National Rail Corporation Limited
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DRAFT ACCESS UNDERTAKING

BY THE

AUSTRALIAN RAIL TRACK CORPORATION LTD

Submission by
National Rail Corporation Limited
to
Australian Competition and Consumer Commission

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CONTENTS

1. INTRODUCTION AND OVERVIEW OF SUBMISSION

National Rail supports the ARTC's efforts to gain approval for an Access Undertaking. However, the company believes the draft Undertaking submitted for approval by the ACCC does not adequately fulfill the requirements of Part IIIA of the *Trade Practices Act 1974* or of the ACCC's guidelines published in *Access Undertakings: A Guide to Part IIIA of the Trade Practices Act* (1999). The concerns of National Rail in relation to the Undertaking are summarised below and detailed in the main body of this submission. Where relevant, the questions posed in the Commission's *Issues Paper* of March 2001 have been referenced in italics.

1.1 Summary of key issues requiring change to the ARTC draft Undertaking

There are a number of changes required in the Undertaking, the details of which are contained in this submission:

(a) The Undertaking should state as objectives:

- To establish uniform conditions for access to interstate rail infrastructure regardless of the ownership or control of the track being used.
- To promote the adoption of uniform operating practices on the interstate network based on the *Code of Practice for the Defined Interstate Network*.
- To provide access in an efficient manner consistent with *best practice* operational performance and costs, subject to *continuous improvement.*

(b) The Scope of the Undertaking should envisage progressive expansion of the "Network" as defined in the Undertaking to encompass the whole of the Defined Interstate Rail Network.

(c) The Undertaking should place a duty on the ARTC to implement all parts of the Code of Practice for the Defined Interstate Network as and when it is published following endorsement by the Australian Transport Council.

(d) It should provide for review of the Undertaking at the request of (say) any two Customers, and for a process in which such reviews can be conducted with the independence anticipated by the ACCC Guide.

(e) It should be more explicit as to which obligations and processes would be material to a decision by the ARTC to refuse to negotiate. The ARTC should also be required to provide reasons in writing for its refusal to negotiate.

(f) It should require that an Applicant either be an accredited operator or nominate an accredited operator to operate the paths being applied for, and that any such nominated operator must be a party to the Application.

(g) It should make clear which aspects of an Access Agreement may be negotiated by an end-user and which by an accredited rail operator.

(h) Concepts and processes relating to 'Capacity' require clearer definition in the Undertaking. Four principles should apply:

- The term Capacity must be better defined in relation to what factors go to quantifying it.
- Capacity Analysis – the process for quantifying Capacity – must be open to independent assessment, at the request of any Applicant, and the Undertaking should commit the ARTC to providing the information needed for this purpose.
- Capacity Entitlements – the Capacity contained in a negotiated access agreement – must be expressed in terms that can readily be translated into scheduled capacity, i.e. train paths.
- Capacity Allocation – the process of converting capacity entitlements into train paths – must be conducted by transparent processes, and be subject to arbitration.

(i) The definition of Capacity and its various derivative definitions should provide for time 'buffers' between Train Paths to protect rail operators from the risk of operator or system failures.

(j) The method for Capacity Analysis should enable the distinction to be made between additional capacity for an individual operator and for system requirements.

(k) Indicative access proposals must be negotiated 'in good faith' or be made as firm 'offers' of a contract for 'acceptance' by the Applicant, subject to negotiation; or alternatively the process be amended to add an early step in the negotiation at which the ARTC is required to make a firm 'offer' for further negotiation.

(l) Where there are potentially conflicting Applications (for the same paths), the process by which the ARTC assesses the "most favourable" must be undertaken with transparent criteria, in particular the assessment of risk.

(m) The ARTC must be required to inform potentially competing Applicants of this situation.

(n) The Undertaking must require that Access Agreements contain agreed KPIs relevant to both the supplier and all users of the 'service'.

(o) The Undertaking should provide for 'service standards to be sustained' by both access provider and users, and that this compliance be monitored. Track users must be obliged to maintain high standards of conduct on the track, to ensure compliance with the limits placed on train mass and dimensions, and prevent unfair economic advantage accruing to some operators to the long-term detriment of the track asset.

