole process itself, please. Thank you.

THE CHAIRMAN: Any other comments on the negotiating, and any fundamental issues? One of the things, it appears to me on Martin's comments, you say you don't want reference to an access seeker. You then use the term "access user". Is that what - like - and secondly, you are saying you want access agreements. Are you thinking that the undertaking precludes you from getting that?

MR SVIKIS: No. Not - that is not entirely what I am saying, no. We feel that - SCT feels that the process of an undertaking more really talks about people that probably are wanting to gain access. And doesn't property value a situation that we find ourselves in, which is having a significant amount of assets already taken up in access, getting access. The only thing we don't have is not an undertaking. The thing that we don't have is an agreement. We want an agreement, the access provider wants to get agreements. So it is like nearly, not so much that the access undertaking is necessarily wrong. It might be wrong. But it is not relevant to our issues.

THE CHAIRMAN: I am just wondering, David, did you want to make a comment at this stage? In terms of this - where - how agreements might be restricted by the undertaking? Or - - -

MR MARCHANT: Access seeker, access user, actually the undertaking is applicant. The - we actually didn't use access seeker, access user for that reason. In answer to the specific type of issues for an existing user who has had the benefit of the use without a contract, let us go back two steps. 89 or 90 per cent of the access agreement submitted this access undertaking, had been agreed in writing by the Interstate Rail Operator Group. The only issues outstanding were insurance and indemnities, and the price escalation.

They were the only three issues outstanding after two and a half years of attempting to get a reasonable consensus access agreement. And those issues outstanding are issues that there are quite significant economic

differences between an applicant and a track owner. This access undertaking seeks to actually get the economic value of the assets a track manager is dealing with, and put those economic values into a framework for floor and ceiling prices. The issue for an existing user, seeking to transition over to an agreement of which both they and we would like, if in fact there is a dispute between them on an access agreement for their use, that dispute, whether it deals with insurance or indemnities, or in fact, price escalation, there is provision in here, regardless of whether you are a present user, or whether you are, in fact, an applicant, because the distinction is only whether you have got an access agreement.

It - the distinction isn't about whether you are an operator without an agreement. The issue is you are an applicant to have an agreement. So, in Martin's particular case, under the benefit of this undertaking he has the benefit, even though he may be a user in fact, but not a user in the form of a commercial agreement, will have the benefit of the ACCC being the arbitrator in the event that we are not able to conclude that agreement with regard to the particular items he has raised. Or, for that matter, for National Rail or anyone else. Although I would point out National Rail actually is contractually bound by an agreement now.

The - that effectively, some of the attempts to try and resolve some of the individual, three individual commercial issues, can only be resolved when you actually put the undertaking forward and get the economic principles around the assets and all the rest bedded down, and therefore give the parameter for the mediator, or the arbitrator, using the CPA principles and Act and the structure around it. Unless you have those things bedded down, it is nearly impossible for the arbitrator then to - or the mediator to actually do that within parameters. So in that particular case, in the event that when we - after this undertaking was accepted, in the event that in fact there were still irreconcilable difference between the track owner and the applicant for an access agreement - they may be an existing user but they are an applicant for an agreement. In the event there is a dispute on that, then the benefits of the negotiation and arbitration provisions apply, in my view, as if they were a fresh, new person working onto the track, because they actually don't have a contractual relationship with us.

So I think that those issues will be - are able to be resolved by actually putting in place a mechanism that gives that very right of resolution. It is quite possible, today, that a track manager in ARTC circumstances, it is quite possible that today they could refuse access. And - on the basis that they couldn't negotiate an arrangement, and leave the only recourse to the applicant, in those circumstances, is basically to seek a declaration. And if they went to seek a declaration, which would take, probably, about 8 to

12 months, at the end of the declaration process they would still have to deal with a framework for an access undertaking, if in fact it was declared.

In my view, the probability of the track that ARTC being declared is extraordinarily high. So rather than having to frustrate people by actually seeking a declaration, it is easier to put a voluntary undertaking up and therefore circumvent that very long, long and expensive process. So, you know, the issues that attempt to resolve a negotiation, an access undertaking will give a lawful structured format to enable those individual negotiating items to be either attempted to be resolved, or arbitrated. So I - I am not sure, but - I am not sure, and I am positive, that going into a time out to deal with an indemnities, insurance and pricing escalation will not get an agreement between ARTC and the people who seek it.

THE CHAIRMAN: Thanks. Well, that probably - given though the issues that have been raised, maybe we could go over the - some of the - the framework dispute resolution issues. I mean, I think David has now made the point, one, particularly now that there is an arbitration role to be provided by the Commission, that was a major issue that was raised at the last forum. And that has been proposed. And perhaps we - before we go onto some of those specific issues that both Martin and John and David raised about - I think you have got the real issues of operational issues that you are talking about, what would be reflected in an agreement.

The process for dispute resolution, maybe we could just tease that out a little bit more. David has raised some concerns about the panel-type approach, the conflict manager role, and presumably, there is no major dispute at the moment about the framework of negotiating - a three step process of negotiations between the party, optional mediation, and arbitration by the Commission. It is a matter of how the thing gets structured together. So I would be interested in comments from - from others, about these proposals which include the appointment of a conflict manager. We have got a publication of arbitration decisions, and allowing joinder of arbitrations by the arbitrator. I would have thought, and this goes beyond any discussions or further comments others may wish to make about the time out issue that has been raised.

I mean, it is not - we see this process as needing to move on. But certainly, around those issues of dispute resolution, do parties have comments, and particularly in response to what David said? Or are we happier to get then onto the - some of the more nitty-gritty issues? Is the certainly, we have had - yes?

MS KIRSCHNER: Chairman, I am Shirli Kirschner from Resolve.

THE CHAIRMAN: Yes.

MS KIRSCHNER: Just in - if it is useful to people, it may be - it is quite difficult often to read about processes in a report. They tend to look very cumbersome and bureaucratic.

THE CHAIRMAN: Well, maybe if you could - - -

MS KIRSCHNER: I am very happy to run through them.

THE CHAIRMAN: - - - come and make some comments to help us address this.

MS KIRSCHNER: I just think it might be useful for me to just address some of those issues because some of the concerns raised are quite legitimate. Just quickly, and in starting out, what we tried to do - and there was a team that actually looked at designing something and what we started from - the starting point was that I thought the submissions that came through on the process that was a negotiate - use ADI Lack Mediation Arbitrate Model didn't want to sort of throw out that process. What they were saying, quite legitimately, is, "We don't want it to be such that, you know, 180 days or a year, half a year down the track that we finally get a decision. We want it quick, we don't want it to be gamed and we want it to be flexible."

And that was really what was trying to be designed. There was one other factor that we took into consideration that might be useful, and that is the learning from other access areas such as telecommunications and national electricity market and, finally, rail access disputes in New York in the United States. And one of the really interesting things that came through that was that when you have a dispute, if you are in the business of rail you are in the business of running trains, you are not in the business of having disputes. Disputes are these things that you need to get rid of quickly so that you can go back to your own business.

And the reason that that is really critical is because other industries like lawyer - legal industries, etcetera, don't have that issue but what people have found is if you say to people, "Go and get a mediator," you have often got two CEOs at the table who don't even know what a mediator is, let alone where to get one. Or they know what a mediator is but they have one or two in mind in a particular state. So what the idea was was to say, "Okay," - or you have a mismatch. You have one who has been to seven mediations because they happen to be the access provider and they have been through it before and you have got one who is a new entrant who has been through none.

So the idea was, "Let us have a very quick streamlined process." The first thing was the recognition that negotiation is a really good step and we also thought that the people in this industry are sensible enough that if there is a problem the first thing they are going to do is negotiate. So that if it is a dispute one would assume that they have already been in negotiation for some time and the reason there is a dispute is because they can't negotiate it out. So we didn't see any real benefit in actually mandating a negotiated period.

We thought you could cut a whole lot of time by assuming that people had already negotiated. So that is why the first step was to get the CEOs to meet, to ensure that it had escalated to a senior enough level in the company that there was nothing else that could be circuit broke. The second thing that we assumed was often the CEOs would know about it, because that is, you know, good corporate governance. And so that was the idea of having the CEOs meet with what we call the conflict manager.

And I take on board the comments made before, because I think that they are right, that the skills of a conflict manager are very similar to the skills of a mediator, ie they are not there to make a decision. However, the role of a conflict manager is very different to the role of a mediator in that the mediator is there to resolve the dispute, the conflict manager is there to project manage the dispute. So the idea of the project manager - if they happen, you know, to resolve the dispute that is well and good. But in electricity we haven't had one of those.

Basically their role is to sit with the two CEOs and say, "Okay, well what has been tried - we have negotiated, we have done this, we have done that. Here are some other options, okay." So in that way, if the parties consensually decide that they want to mediate then one of the roles of the conflict manager is to assist the parties in identifying an appropriate mediator and getting that mediator in quite quickly. And that is where the panel was thought to be helpful.

It wasn't there, in any way, to restrict the choice of mediators for the parties. So that if the parties wanted Sir Lawrence Street and he wasn't on the panel, that would be fine. It was just meant to be there as a starting point so that there were CVs and stuff available and people didn't waste time. And if they wanted to go outside those panels that is completely fine. The second major point that we tried to address is the issue of gaming. Now you find an access regime and you will find a regime that often gets gamed. And the thing about gaming is just that, you know, often there is - gaming is probably harsh.

It is probably a mismatch in commercial drivers. So one party may have a commercial driver that says "delay is not a bad thing it is indifferent towards a good thing" and the other party has a commercial driver that says "delay will mean that I am not in business next week". So the idea was to balance those expectations by not making mediation a necessary precursor. So the idea was if you have got a conflict manager that at any time during your mediation, or expert evaluation, or whatever process that you are working through, either party can cause the matter to go to an arbitration.

And in that way it is not possible for the matter to be blown out because you are arbitrating along, the access seeker sends in a notice, you meet. The arbitrator gives you 21 days, or whatever, to exchange information, etcetera, but at the same time you have now got an incentive and an end date for your mediation to occur because one of the biggest problems with mediations is that often there is no - while the parties are negotiating in good faith and doing really well, there is often no real incentive for them to end it at a particular time.

Whereas if there is an arbitration hearing set down for six weeks time, from experience you can bet that in five and a half weeks time that they will get a deal or they won't get a deal. So that was the idea of running the parallel processes. And what we took - it is not a new idea, all it was was a small variation on what ARTC put up, quite properly, as having - you know, moving from high - low cost to high cost interventions. The only thing that we did was to say, "Well, hang on, do not stop your arbitration intervention because it is a very valuable incentive for parties to negotiate."

So that is basically it. The only other two practical small adjustments that we suggested was publication. In other jurisdictions publication has been valuable for three reasons. One is: really really useful to see what other kinds of disputes other people have had - because you can avoid them by just following the precedent of how it was decided. That is one reason, great transparency. The second reason is a little bit less obvious but what happens then is you have a situation that arises whereby mediation and expert evaluation, ie where you get your own private expert to tell you which way it should go and you deal with that, those two processes are not public and they are private and they are confidential.

And one of the other incentives in other industries has been that often parties will want to keep their negotiation, or whatever, private and confidential. And that is a great incentive for parties to stay using their ADR processes rather than use arbitration, because once it is with arbitration it does become public. And the final - the final discussion point

that you will probably find in the report was just an interesting adjunct to all of that. One of the things that we discovered, when we were researching overseas, that people need to be a little bit careful of is that having any kind of clause which, you know, well meaning, saying if one person gets a commercial arrangement then other people should get a like for-like commercial arrangement.

The only issue with that sometimes is that it can result in an argument that talks about, "Well, you can't unilaterally resolve any disputes because anything you do needs to flow-on." And what that then can turn into is a dispute resolution process where everybody in the industry has to be involved because, otherwise, you have an argument as to whether it should flow on or not. So that is the only other thing to be careful of. This was designed very much as unilateral: it is your issue, get it in, seven days, conflict manager, mediation is not working, start the arbitration process and one of the two will sort it out, whichever one is quicker.

THE CHAIRMAN: There was a further point that I think David made about the threshold, or what expectations on the conflict manager that he would have to be Einstein who could bowl leg spin as well. So if you could - - -

MS KIRSCHNER: Thank you, thank you. No, that is a very very good observation you make. And look, that is an issue in any technical area - electricity, telecommunications, rail, it is no different. What you are looking for in a conflict manager is a good project manager. They do not need to be able to understand your industry so that they can go and get a commercial job in your industry. They only need to be able to understand it to the extent necessary to - so that you don't have to sit there and explain everything in mono-syllables.