(p) It should contain explicit provisions for the Arbitrator to obtain access to relevant information held by the parties. The power of the Arbitrator to obtain information should be clearly stated.

(q) The Undertaking should provide a simpler, quicker, more direct path to Arbitration, with determination of all unresolved disputes by the ACCC.

(r) For instances where there is refusal or unreasonable delay in complying with arbitral decision, the aggrieved party should be able to obtain an enforcement order by the ACCC.

(s) DORC should not be escalated by CPI. This approach is an arbitrary and unsatisfactory way, even if it is assumed there is an understatement of DORC owing to a shortfall in notional future network investment. A more acceptable approach to this issue is required.

(t) The date on which the long-term Commonwealth Bond Rate to be used in the CAPM quantification of WACC should be explicitly stated in the Undertaking to be the date of approval of the Undertaking.

(u) The WACC should be explicitly stated in the Undertaking. It should be the 'real pre-tax' rate, and should be the mid-point determined by CAPM.

(v) The Undertaking should require that the WACC should be revised annually.

(w) The 'X' in CPI-X must be reviewed at two-year intervals.

(x) As with the date for fixing the long-term Commonwealth Bond Rate, there must be dates fixed for application of the CPI-X escalation of the Reference Tariff.

(y) The major terms of the Indicative Track Access Agreement must be in the Undertaking to ensure they are enforceable by the ACCC.

2. PART 1 'PREAMBLE'

2.1 Objectives – uniformity of access codes and operational codes

Q. *Is the ARTC undertaking accommodating of possible moves by other States or Territories to establish an appropriate interface with their respective access regimes?*

No. The Undertaking should include in paragraph 1.2 an objective to promote the adoption of a uniform code for access to all parts of the Defined Interstate Rail Network[1]. This would be consistent with clause 6(4)(p) of the *Competition Principles Agreement*, and with objectives of the 1997 Intergovernmental Agreement (IGA) to establish the ARTC.[2]

This issue of consistency with other access regimes or codes – uniformity of track access arrangements covering the interstate network and contiguous 'intrastate' networks – is critical to National Rail and other rail operators.

The Undertaking should state as an objective to seek to establish a basis on which the conditions of access for interstate rail transport can be uniform regardless of the ownership or control of the track being used. This should include all track on the 'Defined Interstate Rail Network' and also contiguous 'intrastate' track owned or controlled by states and other track owners. In NSW and Queensland both interstate and 'intrastate' track (which is used by some rail operators for interstate transport) is state-owned and subject to state access regimes; in Victoria, SA and WA 'intrastate' track is privately owned or leased and subject to state-based access regimes.

A number of key objectives in the IGA are not recognised in the objectives of the Undertaking (clause 1.2). Paragraph 1.1(b) recognises the stated objective of the IGA to create a "single process for access" to the interstate rail network, clause 5.1 states "the company will aim to provide efficient and seamless access to the interstate rail network", and clause 7.1(i) requires the company to "develop and promote uniform safeworking, technical and operating requirements, and work with other track owners to achieve this". Clause 15.2 also requires an undertaking by the ARTC to be "consistent with codes covering intrastate track which intersects with the interstate network".

There is substantial support for this uniformity objective, beyond the aims of governments expressed in the 1997 IGA. The NCC has been aware of non-uniformity between access arrangements applying to the interstate and 'intrastate' track, and decided that the NSW Access Regime should only be certified until 31 December 2000 on the basis of the anticipated lodgment of the ARTC Undertaking by 31 December 2000 and the development of a national access regime. In other states, regimes for 'intrastate' track contiguous with the Defined Interstate Rail Network have not been certified. Part IIIA of the *Trade Practices Act 1974* permits dual coverage by undertakings and certified regimes.[3]

The Undertaking should include in paragraph 1.2 and the Preamble an objective to promote the adoption of uniform operating practices on the interstate network based on the *Code of Practice for the Defined Interstate Network*, as it is agreed and implemented.

The Undertaking should place an obligation on the ARTC to implement all parts of the *Code of Practice for the Defined Interstate Network* as and when it is published following endorsement by the Australian Transport Council.

Among the objectives of the 1997 IGA is also "advancing uniformity of technical, operating and safeworking standards on the interstate network" (clause 2.1(f)); clause 13.12 of the IGA also states

[1] A term agreed by rail track owners to encompass the track to which uniform codes of practice will apply; see details under heading 'Scope and Administration' in this submission.
[2] *Australian Rail Track Corporation*, agreement of 14 November 1977 between the Commonwealth and the states of New South Wales, Victoria, Queensland, Western Australia and South Australia.
[3] Productivity Commission, *Review of the National Access Regime, Position Paper*, March 2001, p 194.

"the Parties and the company will seek uniformity of technical, operating, and safeworking standards and requirements". Pursuant to the IGA, a uniform *Code of Practice for the Defined Interstate Network*, pursuant to AS 4292 (Rail Safety Management) is currently being progressively implemented by relevant rail infrastructure providers, operators and maintainers.

In Schedule D of the Undertaking, the definition of "Code of Practice" refers to an obsolete document. It should also refer to the *Code of Practice for the Defined Interstate Network*.

2.2 Efficient Infrastructure practice

Paragraph 1.2 (c)(iii)(B) should be strengthened to include providing access in an efficient manner consistent with best practice operational performance and costs, subject to continuous improvement.

It is noted that paragraph 1.2 (c)(iii)(B) states as an objective that access should be provided in an "efficient" manner. This is supported by the assertion in paragraph 1.1 (g) that "maintenance of the Network and Associated Facilities [have been] outsourced … with a view to ensuring that the ARTC's cost structure will reflect efficient infrastructure practice".

While these words are encouraging, they give no reassurance that there will be continuing advancement of efficiency going forward. This could be achieved by reference to 'continuous improvement', which is a widely recognised requirement of entities supplying goods and services in competitive markets.

3. PART 2 'SCOPE AND ADMINISTRATION'

3.1 Scope

The Scope of the Undertaking should envisage progressive expansion of the "Network" as defined in the Undertaking to encompass the whole of the Defined Interstate Rail Network. Therefore the Defined Interstate Rail Network should be included in the Definitions in the Undertaking. Schedule E ('the Network') comprises only the network now directly controlled by the ARTC by means of ownership or lease.

The scope of track covered by the draft Undertaking is defined very narrowly in Schedule E, and appears to be inconsistent with the requirements of the 1997 Inter-governmental Agreement, which states "the company will negotiate agreements and operating protocols with owners or operators of track it does not control for seamless access and operations" (clause 13.13). The Network defined in Schedule E does not provide connections between any capital cities or other major traffic generators other than between South Australia and Victoria. This and the expressed intention of the IGA strongly suggest the scope of the Undertaking should be whole Defined Interstate Rail Network.

It is understood that the scope of the Undertaking might be constrained by s44ZZA of the *Trade Practices Act 1974,* which specifies that an undertaking may be lodged by "a person who is, or expects to be, the provider of a service". In s44B a provider is defined as "… the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service".[4]

Clause 7.1 of the IGA envisages extension of the scope of ARTC control, consistent with the requirements of s44ZZA of the *Trade Practices Act 1974*:

> The company will … (b) manage, through a lease contract, Victoria's interstate track and related assets; (c) manage, through a lease contract, any other interstate track and related assets agreed between the Parties; (d) provide access to the track it manages under … (b) and (c); (e) provide access for interstate operations by accredited rail operators to other track, through agreements with other track owners…."

This clause appears quite explicitly to anticipate that the ARTC "is or expects to be the provider of [the] service" the words in s44ZZA, and that therefore the scope of the Undertaking should, and legally can, extend to the whole of the Defined Interstate Rail Network.

It is understood the ARTC has executed an agreement with the Government of Western Australia providing for the ARTC to 'wholesale' interstate access to the track west of Kalgoorlie. This has not been recognised in the Undertaking. It is therefore unclear whether the ARTC/WA agreement has any practical effect for interstate users. It appears the Undertaking would not cover this track, and therefore would not be consistent with the objectives of the 1997 IGA.