Now the best place to look is - you know, you look at court cases that are run in relation to rail or telcos. Barristers and lawyers who are not technical people - most of are Luddites - manage to pick up enough technical understanding to run a case. So that is the level that we are talking about. We are not talking about technical experts within your area, we are talking about people who, say, work in building or electricity who have a technical aptitude. Who then, because they are doing a lot of disputes in rail, pick up the language and will invest in their education to understand what are the commercial and corporate drivers within your industry.

And the more important skills are their ability to project manage, their ability to cut to the chase on the issues, and their ability to actually work out - I think one of the comments that Martin made was that when we get

into these discussions that are intense, whether it be about an access regime or whether it be a dispute, people tend to get very focused on the micro detail and it is very easy to stop and not to look down and say, "This is the helicopter view, this is the big picture, let us fix the big picture."

And what you want is someone who can do both of that - who can say, "These are the micro issues we need to do and here is the big picture. Now, let us go back and fix the big picture as well. Have you thought of this? Have you thought of this? Have you added this in?" So that is what you are looking for and there are quite a lot of people who have those skills who would be willing to pick up the technical expertise.

THE CHAIRMAN: Thanks.

MS KIRSCHNER: Any other questions - I ran through that at breakneck speed. No?

THE CHAIRMAN: No, that has been helpful.

MS KIRSCHNER: Good.

THE CHAIRMAN: Thank you. So any comments on this - like I think we are - what we are talking about here, in this initial session, has been how you build the framework to sort of reinforce the processes that have already been underway, and that the framework is transparent and fair and reasonable. And - I mean, we are looking for any comments as to - and there have been changes and adjustments made in what is now being put in the undertaking. Obviously ARTC have made some qualitative comments on this dispute resolution process. Before we move on to the access pricing are there any further comments?

MR MASON: John, could I just raise a question? I don't know whether it is - whether I should go out the front or not for a question.

THE CHAIRMAN: Yes, can you - yes, be useful if you all just pop up there just so that we can get it for the record.

MR MASON: Yes, my name is Peter and I am a consultant. I think I - I am seeking some guidance, I think, from you. Because I think I have heard issues raised by the operators, and I have heard answers from our side that don't address those issues.

MR HALL: Hear, hear.

MR MASON: My understanding of the issues that were raised is some problems with the draft contract. Now my understanding also is that the draft contract has been blessed by the ACCC as part of this undertaking therefore it doesn't matter what happens after that event, there is no basis for the things that are included in the contract to be changed through a dispute resolution. That is what I think is being - what I heard being addressed earlier: there are problems with the contract, the operators are not happy with issues in the contract, dispute resolution is not going to resolve it.

THE CHAIRMAN: Well, maybe if we could hear a little more about the problems in the contract and how that impacts. I thought that would be sort of reflected in the final agreements but - - -

MR MASON: But is not approval of the draft contract part of the undertaking? It is attached to the undertaking?

THE CHAIRMAN: No.

MS KIRSCHNER: No.

THE CHAIRMAN: I - sorry, does - - -

MR SALISBURY: The agreement itself is a - - -

THE CHAIRMAN: Maybe - maybe if you could talk - - -

MR SALISBURY: Sorry.

THE CHAIRMAN: We need to sort of talk to a microphone somewhere or it is not going to get on the record.

MR SALISBURY: David Salisbury from the ACCC. Essentially what we are doing at the ACCC here is to - to put our decision down on the basis of the undertaking. And certainly once the undertaking has received an endorsement from the Commission that is something that does - does maintain and gets changed at the discretion pretty much only of ARTC. If there is a disagreement about the terms of those undertakings then that can move to arbitration. But the access agreement itself is indicative and it is designed to - within the principles established in the undertaking it is designed as a process whereby agreements can be made outside, or different to what is in the indicative access agreement, with guidance from what is in the undertaking.

MR MASON: I still see the point being missed.

MR HALL: Yes.

THE CHAIRMAN: Okay, well Bruce do you want to come - - -

MR HALL: Yes, Bruce Hall from FreightCorp. I - Peter Mason has hit it on the head here and unfortunately, though, I think we have then took off at cross purposes. What we are talking about here is that as it is currently constituted the agreements that operators have still have significant areas of dispute - and David outlined them. The likelihood of this access undertaking, as it has been drafted in your draft decision, being the mechanism which will free up this log jam of dispute, the operators say, is most unlikely.

Now we have got two ways to go here. That is make the access undertaking more proscriptive or, within and in the shadow of the access undertaking, making the indicative access agreement that is in there more prescriptive more - or perhaps that is the wrong word to use, but give more direction. What the operators are coming from is perhaps that latter course. Can we sit down with ARTC, with the facilitation of ACCC - and we just heard a sales pitch for the way you might facilitate or mediate that - and resolve such that the indicative access agreement within a very broad access undertaking gives far more direction and therein far more likelihood of resolving what have been running sores since the formation of the ARTC.

[2.07pm]

If that is not the course, and this very broad access undertaking goes into the - goes forward, then the likelihood is that the current disputes will continue to be there, without a framework that would suggest that the logjam is going to be broken. Let us resolve that before we go out there. Now, maybe that very process may say no, it is not the indicative access agreement that we should - well, maybe it is a combination of both. But maybe it is not the indicative access agreement we need to concentrate on. Indeed, it is to make the access undertaking a bit more prescriptive.

I don't know that. But I think if we started with looking at that indicative access agreement, firstly, and try and facilitate - see if that will facilitate and get a result on some of these areas that have been intransigent, then it will certainly give a big direction to how the final - what the final form of the access undertaking may be.

THE CHAIRMAN: Bruce, the - just while I have got you there. So, what precisely is it, in terms of the indicative agreement, say, if you were going to, sort of, polish that up a bit more. What would you be focusing

on, or more prescription in the undertaking. And how would that be more practical or pragmatic than the undertaking actually, if it is going to be effective, being worked through and individual agreements actually, you know, hopefully being reached. I mean, what are the blockers that you see in what is there?

MR HALL: Well, I think that is a difficult question because the - as I have said, it - as operators, we are all experienced with the agreement. We haven't had the benefit of an undertaking, to see what that does to make life any more pleasant, if you like, in negotiating agreements. But, again, it still comes back to these broad issues of pricing principles, issues of insurance indemnity, the ones that David has outlined. I mean - - -

THE CHAIRMAN: And - well, I - - -

MR HALL: And, you know, it - we have a situation here of trying to strike a balance. I mean, the word keeps ricocheting around every time I come here, and it is something - because as operators, we keep saying we want a balance. But the balance has got to come in an environment that recognises that we have got a monopoly supply situation. The ability for rail based operators to switch modes, there is a very high cost associated with it. And therefore, we are in a very difficult bargaining position.

THE CHAIRMAN: Okay. Well, I think there is a couple of - there may be that David wants to respond at this stage, or we can run through this in terms of some of - at least we are covering in other sessions some of the specific areas that you are talking about. But, I think, Linda, you had a comment. Thanks, Bruce.

MS EVANS: Linda Evans, on behalf of Toll and Lang Corporation. And I - it goes to some of the more specific issues that we will discuss later, in the context of pricing and service issues. But it, perhaps, reflects some of these over-arching concerns that the operators are addressing. And the first is that the undertaking and the access, indicative access agreement, don't deal explicitly with the sort of service quality and performance issues that operators need in order for them to be able to provide a reliable service, and in order for them to be competitive.

The Commission has identified, in its draft decision, the very clear and explicit relationship that there should be between price and the quality of service. And indeed, the prices which are set, and explicitly set in terms of the access undertaking and the indicative access agreement, are said to be based upon certain service characteristics. One of the issues which has been identified in the August workshop and I think has been consistent in terms of operator submissions, is that that is not the service standards that

they are actually receiving, and therefore that is affecting the quality of service that they can provide and how competitive they are in those industries.

So it is a fundamental question about importing some service and quality standards, as both an enforceable part of the undertaking, and in terms of the indicative access agreement. Now, there has been some move towards that in terms of performance indicators, but that, I think, goes to the nub of what a lot of the operators are talking about. The second is an issue about the ACCC's approach and the impact that intermodal competition has in relation to rail operations. And there, there seems to be quite an important functional market delineation between the provision of track access, rail operations, and downstream freight forwarding.

And it is quite clear that there is intermodal competition in downstream freight forwarding, and switching costs for freight forwarders are quite low. But fundamentally, switching costs for rail operators are much higher. And that is the point that has been made earlier. And in some of the Commission's assessment of some of the principles, there is some confusion between what is three essentially separate functional market delineations. So I think that is perhaps some of the framework things that we will talk about in more detail.

THE CHAIRMAN: Thanks, Linda. David, did you want to make a comment at this stage?

MR MARCHANT: No.

THE CHAIRMAN: Well, I think certainly we have identified some question marks from the operators. If everyone is happy, and given that we have got over the first couple of items fairly quickly, we will go on to the access pricing, because that may, sort of, raise some of the issues. And then, I would be proposing that performance indicators, and this issue that Linda has raised, obviously, about linking price to what you get for the price, is something we would discuss after that. So the ARTC's undertaking sets out the principles which are used by the ARTC to derive access charges:

Access charges will be based on an indicative access charge that ARTC publishes for services in specified geographic segments, and which have certain characteristics. Departures from these indicative charges will take account of the characteristics of individual services, including technical aspects, the particular segments of the network to which access is sought, the opportunity cost to ARTC, the impact on other traffic in the network, including system capacity

and flexibility, and the market value of the particular time path being sought.

In other respects, access pricing will not differentiate between types of operators or between like services operating within the same end market. ARTC's indicative access charges are such that revenues are at the low end of the floor/ceiling range for each of the specified segments. ARTC claims that the indicative access charges are market based rather than cost based, and are designed to promote use of its infrastructure in view of competition from road transport.

The indicative access charges are effectively price capped. There is provision in the undertaking for indicative access charges to be adjusted annually by a factor which is the greater of CPI minus 2 per cent, or two thirds of CPI. The Commission understands that ARTC's long term strategy is to build a sustainable interstate rail track business. As ARTC has committed to ongoing reductions in real prices charged to users, future profitability will depend on growing the amount of traffic on the network, and greater efficiency.

Given that the most significant revenue sector of the ARTC business is freight, that could alternatively travel to road or sea, ARTC argues that it has every incentive to drive greater productivity from the asset, and ensure that the physical asset is maintained to its increased relative competitiveness.

So, to some extent, what is being said there is that is the incentive for ARTC to meet the market interest and the market imperatives:

The Commission has therefore considered the proposed undertaking from the point of view of setting in place a structure that ensures ARTC is provided with the appropriate incentive to allow it to work towards it goal of developing the sustainability of the interstate rail track business through growth in traffic. The draft decision interprets the submission by the ARTC and by a number of interested parties as implying that intermodal competition plays some role in constraining ARTC's ability to increase charges.

The draft decision suggests that one effect of ARTC committing to these levels of pricing is that its returns are below the full economic costs of providing services in the short to medium term. On this point the Commission makes the observation that in the longer term this may undermine investment incentives, and compromise the sustainability of the network. The draft decision also notes that in the event that competition proves not to impose genuine constraints

on ARTC's pricing behaviour, the price capping of the indicative access charges, combined with the imposition of floor/ceiling price limits provides users with a degree of protection against monopolistic behaviour.

A number of submissions argued that the indicative charges are unacceptable as they bear no relation to cost. The draft decision takes the view that given that the current charges originated through a process of negotiation with the users, these charges were made with reference to the market rather than costs. As I mentioned earlier, ARTC proposes that its access prices will be subject to floor/ceiling revenue limits. The floor is given by the incremental or avoidable costs of providing a service, which excludes depreciation and a return on assets employed.

The ceiling is defined as the full economic cost of a providing a service, including the costs specific to a service, depreciation, and an allocation of indirect costs, and a return on assets employed. ARTC claims that costs are forward looking, and include planned efficiency improvements. In developing the floor and ceiling limits ARTC has used the cost based analysis. ARTC's approach is generally consistent with the Commission's own building block approach, as described in our draft statement of regulatory principles.

This approach has been applied in other areas where infrastructure is regulated, such as gas pipelines, electricity transmission, and at Sydney Airport. The draft decision therefore broadly endorses the ARTC's approach. The ARTC has also largely accepted the parameters that ARTC has used to estimate its weighted average cost of capital.