In particular, clause 2.1 should be amended to include all of the *Defined Interstate Rail Network*, with the proviso that its terms will apply to those segments of the network beyond those in Schedule E as and when the ARTC gains effective control (by means of ownership, lease or agreement).

As required by clause 7.1(i) of the 1997 IGA, identification and definition of the *Defined Interstate Rail Network* has occurred in parallel with development of access arrangements by the ARTC. The uniform *Code of Practice for the Defined Interstate Network* developed by the Australian Rail Operations Unit with support from all track owners explicitly recognises and defines the Defined Interstate Rail Network as follows. The portions of the Defined Interstate Rail Network currently controlled directly by the ARTC are highlighted in *italics*:

[4] Productivity Commission, *Review of the National Access Regime, Position Paper*, March 2001, p 188.

Queensland

- Acacia Ridge-Dutton Park-Fisherman Islands
- Dutton Park-Roma Street
- Acacia Ridge-NSW border (Border Loop)

New South Wales

- Queensland border (Border Loop)-Maitland
- Maitland-Broadmeadow
- Broadmeadow-Scholey Street Junction-Morandoo Yard (BHP)
- Berowra-Hornsby-North Strathfield-Chullora/Enfield (proposed freight route)
- Chullora/Enfield-Sefton-Liverpool-Macarthur (proposed freight route)
- Lithgow-Orange-Parkes-Broken Hill
- Parkes-Stockinbingal-Cootamundra
- Macarthur-Moss Vale-Goulburn-Cootamundra-Albury

Victoria

- *Albury-Wodonga-Tottenham-West Footscray*
- *West Footscray-South Dynon/North Dynon*
- South Dynon-Spencer Street
- *Tottenham-Newport-North Geelong-Gheringhap*
- *Gheringhap-Ararat-Dimboola-Wolseley*
- South Dynon-Spencer Street-Flinders Street-Frankston-Long Island (broad gauge)

South Australia/Northern Territory

- *Wolseley-Tailem Bend-Mile End-Islington-Dry Creek*
- *Dry Creek-Gillman Junction-Port Adelaide-Glanville*
- *Glanville-Pelican Point*
- *Gillman Junction-Port Flat*
- *Dry Creek-Crystal Brook-Coonamia-Port Pirie*
- *Crystal Brook-Peterborough-Broken Hill*
- *Coonamia-Port Augusta-Tarcoola-WA border*
- Tarcoola-Alice Springs[5]
- *Port Augusta-Whyalla*

Western Australia

- *SA border-Kalgoorlie*-Avon-Midland
- Midland-Forrestfield
- Midland-East Perth terminal
- Forrestfield-Cockburn-Kwinana
- Cockburn-Fremantle

3.2 Duration of Undertaking

Q. *Is the proposed term for the undertaking appropriate given the nature of the services in question and of the industry more generally? Would a longer term be more appropriate?*

The proposed term of the Undertaking (5 years) is considered appropriate.

[5] This segment of the network removed from ARTC control as from 18 April 2001; now subject to the SA-NT access regime, which contains terms and conditions very different from those of the Undertaking, and no provision for 'seamless' access.

3.3 Review of Undertaking

Paragraph 2.4 of the Undertaking should be revised to provide for it to be reviewed at the request of (say) any two Customers. Paragraph 2.4 should also provide a process for conducting the review which is in the spirit of independence anticipated by the ACCC Guide.

Paragraph 2.4 of the Undertaking is inadequate because it provides that only the ARTC may initiate a review, and only on the narrow grounds that "this Undertaking is no longer commercially viable for the ARTC….". While it requires that the ARTC consult with its Customers regarding the proposed variation, it does not require that they or other stakeholders be involved in the process of review before proposals for change are formulated. This procedure is inconsistent with 1.2(c)(i)(C) which aims to "stimulate customer confidence and market growth in the rail industry….".

The ACCC's *Access Undertakings: A Guide* (1999), at page 63, states,

> Long term undertakings (where the expiry date specified is several years after commencement of the undertaking) should incorporate a periodic review process to ensure that the undertaking is up to date, relevant to current conditions and fully complies with the Trade Practices Act. The frequency of reviews should be specified in the undertaking. The reviews could be carried out by an administration body, the dispute resolution body or some other independent body. Before accepting an undertaking the Commission will need to be satisfied that the review process reflects the interests of all parties and not just of the service provider. "

The Queensland Competition Authority (QCA) recommends that a review of the operation of the proposed Queensland Rail (QR) undertaking be conducted by the QCA and QR "12 months after its commencement".[6]

We are not seeking fixed periodic reviews. However, there should be provision for stakeholders other than the ARTC to initiate reviews. Once initiated, they should be conducted in a transparent manner with transparent review criteria. To achieve this reviews should be conducted by the ARTC and the ACCC, with participation from stakeholders, against performance criteria approved by the ACCC.

3.4 Existing Contractual Agreements

Paragraph 2.5 of the Undertaking should be amended to state that it does not apply where rights to variation of access rights are included in existing Access Agreements., unless otherwise agreed by those contracting parties.

The draft Undertaking applies to "new Access Agreements and to the negotiation of Access Rights in addition to those already the subject of an Access Agreement". This is not appropriate where existing Access Agreements include enforceable provisions dealing with variation of access rights, identical to or similar to those in clause 9 of the pro forma Track Access Agreement attached to the Undertaking.

[6] Queensland Competition Authority, *Draft Decision on QR's Draft Undertaking* (Dec 2000), Vol 2, p 64.

4. PART 3 'NEGOTIATING FOR ACCESS'

Q. *Does the undertaking clearly define the relevant terms and conditions which enable a prospective operator to be sufficiently well informed before making a specific access request? Do these criteria encourage potential operators to apply for access?*

In many respects, the Undertaking does not clearly define relevant terms and conditions, and includes provisions which could discourage applications, as indicated below.

4.1 Parties to Negotiation

Q. *Are the processes for the initial phase of negotiations reasonable?*

No. See the paragraphs below after the heading 'Status of Indicative Access Proposal'.

Q. *Does the undertaking provide adequate detail on what is expected of an Accredited Operator?*

Rollingstock details required in initial applications required should be spelled out more clearly in Schedule B.

The details of 'rollingstock and vehicles to be used' (Schedule B, item 3) are vague. There are many possibilities – e.g. type, age, manufacturer, modifications, dimensions, proposed freight to be carried, ownership history, maintenance history, details of alternative wheel/rail interface (e.g. bogie types)[7] and other change-out components.

Q. *Are the criteria that ARTC intends to use to "screen" applicants appropriate?*

4.2 Threshold issue – conditions for refusal to negotiate

In paragraph 3.3(a) the reference to "relevant obligations and processes" is vague. This is clearly a threshold issue in the negotiation process affecting the basic right to negotiate. This clause should be more explicit as to which obligations and processes would be material to a decision by the ARTC to refuse to negotiate. The ARTC should also be required to provide reasons in writing with 14 days for its refusal to negotiate.

After a substantial analysis of this issue, the QCA concluded that there must be an onus on the access provider to justify its refusal to negotiate by demonstrating that the access seeker was not capable of meeting the terms and conditions, and that reasons must be provided within 14 days of a refusal.[8]

4.3 Negotiation with Applicants who are not accredited operators

Paragraph 3.3(b) should be redrafted to require that an Applicant either be an accredited operator or nominate an accredited operator to operate the paths being applied for. Any such nominated operator must be a party to the Application. Complete compliance with paragraph 3.5(c) appears to require that an accredited rail operator be directly associated with the application.

In paragraph 3.3(b), the phrase "… will procure the services of an Accredited Operator…" is ambiguous; the phrase is used in relation Applicants who are not railway operators. It is not clear whether there is an obligation on an "Applicant which is not an Accredited Operator" to nominate an Accredited Operator at the time of the application.

The ambiguity is worsened by the apparently conflicting words in paragraph 3.7(c)(iii) dealing with Capacity Analysis, which refers to "other operators", and paragraph 5.2(b) dealing with Capacity

[7] Pricing policies can provide incentives to use more track-friendly bogie types.
[8] QCA, *Draft Decision on QR Access Agreement*, vol 2, pp 162-172.