I think we had a few disparaging comments about that issue, or it being a little bit questioned, in terms of technical hieroglyphics:

Although the draft decision presents a different WACC number to that proposed by ARTC, the numbers are of a different formulation and are therefore not directly comparable. A guide to the Commission's approach to estimating WACC is contained in a recent Commission publication entitled the Post Tax Revenue Model.

So, if you need some good bedside reading, you could take that with you:

In order to provide an independent check on the asset valuation process carried out for the ARTC by Booz Allen Hamilton, the

Commission, as I mentioned, employed a cost consultant, Currie Brown. Currie and Brown were also contracted to form a view on the reasonableness of the ARTC's operating costs. Currie and Brown concluded that ARTC's DORC asset valuation was reasonable, and the operating costs were low when compared with Australian rail track operators.

Overall the Commission accepts ARTC's approach to determining prices, and to its assessment of the economic cost of providing services on its network. The draft report makes a number of recommendations in relation to access pricing, but these relate more to matters of clarification than of principle.

David, would you like to make some comments on the pricing side?

MR MARCHANT: Although it would be fair to say ARTC thought the DORC value was an underestimate. And in fact, I even think the independent consultants suggested the DORC may have been slightly under. We submitted it because we didn't actually see it as being relevant to the way we had priced the market, because a ceiling is practically irrelevant to us. And I think all the operators accept that a ceiling is practically irrelevant to us. I mean, effectively we couldn't price to the ceiling and keep our market.

Although some submissions suggested that the actual DORC valuation to an asset shouldn't be utilised. It should be the actual cost return. In many parts of our segments, if that was the case, with the weight of the average costs, the capital prices would increase by 20 per cent. So the - so using the form method through and put on the WACC that goes with it, that would be an increase in prices in real terms, than the present pricing level that we have maintained. The issue comes down to standard and what we have attempted to do this time round and the last one, was publish a whole range, a generic range and mix of standards, to enable applicants to have bargaining power by being able to see a generic range of historical measures.

And be able to therefore be able to see how they can negotiate a process through. The difficulty is that the industry is not homogeneous with regard to standards, although suggested by Toll today that there is homogeneous standards. In fact, in different locations what is required for axle loads and speed is actually quite different. I think even using the Toll submission, the Hunter Valley criteria within the last Toll submission suggested that it should have a different standard, both in access pricing and outcomes, and that is the exact example used in the Toll submission, and yet today wants a homogeneous standard across everything.

Now, there isn't a homogeneous framework. What we indicated was an indicative access services. The indicative access services do represent what we actually deliver to the market, as distinct to suggest that they don't reflect that. And we actually do, in the access agreement, contract in the schedule a path according to those standards. And we actually contract that path according to those standards. And that is actually where the back end of this - how do all the measures fit to my path application. It actually comes to the schedules when you do the actual access contract.

Now, we are obviously wanting to publish, and have started already to publish, material that gives track quality index information, healthy versus unhealthy. We have offered to publish a pathing framework to enable people to choose their pathing. It is really difficult to commit to saying that every piece of track will be kept to a TQI of 32, for example, because on one track, such as Broken Hill/Crystalbrook, the market place could change in the terms of this agreement, and not be required by super freighters and only be required by heavy steel trains at 80 ks with a whole different configuration, of which you would have a different track quality index.

And you would bring it back up if someone went to contract for it. What we have tried to do is make commitments about publishing the track quality indexes over time as well as contract to track paths in the actual access agreements themselves and the framework around that. We have offered on this occasion, to move away from the thing fit for purpose comment, because people said that was vague, although I notice that that is actually what is used in the gas industry and the others in their undertakings to both their regulators and the rest, and suggest it to a higher standard called good and safe.

We were going to use the access contract from New South Wales as the base one, but we decided to go to this one as being more advanced. The issues around those standards is an issue of actually informing the market over time by actually publishing the material and therefore enabling access seekers to negotiate. So what we have undertaken to do is move from fit from purpose to good and safe, a high level. Secondly, that we publish the standards, but thirdly that we contract in paths, attach to the contracts what those standards are for that path.

And I mean, that wouldn't be new. What the problem is in this discussion, is there isn't a nexus in people's mind to what is in the undertaking and what is in the access agreement they sign with regard to path characteristics. Some of the applications here about homogenous standards, are the very people wanting to run trains at a different standard at a slower speed than that offered, of which we were only too happy to do. They are

indicative, and that is what they are based to try and do, indicative to get a bench mark.

[2.28pm]

So what we have tried to do is actually get an informed market. Now, the rest of the principles that the Commission went through with regard to excess pricing and service standards were things that we responded to in our letter. But the heart of the discussion on the last item, which will come up again in this one, is indemnities, insurance and price escalation. I think the bottom line to actually help this go forward is people should say exactly what they want in those three clauses, and lets get it over and done with.

Either that, or what we are going to be doing is double guessing what people are really saying. I mean, the last lot of meetings, last discussion is, well, these are three issues we are concerned about but when asked, well, what is exactly your concern and how can that be resolved, you know, the answers are woolly, and that doesn't actually get us anywhere. So the same comes with service standards.

THE CHAIRMAN: Right. Well, I would seek comments from operators.

MR FULLERTON: Yes. I think I would just like to go back, I guess, to my opening comments about the general issues, and I think David has touched on some of those. We are seeking a time out to go back and address what we believe are the threshold issues, which includes the pricing and escalation, and being able to match the price you pay for track to the standards of that track. Now, whether that is for a low speed path, a high speed path, by corridor, is making sure there is a linkage between the access that is purchased under the contract, and a commitment to the standard of that track, and the performance of that corridor.

I think it is something that we believe is a priority in going forward with this access undertaking to agree those bases up front. I think there has been a lot of discussion on the disputes process here this morning. The issue will be that if you get the agreement right up front the need to go through disputation would be minimalised. And I think that is the important thing that we are trying to say, as operators here today, that lets get the agreement up front, get some understanding on track performance standards, pricing, escalation, and I think we have got the means to go forwards. So I think, again I want to go back to those earlier comments that I made that we wish to discuss those threshold issues up front before we wish to move forward.

MR SVIKIS: A couple of broad comments before I talk about some specifics, and I would like to then re-emphasise David's invitation that he has just made there, which could really be read in the exactly the same way as a request from the operators to pause and have a bit more discussion about the specific points. First of all one of the things that we are all seeing here again today is some consternation about understanding what we are trying to achieve. If there is that communication gap still going on here about what an undertaking is and what an agreement is and where this lies and where that lies, that does beg absolutely directly more discussion, and hence the pause.

We also have to obviously - well, I make one other observation, and that is the methodology of consultation that has been taken in so far. There have been plenty of opportunities for operators to submit documents and to put forward cases even our site at Altona, for example, to the ACCC. As well as that, we all obviously understand, there has been plenty of opportunity to talk to the ARTC over the last couple of years as well, which we have taken as many as those opportunities we can up as well.

But coming back to the process itself. A comment that we would certainly make is that there has been not too much interactive discussion through the process. And it is quite possible that our lack of understanding in that, sort of, you know, take the sort of humble approach there, a lack of understanding of how these things work could have been the direct result of that lack of interaction in consultation. Even this process right now is pretty formal, pretty staid.

A lot of the exposure that we have had to the ACCC throughout the whole process has been - where the ACCC have been very good listeners, those people who have had some exposure to me have complimented you guys on exactly that skill. What I am really trying to get at when I say that is that there is not too much coming back. So if we make those observations, the agreement to pause, could be a total lack of understanding of what is required or could simply be commonsense based on why we have still got furrowed brows in meetings like this at this stage. There is no doubt that the operators have a high degree of nervousness about those sorts of very things.

In terms again of why we don't think the process, and I take up John's direct question to me, why we don't think the process is going to add to getting agreements signed up, which is really what the whole thing is all about. Getting access agreements. The undertaking is supposedly meant to be a means to that end, not the end in itself. So, yes, we have some direct concerns about that. I would like to go in a bit more detail.

Again, two threads that run through that document are that we are not going to be prescriptive because we think that a general concern of freight going back to road will limit any advantages that the monopolists access provider might take. That is an awfully blunt instrument. If we go back and say to ourselves that we are really looking to get down to the finer points, get on with life, and sign up the agreement, why would we be wanting to recognise an instrument such as that.

First of all it is non-specific. Lets have a look at the attributes of an intermodal threat as an instrument towards getting a good access agreement under the undertaking. It is non-specific. It is blunt. It is negative. It is a threat. If you don't do this that is what is going to happen. That generally does not necessarily provide for good consultation, good problem solving, at all. Okay. The other assumption there, of course, is - I am sorry, I have forgotten the lady's name, Linda, is it, from Toll - hit upon, is the fact that being in the business for quite a while, we have built up a fair few assets.

I assure you that saying to an access provider, if you don't cave in at this point I am going to put my stuff back on road. There is no way in the world that is going to help me in negotiation. So where again is this thing? It is in your undertaking, all the way through it, says that we are going to get comfort in the negotiation process. We cannot see it.

The other problem, of course, with that instrument being used, and I call it "instrument", is that it relies on a price gap and relies on a price gap being perceived. For example, we are now in a negotiation of sorts with the access provider over price itself. If I could make a great statement here right now, for example, that would publish my view on the price elasticity between road freight and rail. Why would I want to do that? That is going to contradict my exact negotiation position that is happening right now with the same access provider. So by definition again, it is not a good instrument.

The other thread through the undertaking which is not going to help towards getting an agreement signed is leave it to the operators to negotiate. That is the other sort of pattern we picked up in the document. We have been negotiating for two years. We didn't want - we weren't waiting for an undertaking to tell us to go and do that. Hence a strong dissatisfaction again with the undertaking being a tool to help us resolve problems. We certainly appreciate the comments being made by various parties that there may be better ways to negotiate, there may be fine tuning of steps of disputation, but, you know, we sort of wouldn't disagree with that, of course, and be open to any kind of suggestions with that view. But we certainly have a strong concern that if the undertaking goes through in

its current format that our opportunity to negotiate will be limited even moreso because it would have been seen as a tick, you know, a tacit approval of some of the issues that are out there right now.

In other words, nothing has changed and it has gone through and it has got an ACCC stamp on it, and its the equivalent of law. So, you know, we don't necessarily get comfort from the undertaking, but again that could be a result of us maybe not properly understanding the process and getting lost in where the issues lies, whether it is an agreement or an undertaking. Okay, so I will certainly stand corrected if we have got that wrong. It is not for want of trying though. And I guess if it is not for want of trying you have to then, of course, argue and give weight to my earlier opening criticism that it does not give us certainty.

As far as the pricing models are concerned, and DORC, there is no doubt about it, it is a technical approach, and David recognised it straightaway. The fact that it provides a ceiling which allows the current indicative access charges, the amount of money we pay right now, to doubt before raising the eyebrow of a regulator, yes, says that it is probably pretty broad in its sense. Yet DORC again was used in the undertaking to provide a guideline of fairness and reasonableness in the approach being taken.

So on one hand everybody is sort of saying, yes, its pretty loose, yet we are relying on it as well at the same time. There is a contradiction there. Also it was relied upon to deal with the issues that the operators have put forward in terms of liability and indemnity. Basically, if I recall it correctly, it sort of said, well, there are some concerns there, the clause has sort of pushed more responsibility back onto the operator than what legally they would normally be accepting out there, in the real world, but look, the price looks pretty cheap, so, it should be right. We are well past that type of stage of the negotiation. David wants to sign up access agreements. We want to sign it up. Lets get on with it, is what we feel like saying about that issue as well.

Also lets have a look at the nature of DORC itself. It is a methodology, correct me if I am wrong and you probably will, where it actually is a snapshot evaluation. It has no time factor in it, okay. The depreciation rates, the asset evaluations, and for costs of capitals, etcetera, the prices are all ratios, those ratios that are finding time today. There is no doubt about that in business, successful businesses, are people that find their way to other cost plateaus, downwards, in a downward direction, okay.

So what is stopping, for example, the price being in the middle ground, in a floor and ceiling scenario, and then the revaluations being taken over a period of time, and it is simply all drifting upwards. This leads onto there

being no incentive for proper management of assets. Now, I am not saying at any stage that the assets have not been managed properly. I can point to many clear improvements in the track overtime. This is not a complain about performance of a particular provider. This isn't looking at a model and a policy and an undertaking that has been put forward, it is meant to help the industry. There is no incentive in there to provide good asset utilisation.