Allocation, which refers in a similar context to "Applicants". The pro forma Access Agreement (paragraph 19(c)) also provides for Assignment or Novation only to a "Proposed Operator". The whole pro forma is drafted in such a way that it could be entered into only by an accredited operator.

The QCA in its analysis of the proposed QR Undertaking usefully explains that "an access agreement for below-rail services has two key components: an access right and a haulage arrangement", which can be 'unbundled', and it supports the unbundling of access agreements where requested by access seekers, provided that an appropriately accredited operator performs the train services.[9] The NSW Rail Access Regime allows both end-users and rail operators to enter into access agreements.

In principle, National Rail does not disagree with the QCA position. However, there is a risk in negotiating with an Applicant which is not an accredited operator, and which does not nominate an accredited operator in conjunction with the application. The risk is that a place in the negotiating 'queue' for scarce train paths will be occupied by an Applicant which has no certain prospect of using the paths if negotiations are successful (this would depend on negotiation of commercial terms for the freight transport task). Notification to a subsequent Applicant (clause 3.7(c)(iii)) of the existence of another Applicant with prior rights in the queue could deter the subsequent Applicant from continuing to negotiate, or cause them to seek another less advantageous path.

The draft Undertaking should be redrafted to make clear which aspects of an Access Agreement may be negotiated an by end-user and which by an accredited rail operator. For example, those relating to Capacity (analysis, allocation and transfer), are clearly relevant only to an 'access right' (in the words of the QCA), and could be negotiated by an end-user or an operator. However, those relating to network transit management (part of 'haulage arrangements') are clearly most relevant to Applicants who are accredited operators.

There is also a need for paragraphs to be redrafted to remove inconsistencies. For example, paragraph 3.7 (c)(iii) should be redrafted to substitute the defined word Applicant for "operator".

4.4 Confidentiality

This is a difficult area, as the legitimate commercial interests of the parties to an access negotiation can be in conflict with the expressed desire for transparency. Some principles are required in order to distinguish between these two interests, viz:

- Where Applicants request it, the ARTC and its consultants must be willing to sign confidentiality agreements with respect to specified information.
- The identity of Applicants must not be revealed to third parties during negotiations (eg in disclosure of applications for mutually exclusive capacity)
- Access prices should be disclosed only after commencement of agreements

Paragraph 3.4(c)(ii) provides for disclosure to "recipients' advisers under a duty of confidentiality". This leaves open potential for uncertainty by an Applicant if it perceives a risk to confidentiality by advisers who might have conflicts of interest. Clause 3.4 should be amended to provide that recipients' advisers may be required by any party to enter "appropriate confidentiality arrangements", as in the last sentence in paragraph 3.4(a).

4.5 Indicative Access Proposal

Q. *Does the Indicative Access Proposal contain sufficient information and details to enable the access seeker to adequately evaluate the proposal? Does the Indicative Access Proposal provide an adequate basis for meaningful negotiations?*

[9] QCA, *Draft Decision on QR Access Agreement*, vol 2, pp 156-160.

4.5.1 Definition and quantification of Capacity

Both the nature of 'Capacity' and the process of 'Capacity Analysis' are unclear in the draft Undertaking. The definition of Capacity in the draft Undertaking sheds no further light on this. The term Train Path is better defined, and seems to be the major factor in Capacity but this is not clear.

This is a key issue. Capacity could be interpreted by the ARTC to mean more than the defined term Train Path, with the potential for the ARTC to require in its Indicative Access Proposal that the Applicant meets the cost of Additional Capacity. It also leaves uncertain whether negotiations might be proceeding in parallel with another Applicant for overlapping Capacity.