If we now go into detail. Again, the incentive is not there because DORC, by definition, is a snapshot of time on the ratio of income received and cost expended. There is no overtime analysis. And every business, us included, have got significant benefits, plateau changes, plateau changes and cost base overtime because of things outside of that.

Lets go look to then the price. The indicative access price. Mark said to me, "Martin, if you get out there and complain about that, they are going to tell you to sit down. They are going to tell you to sit down because your prices - they will say your prices are capped to two-thirds, etcetera, of CPI and therefore you don't have anything to worry about." Well, what is all the rest of it in there for anyway. We are here to talk about the whole industry, the whole process. Okay. It is not just here to talk about our price today. We are certainly not here to discuss that.

So I don't see that as an answer to - a potential answer to our position. However, having an income stream regulated by CPI which highly unlikely it is going to go down. It may, but I doubt it very much. World economies have not seen deflation for quite a period of time. Therefore it is going to go up. Therefore it is actually a regulated price. Now, the whole of Australian economy is moving into deregulation, yet we are going to have a regulated price environment. And again, if I read the words in the undertaking wrongly, it says in there that if the price is regulated it gives the access provider an incentive to create savings because it can keep them and not pass them on.

I assure you I have never seen anything where a regulated price has created that sort of behaviour. Regulated prices generally create the opposite behaviour. There is absolutely no doubt about it that the rail industry has been successful because our prices have dropped like a stone. All we want to say is the same thing. We are just looking at every single cost element and we would like it to go down. So where is the incentive in that pricing mechanism for them to go downwards. Again we go back to DORC. DORC is used as a tool on the current price, okay, DORC is used on the current price to say, don't worry about it, its cheap as it is.

Yet we could all look at DORC and say, I don't know who owns a business that could afford to double its price and, again, get away with it for a starter, and let alone not attract the raising of an eyebrow of a regulator.

THE CHAIRMAN: Martin, if I could just interrupt you for a second. In terms of prices going down, I mean, what is the - therefore you are saying, well, DORCs irrelevant. I mean, in terms of sustainability and reinvestment how would you see that working?

MR SVIKIS: Yes, sure. Sustainability investment is measured by return on capital, employed. The key thing, employed. I can improve my return in the business today, and we have done so, okay, and I am quite happy to stand here and say we have doubled our return on our assets employed in the last year. And my prices have gone down. I see it working by a better management of a cost base. The return of capital is a ratio. The top is your income, the bottom is your cost. You can improve that return and the sustainability by lowering the cost base.

I take the annual reports of FreightCorp, and I see for the same revenue received they have halved their labour bill over a period of time. Before privatisation. I look at the annual reports of Freight Australia and see they have almost halved their labour bill on the same revenue, before they were privatised. Even if it is government corporations. So there is us, there is FreightCorp, there is Freight Australia, all access users. They have had significant improvements in the return on capital employed by attacking the cost base. DORC is a snapshot in time, it does not necessarily allow for that because it freezes the amount of assets involved in that calculation over time.

THE CHAIRMAN: But you can point to where ARTC can do that?

MR SVIKIS: I could point to where ARTC have already done that.

THE CHAIRMAN: Yes. It is the future we are talking about.

MR SVIKIS: Absolutely. It is about getting a model and a policy in place that gives everybody confidence we are getting value for money. A regulated price is really going against the whole direction of the Australian economy, let alone businesses. Our price has gone done. We have got a right to say we want the rest of it to go down too. Or at least see we are getting value for money. Which then brings us onto things like the costs of doing business.

The cost of doing business is also not just about the access price. It is about things like the liability, track quality, what we are getting out of it. The issues we have raised like capacity, the invisibility of investment strategies. We recognise this is not just about price. We encourage our customers not to just look at the price but to look at the value for money and the impact on their business through dealing with STC. So no more than anybody else. Yes, that is our comments on pricing and DORC and the irrelevance of it.

I could actually probably take - not a cheap shot, but a real shot. I could say our electricity costs in Victoria are doubling, going up through the roof, and the same access modelling pricing scenarios were employed in that industry. When our contract for our fridge dock expires for electricity purchasing next year it will double directly. My customer electricity bills are already doubling as well, one of them so being McCains larger freezer manufacturer. So we are not so sure that these methodologies are proven over time in the industry and we have taken a few bites ourselves out of our cost bases as a result of similar methodologies.

I guess it comes back to saying that is there a lack of understanding of what is meant to be going on here, and we believe that the - and I have drawn to many examples used in the undertaking, not the agreement, where statements have been made that we do not find particularly helpful towards resolving these issues. I certainly note David's - and I will wrap up on this one - note David's invitation to - we thought we actually had contributed on these matters, but if David wants to reconfirm the herd himself correctly, Martin, amongst other operators, get off your bum, tell me what you want, and we will put it in. Now, if that is what I have heard said, that will certainly help. Thanks.

[2.46pm]

MR McAVOY: I am Mark McAvoy from SCT. Just on the indemnity issues, perhaps he mentioned - David mentioned before that perhaps the detail hadn't been provided. Here is a QCs opinion, 11 pages referring to the detail. Probably about three months ago, circulated to everyone, down to the nitty gritty detail. I would just - I would encourage everyone to have a read of this if they haven't already. The amount of instances where this it is a top Melbourne commercial QC has basically said, "This is not fair or reasonable, this is not fair or reasonable, this is not fair reasonable," it is all there in black and white. A one a half page response from ARTCs solicitors, Kelly and Co - not disputing any of the findings within the QCs opinion but referring to matters of policy, and I will address one other matter in one minute in relation to that. But that is the response, so

nothing - nothing which says to me that this QC has got it wrong in relation to the issue of indemnity.

The draft decision, which has very briefly dealt with the indemnity issue in probably three paragraphs, is probably one of the most important issues in this whole access agreement, in access agreement - but probably within four paragraphs dealt with it. And there is probably general issues such as one that was raised before about perhaps there is intermodal and there is that threat there which Martin has covered. The two other criteria which the Commission address, they said that they wouldn't pass an indemnity issue, that there would be - there would be likely to disputation. That is the first issue.

Well, once again, I just ask everyone to read the QCs opinion and then actually read the third paragraph within the response from ARTCs lawyers - it can lead to no other - to any other conclusion than that there will be disputation in this clause and definitely not within the interests of the public. And the second issue was the Commission rightly referred to the fact that - or correctly referred to the fact that the indemnity is - could possibly shift responsibility from ARTC to operators, something which I referred to at the last session. And that could result in an additional cost.

The Commission said, in the draft decision, that they did not have any estimate of the additional cost before them. And that, you know, that cost is here. The ARTC can provide examples of the cost. We can provide examples of the cost. It is a big cost and it should be taken into account. It is part of this whole economic framework which, as David referred to before, let us wrap up the economic framework within the undertaking before we address the insurance issues, the indemnity issues and these other issues.

It is all in one, it is part of that economic framework which we have got to deal with now. Indemnity is a big issue. The cost is a big issue and we can provide further information on that. That is about it, thank you.

THE CHAIRMAN: Yes. Further Comments from operators? Did we want any comments from the Commission on any of the matters raised?

MR VIGLIANTI: Just to - Renato Vigilanti from the ACCC. Just on - Mark, I mean, if we can have access to that sort of information that would help us. So - - -

MS ARBLASTER: Might I just comment that I think the access undertaking is a broad agreement and there are specific things, a lot of specific things in there and there is - you know, including a dispute

resolution process and price - specific prices, including a price cap which I think needs to be taken into account. And that there is some simplifications that have been, perhaps, made along the way. I don't think that resolution of a lot of things is being left and finally market forces, given these uncharacteristic - - -

THE CHAIRMAN: Yes, I think - I mean, from the Commission's point of view, a lot of - with these - the undertaking provides a framework and it has to be made to work but it is - there are trade-offs involved in it. And I think, to some extent, what was said there is - I don't know if it is challenging the fact of this - the point that David made about the motivation of ARTC in making the business work and that everybody has got a sort of interest in it. So I accept that there has been a process ongoing and we have got to - we want to keep hearing these practical elements.

But I think, Martin, you made the point of either there has got to be more proscription in the undertaking or you would like more done on the indicative agreement. Now, I think in a practice sense the more you try, at times, to tie these things down the more difficult you can make it to work. And at the end of the day the individual agreements coming out of the process will be the things that will really matter. But before we go on to the sort of - in terms of the sort of the standards and performance indicators and that, I thought one - David, did you want to make any more comment at this stage? Because otherwise I was going to suggest we might sort of stop for some afternoon tea and then let everyone sort of mull on some of these issues around afternoon tea. But, David, did you want to make a - - -

MR MARCHANT: Just a couple of things. Firstly, Commissioner, I think we are getting close to the three things. I think my friend from SCT QCs opinion, I think, is a focus of some of the debate between two different value systems. I agree with that. And I would be very happy in this last stage of the consultation - not today but in the last stage of consultation - to try and resolve those. ARTC comes from the position that if you come on to our asset and you damage it you pay and if you come on to our asset and we damage you, we pay. That is the ideological position we have come from.

The QCs opinion doesn't change that. It changes the way the drafting of the agreement is around that and I am happy that that is an issue that can somehow be resolved in these last couple of months because I actually thing that that has been a diversion from the principles of you come on, damage it, pay; or cause and attribute, and vice versa. And part of that is in a drafting format and the - it is the drafting format that is the subject

of that opinion as distinct to the substance of the policy. So I think that actually working that through would be very worthwhile.

The second issue which I think is the heart of what the operators' concerns are is the escalation issue. Let me assure the Commission, and all the operators, that ARTC is not able to double its price under this access undertaking. For the indicative access agreement and the indicative access service, for example, the service is capped at CPI minus a factor. Unlike the electricity example it is impossible for that service, that category of framework, to actually go or increase in real terms. And, in fact, it decreases in real terms if ARTC escalated the CPI minus X - which has not been ARTCs history - but in earlier years.

But unlike the electricity example it is not possible, under this undertaking, for ARTC on the indicative access service - which is the service that SCT are referring to - to increase its price and maintain its price, even in real terms. In fact it reduces in real terms in each period of this undertaking. The undertaking, therefore, and the trade-offs between what is sought in terms such as standards and what is sought in indemnities, therefore, have a direct bearing on the costs and risks that the ARTC submits in its access undertaking.

This is not something which can be traded off one way or another without actually going to the heart of price. If in fact it is suggested in, say, in the indemnity area that the policy position of: you come on to the track the degree you cause or contribute to it, you pay; you come on the track the degree that we cause or contribute to it, we pay - if someone says, "Well, wait a second, we shouldn't have to pay for our rolling stock damaging the assets," the heart of that question is a price on risk question. That is the heart of that question.

And if, on the terms that we have put forward - forgetting the legal drafting of how a third party indemnity clause may look, which is the Colbran debate - if in fact it is not the legal drafting it is the policy you cause or contribute to and held accountable for, then that does have a direct bearing on price - a direct bearing on price and risk. You can't have one without causing an effect on the other. This undertaking was submitted with a price for those indicative services reducing in real terms and the indemnity clause around it reflecting the risk equation. So I think the indemnity thing, apart from the legal drafting, the policy question of it goes to the very heart of price and risk.

And I think that is an important trade-off because it looks as if it is something you just say, "Well, we are not happy with the indemnity clause but we should still keep the price and all the other term frameworks in

there." But in changing the indemnity clause you change the very framework of who takes what risk, you actually do change the price and a category around it. So, I mean, from our angle we agree, that is one of the issues that either will be resolved in this part of the consultation or in our view will be resolved in a dispute resolution provision under the undertaking, soon after the undertaking is approved, when we actually get to that point. Our preference is to resolve it now if possible, but if not at least resolve it in the undertaking.

The third element which I have got to emphasise, the indicative access agreement we have submitted is exactly that, an indicative access agreement. We have already negotiated changes to the indicative one we had before and we have circulated amendments to it. Our view is that the indicative access agreement once agreed to by the Commission in the ARTCs voluntary undertaking, will stand in time as being that and we will also publish update changes that have been agreed which will be offered under a - to all parties with like services. Just as we have done, we will continue to do that. So it is not going to be an agreement set in stone and concrete of which you cannot move from - because effectively we have been moving from it.

And in our view, unless we have misunderstood a process, even if there is a fight about the relative - the relevance of a particular clause in the indicative access agreement to the application with regard to what they are seeking, that very fight could be a matter of dispute resolution with regard to the terms of it. That it is not the holy grail. It is something there that people who are applicants, who may wish to say, "Well, we are happy with that agreement now give us the service," have that right that they can take that agreement as is, or you can negotiate variations to it through the process in the event there is a dispute ..... or a dispute resolution.

So it is not concrete, you know, sand exercise. And it has proven not to be in reality. I mean, some of the amendments we have circulated today that is good and safe and the rest - are things that we are moving through. So, you know, we have not seen that as being in concrete sand never to move, as distinct someone who is not in this room who actually decides they want to become a rail operator, even given they have got some fixed costs and it is a very dangerous business because, you know, it is hard to be competitive intermodal, comes in and actually wants to do something quickly they have actually got an agreement there which they know we are obliged to offer the service of under that agreement.

Conversely, they may want to seek changes to it for the particular needs of their service. So it is the best of both worlds. It is one there that is concrete or you can go to dispute resolution about variations to it. This is

the very thing that we were trying to create: certainty on one hand, but negotiability on the other depending on your characteristics. In the resolve comments, for example, it mentions there that that process is difficulty of the context where you have got like-for-like services. And my colleagues from SCT are the strongest advocate for clauses about like-for-like services.

So, you know, it is recognised that if we offer one to one then a similar service actually picks that up. So, you know, those contexts do become part of any dispute resolution processes because they do follow-on based on this very undertaking. So, you know, the bottom line of framework here, before we go to coffee, is that the indemnity stuff has been argued through. What we are seeking is that certain principles be agreed to. If there are legal drafting issues that can resolve those things but maintain the principles, we will be happy to look at those in this process, now.

THE CHAIRMAN: Thanks, David. Well, I think that is probably a good note for us to break for afternoon tea and give everyone a chance to discuss what has gone on. I would see us reconvening at a bit after - say, 20 past and we could then well wind up between quarter past four and half past four, I think, depending upon how the discussion goes. So we will break. Thanks very much.

SHORT ADJOURNMENT [3.00pm]

RESUMED [3.33pm]

THE CHAIRMAN: If we could move on then to the - to the second or final session. I think we have - we have covered some ground and I think we have had a few questions raised some of which the - the Commission would like to respond to for its part, but we are moving on specifically and I would like to focus the next half an hour or so on performance indicators.

As many of you are aware, the original undertaking submitted by ARTC did not contain any performance indicators. However, in response to written submissions and comments made at the Commission's public forum, ARTC submitted a revised version of the undertaking to the Commission on 14 September, which included a new part 8 on Performance Indicators. This part of the undertaking imposes an obligation on ARTC to maintain the network in a fit for purpose condition and to publishing a set of specified performance indicators on its web site.

The performance indicators are in two categories. The first relates to service quality performance reporting. These measures include the reliability of the network, transit times and a track quality index. The measures are to be published quarterly. The second category of indicators relates to annual reporting of ARTC's unit costs.

These costs are infrastructure maintenance costs, train control costs and operational costs. The Commission believes that in incorporating part 8 into its draft undertaking - undertaking, the ARTC has demonstrated a preparedness to respond to the concerns expressed by operators. The Commission is encouraged by ARTC's willingness to publish performance indicators and its commitment to maintaining the network in a fit for purpose condition.

The Commission believes, however, that there currently are impediments to the fit for purpose condition clause performing this role and, as currently drafted, the clause is quite vague and therefore difficult to enforce and I think there have been some suggestions from ARTC in this regard to further respond and that issue - accordingly at the moment in the draft decision, the Commission has concluded that what constitutes "fit for purpose" needs to be more closely defined.

The Commission also made recommendations in relation to the performance measures. For example, the Commission was concerned that the performance measures measure track quality measured by index was not defined. The Commission therefore required an explanation of what the track quality index is, how it is to be measured and whether it is widely recognised an accepted measure of track quality.

The Commission also believes that the performance reporting needs to be strengthened by including further performance measures in table 1. Importantly, the Commission argued in the draft decision that performance indicators for safety and service satisfaction need to be included. We would welcome any comments that participants may have on this recommendation.

Finally, the Commission recommended that the accuracy of the information to be published must be independently verified. The Commission therefore has recommended that the undertaking provide for periodic independent auditing of performance indicators.

The Commission has proposed the changes to this section to ensure the commitment to maintain the network in a fit for purpose condition is meaningful and is supported by the publication of relevant independent, verified or independently verified performance indicators.

So that is the position in relation to - to the performance indicators. I might just start before I ask ARTC to comment, to go back to some of the things that were raised previously and in particular the reference in the discussion in the first session where there was - the link being made between the undertaking and the indicative access agreement and I know there was some discussion over afternoon tea in terms of trying to clarify between the parties what we were precisely talking about and Renato, I might sort of pass over to you to - to clarify from the Commission's point of view what - where we see the link and how it works.

MR VIGLIANTI: Yes, thanks, John. Just a word about Peter Mason's point about the relationship between the indicative access agreement and the undertaking. I had a word with Peter during the coffee break, but I just thought I would just clarify it. We have said in the - in the draft decision that we consider the, and I am actually reading from the report itself:

The inclusion of the indicative access agreement has merit -

and we go through reasons of what we think, so that is useful to have there, but we also make it clear that the indicative access agreement does not seek to displace the primary role of negotiations or otherwise to abrogate the rights of an operator to negotiate an access agreement that differs from it.

So, we are saying that the indicative access agreement is not a prescribed formal agreement and operators and ARTC can negotiate an access agreement that differs to it. So we see it as an example of an access agreement but not necessarily the only type of agreement and nothing precludes - nothing precludes operators and ARTC from coming to - from coming to an agreement on a different set of arrangements. So just to put that on - on the record.

THE CHAIRMAN: I think effectively that reflects a comment that David had made.

MR VIGLIANTI: Made as well, yes. Just to make our position clear.

MR MASON: From my point if I could make, still on that same one, is that still doesn't address the concern that I think the majority of people have. It says:

The indicative access agreement is good -

with inverted commas, if you like, around the good -

but it doesn't stop you from having another negotiation.

That, to me, implicitly says that the indicative - the position taken in the indicative access agreement on any issue is prima facie acceptable and I don't believe that the Commission should be taking the position of saying "I believe that the indicative access agreement is correct on any position", because if you do and just to take - and I personally have no personal involvement in it, but the issue on the indemnities - the contract takes a position on indemnities.

David may be right in what he says of having that freedom or he may not be right, I just don't know. But I doubt very much if an operator or the group of operators, IROG, could challenge David's position through the dispute resolution process and have the issue opened up for independent assessment. I think that if the Commission though said it is accepted as a starting point but it doesn't endorse any position taken in that contract, then I think that overcomes the limitation that I have heard the operators talking about.

MR VIGLIANTI: Well, we have stopped short of saying that, but I think the implication is that operators are free to - to negotiate other positions. That is the - I think that is the key. That is the key point.

MR SVIKIS: Yes, Renato, it is a valid point still to - it is like there is some uncertainty as to whether or not the undertaking is helpful or not, we have heard about that, but also whether the undertaking will limit our ability to continue the questions - the questions of things that we - we have already put forward. Do you see what I mean? That is why we are sort of saying, "Can you hang on a second, while we sort a few things out before it goes too far".

That just says that we are not too sure and that is exactly what Peter is saying. You know, if we are unclear on something then we will all take responsibility for the fact that we are still unclear on it because a lot of us are. So the undertaking in that sense is not really giving us certainty in that position because - just because we may be misunderstanding something. So it is still a valid point and we don't really want through this process keep on going until these are properly talked through.

THE CHAIRMAN: But specifically what things because I mean this has been going since you know 10 months ago and we do - you know, we have a process that we want to keep moving here, so it sounds to me like 10 months down the track we ought to be able to be very specific about what it is that you are after.

MR SVIKIS: The very specifics that are contained in all the submissions we have made to the ACCC. How many pages, Mike, 100?

THE CHAIRMAN: But give us some examples.

MR McAVOY: The one about the indemnity issue is just one example which we have already covered.

THE CHAIRMAN: Yes.

MR McAVOY: You have the Commission reaching a decision in relation to a couple - you know, their criteria - will not lead to disputation and - and the cost, if there is a cost - an additional cost falling on operators will not be excessive and it appears to me taking on what Peter said that if we go into an arbitration surely the ARTC will be taken to negotiation in good faith given that the ACCC has already made some - - -

THE CHAIRMAN: Well, that is understood, but okay what are the other ones?

MR SVIKIS: How we ensure the pricing mechanism allows for future cost savings to be delivered. The fact that a cap - that fact that a cap is a regulated price.

MS ARBLASTER: It is a decrease in real prices .....

MR SVIKIS: Only real in the terms of CPIs being relevant to the costs to the industry.

THE CHAIRMAN: No, it guarantees the real cost goes down.

MR SVIKIS: But it may not go down enough. The real costs of my prices go down by 30 per cent.

THE CHAIRMAN: It guarantees it. We are not - we don't know how much it will go down. It puts a cap and it is consistent with other forms you know in other areas. It is a sort of unilaterally recognised process in this sort of regulatory arrangement.

MR SVIKIS: But that is not relevant to us.

THE CHAIRMAN: Well, it is - - -

MR SVIKIS: Our prices received have gone down by 30 per cent. That is where we are coming from, John - in the same time.

THE CHAIRMAN: But you are saying it has gone down because of the efficiencies that you have managed to - - -

MR SVIKIS: Well, my income has dropped by 30 per cent - - -

THE CHAIRMAN: No, I thought you were saying or it was being said that the industry had found these - I thought you were talking about labour costs and so forth, but the - I think you are linking what the operators are doing and then saying, "Well, ARTC is exactly the same".

I mean they may have a different configuration so I am saying what are the specifics. You have mentioned a couple of areas that you want - maybe want to tease out some more and by - we are saying, "Look there is a process being going on here and that process has to keep going because we have go get runs on the board here", and you are saying, "Have a pause", and I am saying, "What are we going to get out of a pause and why cannot we keep pushing the thing forward now and find out how it is going to work". I mean, it is almost like, "Well, we are afraid to open the door here because we think the whole - it is going to fall down on us or something".

MR SVIKIS: No, the - when we say "Pause" let us have a look at - what we are really saying is that an opportunity to sit down and talk in detail about these issues that keep on going on and on and on and we don't feel having been resolved. Now, that is not - you know, now we are playing on the word "pause". That is actually not pausing, that is just recognising the fact that the timetable issue insofar to complete the conversations today, put more things in writing that we have already put in writing, then we get tolled back without any further communication from yourselves, tolled back to what the decision is.

We are saying why cannot we have a more interactive conversation about these particular issues that are still going on.

THE CHAIRMAN: Well, that is why we are here today. So that is - that is - we are here today and we have got to do it today.

MR MASON: Just falling on from - from that one, John, the point that I am - the key point I am trying to make is that we shouldn't be freezing things where it may be sensible to sort them out in the future. It is somewhat similar, but not quite the same as what Martin is saying. The the reading of the Commission's words on the undertaking gives each and every one of the terms that are covered in there some sense of legitimacy and there are some areas and I think Martin has identified one or two where he believes that the jury should still be out on them.

So the undertaking covers them adequately, the contract then suggests one solution. That might not be the correct solution. So, what I am proposing if you like is that the contract that - the solutions in the contract are given no legitimacy by the Commission but the issues can be taken to arbitration.

Now the fact that it could be taken to arbitration generally means heads could bang together and you end up with a sensible thing. The concern - the specific concern that I would have is, and I guess in some ways I am almost taking issue here with an approach of the Commission. I beg your indulgence, or whatever, a lot of the wording which you read out at the start of the last session was to do with intermodal, the competition, the potential to go on rail will keep the system honest and then there was some challenge to that and I think that both positions are reasonable.

But there are at least three services which I think the Commission has totally overlooked. Those ones are - and they are basically the non standard - non superfreighter services. They are the grain service, or it is characterised by the grain service. They are the passenger services and they are the non-superfreighter paths and for example, Freight Australia has an agreement which is very different in some components to the inter state agreement and the reason it is different and it was fought out with blood is because there are different issues in different traffic.