Four principles should apply in the Undertaking:

- The term Capacity must be better defined in relation to what factors (including constraints) go to quantifying it. Capacity must take account of the time dimension. The factors and constraints which determine Capacity should be listed, and their influence on total Capacity described. To the extent that existing Train Paths are a factor in Capacity, there must be a sufficient 'buffer' between individual paths to protect train operators against the risk of failure by other operators or the track provider, and subsequent interference with their train path. This is a constraint on Capacity.
- Capacity Analysis – the process for quantifying Capacity – must be open to independent assessment, at the request of any Applicant, and the Undertaking should commit the ARTC to providing the information needed for this purpose. The process of Capacity Analysis must take into account the requirement for 'buffers' between Train Paths (see previous point).
- Capacity Entitlements – the Capacity contained in a negotiated access agreement – must be expressed in terms that can readily be translated into scheduled capacity, i.e. Train Paths.
- Capacity Allocation – the process of converting capacity entitlements into train paths – must be conducted by transparent processes, and be subject to arbitration.

'Capacity' is quantifiable in terms of 'available train paths', but these things are not the same – capacity entitlements must be converted to train paths by the process of capacity allocation. The availability of train paths will be affected by:

- The condition of the track and other infrastructure and hence allowable maximum speeds.
- The type of train services proposed, in particular average speed and length of train (which determines the requirement for crossing loops on single-line track).
- The need to observe safeworking procedures including allowable headways.[10]

The Undertaking must contain a useable definition of Capacity, and must also implement the four principles described above. Paragraph 3.7(c) and also paragraphs 5 and 6.2 must be amended to provide for a full definition of the term Capacity, ensuring that the defined terms Capacity Analysis and Capacity Entitlement remain appropriate, and to provide a definition for the term Capacity Allocation. Before any revised definition of Capacity is attempted by the ARTC, there should be consultation with existing Access users.

4.5.2 Status of Indicative Access Proposal

Paragraph 3.7(d) provides that the Indicative Access Proposal "does not oblige the ARTC to provide Access in accordance with specific terms and conditions, including Charges, contained with it". However, paragraph 3.10(b) seems to contradict paragraph 3.7(d), but requires only that the Access Agreement must be consistent with the 'principles' in the Indicative Access Agreement. These

[10] There is a very useful discussion in the QCA's *Draft Decision* …, vol 2, from page 252.

provisions are inconsistent with paragraph 1.2(c)(i)(A) ("customer confidence and market growth"), because it could significantly discourage potential applicants from commencing negotiations, as it will be perceived they could spend many weeks or months negotiating with the ARTC, with the ARTC 'moving the goalposts' during the negotiation.

The simplest means to overcome this uncertainty is to commit the ARTC in the Undertaking to negotiate 'in good faith' (in paragraphs 3.1 or 3.2). Alternatives are to provide that the Indicative Access Proposal be a firm 'offer' of a contract for 'acceptance' by the Applicant, subject to negotiation; or the process be amended to add a step at an early stage in the negotiation (say after 30 days) at which the ARTC is required to make a firm 'offer' for further negotiation.

4.6 Negotiation

Q. *Are the various negotiation steps reasonable? Do they define the framework for negotiations and allow meaningful negotiations to occur? Are they likely to lead to outcomes that are beneficial to both ARTC and access seeker?*

The heading above on 'Status …' suggests changes which should be made to remove some uncertainty in the process. There are also other issues:

4.6.1 ARTC decisions in the event of applications for mutually exclusive capacity

In the event that two or more Applicants apply for mutually exclusive capacity, paragraph 3.9(d)(ii) provides for the ARTC to grant access to the Applicant offering terms "most favourable" to the ARTC. This raises a number of issues:

- Because the definition of Capacity is vague, the circumstances in which this might occur are unclear, and criteria for arbitration would be unclear in the event of arbitration on this point. The definitional issue is dealt with above.
- There is no provision for transparency in the ARTC's assessment of which offer is most favourable.
- Is "most favourable" a reasonable and fair criterion?

The Undertaking should require the ARTC to use its best endeavors to accommodate all applicants by flexible adjustment of requested paths; this is in fact established practice. If this is not possible, then the process by which the ARTC assesses the "most favourable" must be undertaken with transparent criteria, in particular the assessment of risk (see below for further discussion on this matter).

4.6.2 Failure of ARTC to notify of other Applicant for mutually exclusive capacity

It is important that the ARTC be made more accountable in this area by removing this exemption. There must be an absolute obligation to inform each Applicant there is a potential conflict, but not of the identity of the other party(s).