I think that the Commission has skated over those differences and some of the things that are in the draft contract may not be appropriate where you have got the different sort of traffic and the protection of the market place necessarily keeping a lid on it probably won't apply. Now, that was put into submissions and I believe was skated over by the Commission. The but all of those - most of those solved, but there is no legitimacy given to the draft contract although I think it is an excellent idea to have it attached as this will be offered, but it shouldn't lock into the solutions of the place. The other one is, I understand - - -

THE CHAIRMAN: I think that it has been said, certainly by ARTC and I think the Commission views it that way that it doesn't, that it is indicative and that - - -

MR MASON: We have to read the words that are on paper not the statements that are made, say, in a meeting like this, because it is others who are going to take those words in three months, two years and interpret them and in this state - in the same way as I am talking now, you tend to be a lot looser than the actual specifics of the words and I don't think the words in the undertaking or the words of the Commission of the assessment actually do form the same position as - as has been spoken about today. And yet, I think there probably has been an attempt so like it should be a

fairly easy thing for the Commission to just change some words and give effect to what it says is its intent.

THE CHAIRMAN: I might turn to David and see - because he is the one - they have got to change the words in the terms of - - -

MR MARCHANT: Yes, Peter. I mean this is a voluntary undertaking. It is either ARTC changes or nothing happens. The - the Commission doesn't have an ability or amend or vary - it either accepts or rejects but it doesn't have the variation role. If the ARTC doesn't listen to the Commission and then it obviously gets rejects but it doesn't have a discretion to do the drafting for us other than by the force of being able to reject it but it may not necessarily be a bad thing for ARTC. So rejection may actually be to our advantage, by the way.

[3.54pm]

So within that context, the contract attached is clearly titled Indicative Access Agreement. If, in fact, the intention in the undertaking was to make it the access agreement of which someone can try and bargain with us for something else, then we probably would have titled it somewhat differently, such as The Access Agreement and you fight with blood to get something better. The reality is that in some markets we have actually done variations to the access agreement. The grain market is a good example, where in fact they are not after fixed paths, they are after cycles so it will be varied.

An example that may come up in the future, although it has been argued that we should make a commitment here about whatever happens in New South Wales, even though we haven't finished due diligence, we haven't actually got a lease with the State of New South Wales if we ever get one, and we don't know what those terms and conditions are so we are not likely to commit ourselves to something in New South Wales when we don't even know what the rules are.

But it would be without doubt that if you looked at New South Wales and you looked at the Hunter Valley, you would probably not have some of the terms here with regard to fixed paths when you are dealing with a cyclical coal market of which you are trying to put fixed paths through it. So we don't see it as black and white. If it is helpful, we will look at the words around how the indicative access agreement is described to make it abundantly clear that it is indicative.

However, the very argument that this group has raised a number of times we want absolute certainty at least as a minimum, led us to put in a

document that would give a minimum certainty, but it could do better by negotiating around, etcetera, and conversely the next thing that was demanded was like for like. That is, the small operators didn't want the big operators to bounce ARTC on the table and get a better deal in the same market for the same type of service.

So we have tried to give certainty but have called it indicative, but we have undertaken that if someone wants to take that contract up as is, we would be obliged to sign it for the indicative service. But conversely, if they want variations or changes around, we are happy to negotiate. So if it is the wording around indicative, then we will try and explore some wording. In the end there are three issues that keep on coming up and they haven't come up just for these 10 months, Commissioner.

These three things have come up for two years, and hopefully this process will help to iron them through. One is it is clear that some operators don't like a cap which is CPI minus X on a price. And they are seeking somehow that someone in the wisdom of Solomon come up with a framework that enables it to be something different, but still live within economic principles that a regulator must do and the real bottom line of that is they would rather not have CPI minus X, but don't know what they would really like except annual reviews rejustifying every case round which is actually not going to give certainty therefore to the access provider either. That is the one issue.

The second issue is indemnity. There is two issues around the indemnity. One is the actual drafting of the clause itself in the third party framework which we are re-looking at ourselves based on Colbran QC's advice and a few other things. However, the principle is you come on, you damage the track or contribute to it, you pay. If you come on and we damage you or contribute to it, we pay. If the argument is not about that principle but about the legal drafting, we will obviously get through that reasonably well because we will put out a draft next week or so for people to comment on.

If, however, it is really about the principle, then maybe that is what should be put on the table. And the third issue, is in fact, insurance. That issue comes down to the $200 million provision in the indicative access agreement. The $200 million is not a creation of ARTC. It, in fact, comes from our lease in Victoria and DOI's minimum requirement for insurance for operators who work in the State of Victoria. I notice in New South Wales it is 300 million, for example.

And again, we have done for very small runs and small sections, a different figure. For example, Silverton at Broken Hill and those sort of places where their exposure is to 10 kilometres of track and therefore the

odds and probability of the worst actuarial scenario which regulators require is slightly different. So they are the three issues that have been bouncing around. We then come to reporting and stuff, which we have tried to address.

So those three issues have been the same three issue where we got stuck after two years of negotiating this indicative access agreement. The same three issues. CPI minus X. The answer is nobody wants CPI minus X. What do they want in lieu? We, as a track provider, have tried to provide certainty with an economic framework and CPI minus X actually means we make real reductions in price. Real reductions in price. The other part of that clause, Commissioner, is very clear. There is no catch up provision.

If ARTC chooses in one year not to move on its CPI or part thereof, it can never claim it again. In the three - well, in fact, five years of the track access, this is the first year we have sought to do it and we have done it for part year. The year before last we actually reduced prices by two per cent. We have actually been taking real reductions. But the clause says ARTC may. It doesn't say it shall. And if it misses that year it can't claim it back in retrospect. But the real argument is people aren't happy with that, no matter what form it is.

So I am not certain that some of these things will be - in the end they may have to be arbitrated by someone because sitting down - seeking a pause to sit down with the Commission, resolve or otherwise and it really thinks that that is going to say the economic principles of a CPI minus X ARTC should accept, the reality is we won't. The reality is we are not going to. The reality is that is the situation we are at. On the indemnities, we are happy to look at the drafting of it, but not the principle of it.

And on the insurance, we are left with the regulatory requirement for rail operators in Victoria which we have looked separately at those places where people are doing small runs. It is in the indicative access agreement, but we have actually looked at it separately, because the indicative access agreement is what it is. Indicative.

THE CHAIRMAN: David, did you want to make any other comments on indicators - - -

MR MARCHANT: Not yet, no. I would rather listen to the discussion.

THE CHAIRMAN: Okay.

MR McAVOY: Could I just ask David two questions. David, with the indemnities, if it is a matter of principle, two years of negotiations aren't

about two years talking about drafting issues, I can assure you of that. It is about principle. So we are talking about principle here.

MR MARCHANT: Sorry, well, if you are, then IROG is not, because IROG agreed in principle to that clause in writing.

MR McAVOY: And where SCT sits in relation to the matter of principle is look at the QCA determination and have a look at the liability clause, the indemnity clause which they have arrived at, which is the fair and reasonable way to approach it. That is the first issue. The second issue, in relation to the fit for purpose condition, we have got - we have had a situation where operators wanted a better standard to maintain the track within the access agreement. We heard that last session. ARTC at the last session offered the fit for purpose condition.

At the session it was incorporated into an amended undertaking which went to all operators following that session. Operators had a look at it. Operators commented on it. Operators said that needed to be beefed up. The Commission in its draft decision said okay, that needs to be beefed up. We need to define what a fit for purpose condition is. Operators - well, SCT in particular, when they got the amended undertaking, we specifically wrote and we said why is that fit for purpose condition not within the actual access agreement. Why has the corresponding amendment not been made to the access agreement. We - - -

MR MARCHANT: If you look at clause 8.1 in the letter released on Friday, you will see that we have gone further than fit for purpose and put in a good and safe condition, and we have gone further and amended that that is the condition we also put in the undertaking to the Commission itself.

MR McAVOY: I will get to that in a minute.

MR MARCHANT: So it is both.

MR McAVOY: I appreciate that. Good and safe condition - it is a bit of a side issue, but - or part of the main issue. Good and safe condition as far as we are concerned it goes right back to day one. It is about as general and meaningless as a fit for purpose condition by itself without defining what condition we are talking about. But my question to you was when SCT in its submission basically said why has not the access agreement been amended, when other amendments were made to the access agreement at the same time to incorporate a fit for purpose condition. It was not put in. Operators are still left with an indicative access agreement

with a standard - the standard track to remain to the standard to enable ARTC to maintain accreditation.

MR MARCHANT: And you will see that the proposed amendments to the indicative access agreement reflect the same changes and you will see that the proposed amendment to the indicative access agreement which has also been circulated to operators, has within it option for either good and safe or fit for purpose if you wish that, against the schedules attached - the schedules attached dealing with the actual services. So we have given operators a choice.

MR McAVOY: I guess there are two points, David. The indicative access agreement has not been amended at the same time. I take that that the indicative access agreement still has clause 6.1 as it is, talking about the standard to which ARTC is required to maintain the track.

MR MARCHANT: No, we will be proposing a reciprocal amendment. I mean we are still drafting through the changes based on this report. We will be proposing a reciprocal amendment in the access agreement.

MR McAVOY: Okay. I guess coming back to the good and safe condition, that is still not acceptable as what you put out on Friday. I guess what I am trying to convey to the Commission is that this is - - -

MR MARCHANT: So what - - -

MR McAVOY: The good and safe condition which you have proposed on Friday afternoon is nowhere near what operators require.

MR MARCHANT: So what would you actually like? Fit for purpose for the purposes of which it was contracted in the contract? What is the qualification?

MR McAVOY: What the Commission recommended in its decision.

MR MARCHANT: And what do you suggest that should be?

MR McAVOY: Define fit for purpose condition.

MR MARCHANT: The Commission actually said they would be interested to hear from you. What do you suggest it should be? We are interested in what you suggest it should be too, because for two years we have never been able to find out.

MR McAVOY: A condition to avail operators to get from A to B on a track, to maintain the same service levels and not be disrupted in any way. That is a starting point.

MR MARCHANT: Disrupted in any way.

MR McAVOY: By the standard of the track.

MR MARCHANT: Well, we will certainly look at that. Good and safe actually comes back to the train paths that are calculated behind it, but if you want fit for purpose for the purposes of operation to a train within the contract, we will look at that too.

MR McAVOY: Once again, David, I just draw you to the external opinion we took. It is that at the moment the standard to which the track is to be maintained will lead to disputation. And that is what I am trying to get to. In the advice, the standard to which the track will be maintained will lead to disputation and - - -

MR MARCHANT: There are a number of elements to that advice. I am happy to go through them in detail. I hesitate to bring a whole lot of QCs' opinion. I am very mindful of the Supreme Court action recently where there were three different sorts of QCs' opinions dealing with what fit for purpose for a particular industry - the electricity industry was, and there were different QCs' opinions about that same issue from very different angles, some of which the ACCC has been involved in. We are happy to look for fit for purpose around characteristics.

We have been trying to pin down what characteristics operators want. We are cautious about a homogeneous characteristic on all our infrastructure, because obviously things like the Whyalla line are fit for purpose for the purposes which they are being used which is steel trains with pixar configuration. So we are very cautious about going to a homogeneous things, which is not related to what we are contracted - the contractor for the path for the access seeker. So our caution is about that.

It is not caution about not standing behind our product. It is caution about making sure our product is in accordance with what people have committed to, and that is really what our caution is about. So if there are ways of working through that which don't have an open ended framework and do relate to what is being contracted to, then obviously that is what we want to stand behind. We think in many ways we have done that, but if there are ways of improving that, we are happy to look at them. Does that make sense?

MR McAVOY: Look, the only point I have got to make to the Commission is that these issues are fairly - they are moving the whole time. Even as on Friday, they are moving. Operators need to have - to sit down and sort out these very important issues now. After two years it is about time - we are ready to go to an arbitration if we can not get an agreement sorted out. I would put a timeframe in two weeks, let us sit down with you. If we can't get anywhere going, well we are off to arbitration. The undertaking almost becomes irrelevant to existing users with a lot of sunk investment in the track.

MR MARCHANT: Sorry, all I can say to you is this. The process of this undertaking is to give you that ability to go to quick arbitration. That is what the process of this undertaking does. The very undertaking process enables access applicants to actually trigger a process to go to that very dispute resolution you wish to go to. Quite frankly, right now, and I don't want this to sound too harsh, but right now ARTC could say to you bugger off. And your method then of resolving that, is you have to go and try and get the track declared.

So I mean I agree with you, there are going to be points of either fit for purpose or otherwise which may be a dispute between ARTC and an applicant or a non-contracted operator. This process provides for that dispute resolution to take place. Now that is the reality of it. That is what this is really about. What you are asking for a pause on, is a pause to actually get a procedure so you can do the very thing you would like to do. I am the first to recognise that in some cases, particular operators will seek to use that arbitration dispute regulation the day after the access undertaking is approved.

From ARTC's perspective, we welcome that, because at least it brings to a conclusion a process of dealing with value systems and actually enabling someone independently to weigh those systems up. If, in the end, you and I are in a meeting room and you dig the sword into the tarp and you say David, no matter what you say, we do not want to indemnify you against our rolling stock damaging your track, and if in the end you think I am going to say okay, that is fine, you can have it at the same price as those that do indemnify me, then you must think I am an idiot.

The reality is, if we have that disagreement after the undertaking is approved, you can go straight off to either dispute resolution or the arbitrator on that very issue. At this point in time, to be very frank with you, your option in an uncontracted form, is that if we actually do disagree to that degree, we could actually stop delivering the service and you would have to go off, get a declaration, etcetera. This actually gives you the very

process to get that matter resolved through an undertaking that gives you the right to get it resolved. Does that make sense?

And I think fit for purpose and other things may come up, although we will try and manoeuvre this to try and achieve the operators' objective plus our objective of not over promising a maintenance level that is not what the customer market actually wants. Those things we will massage. The indemnity thing, we will massage that too, but not against the principle that regardless who comes on, the degree in which you cause and contribute, you pay; we cause and contribute to pay.

If however, it is not that principle, it is the legal drafting which we are looking at - we did read the Colbran thing and we have been going through and seeing what other drafts would actually achieve the principle without contaminating it, and our draft that will come back hopefully just after Christmas which should go out to give everybody time to respond, hopefully will address some of that. But in the end, if it is the principle, just like CPI minus X, the issue there is a matter of principle.

If in the end it is the principle, then say it is the principle. Don't say it is the drafting. Say you are opposed to having to sign an indemnity which you are responsible for your rolling stock on my track, and I am responsible - if you are opposed to that principle, you had better say so, because that is the heart of what the dispute really will be about. It won't be about the drafting in the clause.

MR SVIKIS: David, just a comment on what you were saying. It is not so much that - we certainly recognise the fact that if we disputed something now, there is almost no process to resolve it properly, and that is a major problem. It is a major benefit of therefore having an undertaking. Absolutely no doubt. Except we, as operators, had a mistaken or whatever view that we would have also been able to resolve a number of other issues prior to the undertaking going through. That may have been a misguided view, but that was what we wanted to do.

To achieve it prior to the undertaking going through. There was - there is a dissatisfaction to think okay, go through all this undertaking process, put our issues up, and we see you back in Court the next day, sort of thing. That was where the dissatisfaction was coming from. There is another potential dissatisfaction that we might have in the process, and that is the concern that the undertaking may limit our opportunity to dispute things.

Now if that is not going to happen, and the ACCC will sit here and say, Martin, you can argue whatever you want to through the dispute process, none of the processes happening right now will limit you in any way, shape

or form, then also we would have a lot of comfort if you are wiling to say that. But there is some lack of understanding about whether the undertaking will limit our opportunity to dispute things after the undertaking goes through.

MR MARCHANT: Which is the point of Peter's question and that is will the ARTC drop the indicative access agreement on the table and say take it or leave it. That is actually Peter's point.

MR McAVOY: Will you have the right to do it, rather than whether you will or not.

MR SVIKIS: Yes, so that is where the concerns were. Not the fact that we haven't got a disputes process. We are looking forward to that. It is regrettable that we would have to go through all this process and back in here again to argue it. Also I hope nothing in the undertaking is going to stop us from arguing if that is what it comes to.

MR MARCHANT: And we are - our view and the Commission will obviously reflect that view and any time when we do go to dispute resolution is the indicative access agreement is what it is. It is indicative. And it goes with the indicative price for an indicative service. And then a person can actually get that agreement as a right, but they can also negotiate variations or otherwise, which may have an effect on price or may not. And whether the effect on price is rational or irrational will be disputed in itself.

Obviously it will be rational from the ARTC side. You would expect that. But what I am trying to pin down, and that is what my comments are about, is in the CPI minus X capping, as I understand it, I can not respond to that debate in any rational way, because the debate is you don't like it. I understand that. But it is economically rational and it actually goes through a whole range of economic principles and I understand that too. If, in fact, it is irrational because ARTC could price CPI minus X and ruin the market, that is the definition of sanity for ARTC to do so, because it actually loses as well.

Does it imply cost reductions? Of course it does. CPI minus X by the very nature of it means that we have to keep efficient. Can we do CPI minus X plus and make a bit more profit out of it? Yes, notionally we could. But obviously between the floor and the ceiling framework with a capped indicative price. All those things are there to contain irrational behaviour, or at least circumvent it to the degree in which a regulator can ever circumvent an irrational marketplace.

[4.11pm]

The next one, on the indemnities, we think we can improve the drafting to overcome some of Colbran's views which - but Colbran's views don't go to the heart of the policy. The heart of the policy is cause or contribute. And we are saying that we are not there to stand between your rolling stock and what damage they do to our track, you have got to pay for that. If you don't want that then we need to negotiate a different clause to the degree in which we can. I mean, that is policy issue. The drafting is another issue.

What you are seeking from the Commission, in my view, is on the first one, CPI minus X, you are saying, "Forget any rational, objective criteria, we are just not happy." On the indemnity one, cause and contribute and Colbran's thing - all right, it may be the drafting and we have got Colbran's advice to go through it. But if in fact it is not the drafting - because in our view it has never been the drafting, we have been happy to resolve that - in our view there is some operators will not wear the principle that they are responsible for what their wagons do on our track and have to pay for any damage they do.

If that is not the case then we will actually get through the drafting very quickly, but the argument has never been that, the argument has been a matter of principle - "Why are we held responsible for what our wagons do to your track, why don't you do that?" Obviously we can't help that. And on the insurance stuff it is negotiable but we do have to live with the regulatory requirements in Victoria which is 200 million for a train, New South Wales actually 300 million. But we have indemnities on a quantum of the insurance changed it if people are only operating over small segments of track ..... advice you can justify to the rail regulator that they don't have to pay for it. Again, that is why it is indicative.

THE CHAIRMAN: Thanks, David. Other comments?

MR FULLERTON: Can I just make a comment - I think - I mean, we can go through these processes to ad infinitum, I guess, to try and come up with a - an undertaking that we are all going to be happy with. And I think - from the beginning I guess your comments were up front, and so there are still some particular issues, and David summarised them in term of the issues - the escalation, I think the track standard issue - in us putting forward a view today that we should have a pause, is simply on the basis that it is - given that we have been through this process now for a couple of years, we have gone through this access undertaking process now for 12 months, to say: why can't we sit down, have further debate with the ARTC and the operators, with the assistance of the ACCC to see whether

we can make further progress on resolving those what I call threshold issues that remain between us?

If it is the case that they don't get resolved, well there is obviously a dispute process that we can - we can call up, as David explained. But let us - why don't we go - - -

MR MARCHANT: You can't get a dispute process up after the undertaking.

MR FULLERTON: That is right. But why - that is an option, isn't it? Why can't we sit down, as we said at the beginning, and try and resolve these issues before going forward with the undertaking?

MR MARCHANT: I mean ..... - - -

MR FULLERTON: You are saying there is no more room to negotiate, I presume.

MR MARCHANT: We are happy to resolve these issues and this process is attempting to do that. But if you are saying we voluntarily go in to a process and the undertaking to negotiate a package, we would prefer to get the undertaking done so that people can actually do that reprocess easier. Now, you know, the fit for purpose thing, I mean, some customers have actually agreed to contracts with variations to that clause, at their request, and others want that in the clause. Now, what we are after is - one fits with or fit the purpose would do that if it was qualified by what part you wanted and the capacity around it, and that is more qualifications around the actual service.

I am not exactly certain that is what people are arguing. I mean - and it has been hard for us to pin down what people are actually arguing on those clauses because of, you know, with respect, people have different views about the way those clauses are and during these multi-forums - and even in the IROG framework there is not that consistency about what they actually mean. Now, if IROG and the members want to meet with us in the next couple of weeks, we are happy to do that, and we will do it. But, you know, we will be pursuing our application, and we will go through that process.

MR FULLERTON: Well, I mean, so be it, that will run its course. Obviously all we have suggested up front is that it is worth those key issues to try and get it better on this - to a better forum than I think this hearing, sitting around a table, which I think is a far more productive way of doing

it than probably in these sorts of forums, to see if whether we can make any sort of progress on the issues that we still have a concern about.

MR MARCHANT: We are happy to meet IROG and work through the issues and things they want, but on the CPI minus X. We have go nowhere else to go.

MR FULLERTON: Well, it is always very handy to put your negotiating position up front, so - - -

MR MARCHANT: Well, then, really we should go for an undertaking and go for a ..... position .....

MR SVIKIS: Well, just as a question to the ACCC, is there anything in the undertaking that will preclude us from disputing any of the issues that we have raised so far? If the undertaking goes through it is going - - -

THE CHAIRMAN: I think that was the point we were trying to make that, you know, I would - that that is what the framework of the undertaking is for, to allow you to do that. And I think David was sort of saying on a couple of potentially contentious issues or areas where it would reflect a differing view of different operators, that these things will have to be tested and sometimes you will be straight into the dispute resolution and/or arbitration process. And until we sort of get over this hurdle you can't really - you are talking in terms of, you know, what some people would like or what, in generalities, what is the price escalator, what is really going to mean in terms of your costs vis-a-vis what their framework says is the cap.

And, you now, the reality is that the little bit that I have observed in other areas, you know, you don't - until you are into the system you can't test these things. So - - -

MR SVIKIS: Okay. So there is nothing limiting, from what you have heard, in the undertaking that will stop us disputing those things?

THE CHAIRMAN: No, well - - -

MR VIGLIANTI: There is a - I think it is clause 3.11.1 that says that:

any issue arising from this undertaking can be subject to dispute resolution.

MR SVIKIS: Yes, no problem. That is a comfort factor, you know, we are not undertaking experts, and if we can dispute it down the track and

nothing is going to stop us, well, sure we will stand up there with the best of them.

THE CHAIRMAN: Yes.

MR SVIKIS: Although we had desired to get a resolve prior to that, but - - -

THE CHAIRMAN: Yes, well I think the real issue from the operators' point of view is that - I mean there are some - as David said, to some extent there is a sort of point, some points of principle which are a bit hard to - you sort of can't sort of chip a bit away at them, you either do or you don't. But then, in their application - I mean, say the indemnity one, there will be an issue as to how that applies in an individual agreement because, clearly, it will be the - there will be some alternatives available. But you will have all the processes and the undertaking to work them through. So - - -

MR .....: I think the CPI minus X is a difficult one because that is actually a fundamental part of our undertaking for .....

THE CHAIRMAN: That is a - yes - but it is still, I mean, I think - - -

MS ARBLASTER: Yes, I mean - yes, yes.

THE CHAIRMAN: Did you want to make a comment?

MS ARBLASTER: Look, just with the specific things that are in the undertaking that are clear, you know - - -

THE CHAIRMAN: Yes.

MS ARBLASTER: - - - obviously once they are accepted they are accepted. But, you know, issues relating to the interpretation of them, or implications of them, we have - and where it is not specific and there is a dispute in arriving at the process of seeking access, well then that that is subject to the dispute resolution.

MR SVIKIS: So - - -

MS ARBLASTER: But you can't sort of have it all ways. I mean, you want - you are talking about wanting something proscriptive on one hand and then - now you are saying, "We want everything to be negotiable and flexible after it is accepted."

MR SVIKIS: No, I am saying exactly the opposite to that. I am saying because it is not proscriptive we need to still make sure we can argue it.

THE CHAIRMAN: Yes, and you can.

MR SVIKIS: I am saying the opposite to that, Margaret.

THE CHAIRMAN: I mean, think that is the - - -

MR MARCHANT: Mr Chairman, the CPI minus X with the indicative service is in fact a fundamental part of the undertaking.

MS ARBLASTER: Yes, yes. It is one of them, yes.

THE CHAIRMAN: But - yeah. I thought it was sort of a like a safety net clause for the user rather than anything else, so - - -

MR MASON: It is a clear response to wanting certainty of price over time.

MS ARBLASTER: That is right.

MR MARCHANT: Well, there is no right to change, it should be CPI minus 3, but just no right in an undertaking. ..... has just got to accept that. ..... undertaking as I read it.

THE CHAIRMAN: Linda did you have a comment?

MR MASON: ..... problems with that.

THE CHAIRMAN: Are you going to comment?

MS EVANS: I think it is really the same point that Michael made, that just insofar as something is contained in the undertaking and accepted in the undertaking, it is fixed.

MS ARBLASTER: Yes.

MS EVANS: Insofar as its application for a particular contract is concerned it can be subject to dispute resolution.

MR VIGLIANTI: Well, there are steps and processes and procedures in the undertaking that are themselves subject to dispute resolution.

MS ARBLASTER: But then, you know, a contract that is actually signed between two parties and subject to the dispute resolution contained in that contract.

MR VIGLIANTI: Within the contract, yes. Okay.

THE CHAIRMAN: Right, well, was there any more in the way of comments on this issue? I hear what some of the operators are saying, that they would maybe appreciate some more - or an additional sort of side discussion with ARTC. I know these sort of processes are - are a little bit formal but at the same time the Commission, in terms of its role, does try to make this as transparent - and allow the communication process to occur - as much as possible. If there are elements of the process that you feel you haven't been given the opportunity, we would want - we would very much appreciated hearing about the specifics of them because we pride ourselves on the fact that we do try to actually make it as user-friendly as possible.

So I think it has been a challenge in that we have been moving along a path to a new frontier and therefore everybody is on a bit of a learning curve. And hopefully we are getting very clear what the meaning of this undertaking is going to be and what it will allow you to do from the operators' point of view and at the same time that ARTC feel comfortable with what they are offering and feel that they can make their business work and work it with operators. We have to sort of come to a bit a conclusion of the day. If there are any other issues that people wanted to raise now is the opportunity because we are - I think there have been some issues raised today on which we will get perhaps some more clarification.

I think David said that, particularly in the indemnity area, they are looking at that legal view and they may come back with some further clarification on that. But I just give everybody a sort of a lost opportunity to put anything else in terms of these issues that we have raised - anything that we haven't covered. If not, we are looking for more comments, anything that comes out of the further process and that ARTC puts further to us would be appreciated, will be taken into account. I think we are seeking any submission by the end of January. So just summing-up, then, in terms of - - -

MR MASON: Can I just ask a question, Commissioner.

THE CHAIRMAN: Yes.

MR MASON: I guess the question is to David, or maybe the Commission can answer it. The undertaking is that for the standard service it will be

kept at CPI minus 2, or two-thirds of CPI, is auctioning still on the table and if so can auctioning fit in with the undertaking?

MR MARCHANT: I don't know about the Commission but ARTC hasn't proposed auctioning. I would have loved to. The only time that anything like that concept comes up is in the event that two path's applications have been received that are in conflict with each other, and the method of resolving the conflict is the best net present value to ARTC. And that could come about by a number of forms. It could be one path is 80 kilometres an hour for X and only two years; another one could be a path at 110 for a shipper/freighter, etcetera, could be five years, so then the present value obviously of the set committed would be higher than the first. That is the only area where a conflict is resolved by a net present value term.

MR MASON: I am sorry, my question was, how can that sit with a cap on the pricing for a standard path?

MR MARCHANT: And the answer is that the standard path - the conflicts may not be about a standard path. One of them may be for Adelaide to Melbourne, the other one may be a path Melbourne to Perth or Kalgoorlie. Therefore the net present value of one over the other is different because of the different destination and different frameworks. Not all paths are exactly like-for-like.

MR .....: You don't have to have a different price to have a different NPV.

MR MASON: No, I am sorry, my question was: if they are the same path, if they are a standard service, and that price for the standard service is capped at CPI minus 2, then why isn't it auctioned?

MR MARCHANT: The escalation of the price is - the escalation of the price is.

MR MASON: Then doesn't the - sorry, my reading of the undertaking was that if I applied for a path in two years time, well I'd still fit under that cap.

MR MARCHANT: The prices for an indicative access service, for the period of the five years of the access undertaking, the escalation of that price at points of time is capped.

MR MASON: So if I contract in two years time there is no cap on my price ..... ?

MR MARCHANT: No, no, now Peter it doesn't mean that at all. Like, you - is there some sort of trick in this, Peter, or what?

MR MASON: I am trying to - no, no, not at all.

MR MARCHANT: It is very clear and you have been through this stuff many times.

MS EVANS: I can show - sorry.

MR MARCHANT: The indicative access service escalation is capped. What that will be two years from now actually depends where at the end of the first year whether ARTC has taken up the option of possibly increasing it by two-thirds of the CPI. So therefore the answer to your question is on the beginning - is on the third year it is no greater than the two-thirds capped year-on-year. However, it may be lesser.

MR MASON: Okay. And that is for a new applicant that applies in two years time, as well as someone who has got a continuous path running over the full five years.

MR MARCHANT: That is right - indicative access service is capped throughout.

MR MASON: Therefore, it comes back to that auction question of: does - - -

MR FULLERTON: It is not an auction, it is a net present value.

MS EVANS: There is no auction.

MR MASON: No, but doesn't the auctioning mean you end up with - can end up with a pathing price that is in conflict with the cap?

MR MARCHANT: No, because firstly the net present value concept is not an auction. I tis of the two applications before ARTC, two conflicting applications, the first option ARTC will take is try and get both paths and get both lots of revenue. So that is the first thing we will try and do. We will tray and modify both of them so we can get both lots of revenue rather than "winner take all/loser take all". That is the first thing you do. Secondly, though, not all paths are in exactly the like. And that is - it could be the distance they are going to travel over, it could be the number of times, it could be the number of years they are going to contract to.

The net present value system isn't ipso facto an auctioning system whatsoever. It is a method of actually working out the indicative access application put in put by X, compared to the indicative access application put in by Y. Y is proposing to contract for 10 years, X is proposing to contract for four. Could be exactly the same in every other element, what one gives you the best net present value?

MR MASON: So if - maybe I will try and rephrase that differently.

MS EVANS: .....

MR MASON: I am not trying to put words in your mouth but I am trying to understand it because, I mean, I didn't mention NPV, you are the one that mentioned NPV.

MS EVANS: .....

MR MARCHANT: No, the access undertaking does, the access undertaking does.

MR MASON: ..... I accept that. But I didn't, in my question - - -

MS EVANS: You mentioned auctioning, but - - -

MR MASON: I mentioned auctioning - - -

MR MARCHANT: And there is no auction proposal in the undertaking.

MR MASON: And - no, my question was: does it stop auctioning at prices higher than the capped path? And my understanding of your answer is that you have said, implicitly, yes.

MR MARCHANT: No, the only time that the concept of auctioning comes up in this undertaking is in the event that two applications for an access path are in conflict with each other. That is the only time it comes up.

MR MASON: That can't end up with a path price that is higher than you - the CPI minus 2 cap? That is my question?

MS EVANS: .....

MR MARCHANT: And the way this thing is structured, no.

MR MASON: That was the question, is was a simple and straightforward question.

MR MARCHANT: But only for the five years, only for the five years.

MR MASON: I wasn't trying to trick you.

MR MARCHANT: But, I mean, you are looking for a nuance in there which isn't there, because the question is premised on an auctioneering proposal and we haven't put an auctioneering proposal forward. We would have liked to but we haven't.

MR MASON: Yes, I think if I just take one more minute on that one. I - I wasn't asking whether you intended to have auctioning but whether the undertaking allowed you to have a certain type of auction? Very simple and straightforward question. And my understanding is that the answer is "no".

MR MARCHANT: The undertaking enables an applicant to propose a path under the terms we have offered up. In the event, and this is the only time auctioning comes up, in the event that two applications for a path are in conflict and therefore they both cannot be fulfilled, it provides a prescribed method of ARTC to resolve that conflict. And that prescribed method is using the net present value of the path proposals put before it.

MR MASON: If I could - in that sense, if I crossed out auctioning and wrote selection I would end up with the same thing, I think.

MR MARCHANT: You - yes, you would end up with a situation - - -

MS EVANS: .....

MR .....: It is not an option .....

MR MARCHANT: In the event that two people have asked for the same or similar stuff, the only way ARTC can resolve it and comply with the undertaking is to actually assess them based on the net present value of the two proposals to ARTC.

MR MASON: And if I wanted to get my NPV up by bidding twice the path price, your undertaking prohibits that.

MR MARCHANT: No, no. No, the undertaking prohibits nobody from voluntarily contracting to do anything. What it prohibits is the access provider from arbitrarily increasing the floor on the industry. If you walk

in tomorrow and you want to pay four times our published indicative access price for a path, you are entitled to do so and we are entitled to agree. However, you don't have to because we have capped what the maximum is for that path. An undertaking does not stop people voluntarily consenting to agreements in any form whatsoever.

It is there as a surrogate in the event that a monopolist seeks to exploit the market by actually attempting to push both prices and terms into extremes. But, Peter, I promise you if you came in tomorrow and you wanted a path at 10 o'clock on Friday - on Thursday night and you were offering me twice the amount of money, if you could get out of the door alive I would contract with you.

MR MASON: Well, I am saved because I am not going to offer it, I don't think, but thanks.

THE CHAIRMAN: He is not giving any undertakings. If there is no more comments specifically on what was raised today, I will just attempt to very very briefly sum up, if anything for the record. When we started this afternoon with dispute resolution there was clearly some concern from the ARTC over some of the recommendations arising from the resolve report, especially with respect to the proposed conflict manager role, and the panel of mediators.

We didn't have too many comments from the operators in this regard. I think their major concern previously relating to having the Commission with a role - that has clearly been met, and that probably in terms of the arbitration side clearly given a response to that issue that had been raised in the previous forum. In terms of pricing, some concern expressed over the way the indexing of charging is occurring. Comments on competition and certainly indemnities insurance issue has been - was raised as a concern and I think there are - that has been addressed.

That there is a relationship between price and service quality that has to be taken into account was emphasised in a couple of comments. Some train operators did call for the ACCCs processes to be paused while industry consider those three main areas of disagreement - the price escalation, service standards and the performance of the ARTC, and the insurance and indemnity. ARTC has noted that there is a balance being sought between giving certainty to users and providing scope for negotiation. And clearly, from ARTCs point of view, they have accepted most of the ACCC recommendations.

The indemnities issue can be dealt with, it appears, in the legal drafting issues and that is something that ARTC have taken on board. As I

mentioned, in terms of next steps we are still aiming for a process, I think certainly ARTC have indicated that there would be a possibility - or that there could be some side - further industry consultations and possibly including an ACCC as an observer, or whatever people feel comfortable with.

We would be happy to listen to any initiatives of this sort and advise you of our response, so we will certainly maintain close communication with ARTC and with industry - and in terms of any further consultations of a more information nature that can occur. So that is probably a very quick summary of the things that we have touched on this afternoon. I think it has been of further use to us and hopefully may have further clarified in your minds the real implications of the framework that is being developed with the undertaking and how that then - I mean, it is an old adage, but the proof is always in the eating of the pudding and therefore - but we have got to actually have that pudding before we can eat it.

And, hopefully, while we are happy to see some further dialogue we would like to keep the process moving. So thanks everyone for attending and ARTC for their input.

MR HALL: Can I - just - no, sorry, John. You mentioned going forward, I think you are aware that FreightCorp and International Rail, their bidding is due on the 14th - is that right - of next month.

THE CHAIRMAN: Yes.

MR HALL: That is going to create difficulties with - certainly with FreightCorp in attempting to meet your timetable and at the same time wanting to indulge in some further discussion with the ARTC. I can't give you a feel for it at the moment, it is a unique experience for us. But it is killing us in the market, so - - -

MR MARCHANT: I am - I am happy to meet before the 14th - - -

MR HALL: Yeah, well, same here.

MR MARCHANT: All I am saying is - - -

THE CHAIRMAN: Yes, well - - -

MR MARCHANT: - - - that at the same time while we can ..... we certainly don't want to wait.

THE CHAIRMAN: - - - I think - I think the sort of thing we have got envisaged would - yes. With the sort of thing we have got envisaged I think it has got to be short and sharp, on this side. I know you have got a lot on the other side of the plate. So we will - - -

MR HALL: That is all I want to put forward ..... .

THE CHAIRMAN: Yes, yes. Any more comments before we close? As I say, thanks to ARTC and thanks to everyone for participating. And we will certainly take into account the things that have been said today and look forward, ultimately, to any further written comments by 31 January. Thanks very much.

MEETING CONCLUDED [4.40pm]