Paragraph 3.7(c)(iii) requires the ARTC to notify an Applicant of 'the existence of other operators who have submitted' applications for potentially conflicting capacity.

However, paragraph 3.9(d) exempts the ARTC from breach of the Undertaking if it fails to notify an Applicant that negotiations were preceding with another mutually exclusive Application. Without this knowledge, subsequent negotiations could (unknown to the Applicant) be a complete waste of time and expense.

The recourse to dispute resolution processes provided for in clause 3.9(e) cannot repair the damage done in the event of a fruitless negotiation conducted without knowledge of potential conflict and the existence of an effective access auction. The issue would be the damage done by wasted time and

expense (management time, the cost of legal and other professional advice), and loss of customer goodwill by the Applicant if it is a freight service provider.

4.6.3 Matters for inclusion in Agreement

These are enumerated in Schedule C. However, many of the items in Schedule C are vague, and require more detail. A general concern is that because Schedule C is loosely worded, and makes no reference to specific clauses of the Undertaking, that it has the potential to be misused by either of the negotiating parties to establish rights which do not in fact exist within the Undertaking. A few particular examples are:

- A right by the ARTC to vary, remove or review train paths is stated without qualification (see below for discussion of this issue).
- A right by the ARTC to 'conduct audits', without specifying what type, of what, etc.

4.6.4 Key performance indicators

The Undertaking makes no mention of Key Performance Indicators (KPIs). On the other hand, the Guide to Access Undertakings published by the ACCC states that undertakings should:

- Provide adequately for service standards to be sustained, in the interests of users and potential users of the service, and adequate mechanisms for measuring and reviewing service performance.
- Provide for periodic independent review/audit of information accuracy and the process for collecting information in respect of service performance.

Schedule D of the Undertaking (Indicative Track Access Agreement as a Commencement Date) does contain reference to KPIs in its Schedule 6 (referred to in clauses 1.1 (definitions) and 2.9). However, these would not be enforceable by the ACCC in the context of this Undertaking.

A suitable clause should be included in the Undertaking requiring that Access Agreements contain agreed KPIs relevant to both the supplier and all users of the 'service'.

4.6.5 Inspection and Audit

The ACCC's *Access Undertakings: A Guide* (1999) states that undertakings should provide adequately for service standards to be sustained, in the interests of users and potential users of the service; contain adequate mechanisms for measuring and reviewing service performance; and provide for periodic independent review/audit of information accuracy and the process for collecting information in respect of service performance (page 54).

Schedule C of the Undertaking (Essential Elements of Access Agreement) includes "the ability of ARTC to conduct audits on the Operator". The Undertaking itself contains no mention of such audits, or of appropriate processes and standards against which the audit is to be conducted.

On the other hand, Schedule D (Indicative Track Access Agreement as a Commencement Date) contains a number of relevant and detailed provisions:

- The ARTC may audit any particular service of the Operator for compliance with the Agreement; whether wagons are overloaded; or whether any wagon(s) are unsafe (clause 10.1); if overloading is found to be occurring, the ARTC has a right to apply extra charges (clause 10.2).
- The ARTC may place monitoring equipment on its network to measure the performance of rollingstock, to assess compliance with the audit standards in clause 10.1 (clause 10.5)
- The Operator may audit any of the railway track and lines on the Network for the purpose fo monitoring compliance by the ARTC with requirements to maintain the network in an agreed condition.

The Undertaking should contain similar provisions as those in the three dot-points above, to provide adequately for 'service standards to be sustained' by both access provider and users.

This is a matter of some importance to National Rail to ensure that both ARTC and other track users maintain high standards of conduct on the track, to ensure compliance with the limits placed on train mass and dimensions, and prevent unfair economic advantage accruing to some operators to the long-term detriment of the track asset.

4.7 Dispute Resolution

Q. *Are the dispute resolution processes reasonable, appropriate and adequate? Does the undertaking clearly describe the various stages of the process for resolving disputes? Is there sufficient detail on the nature of issues that may be subject to the dispute resolution process?*

There is clear description of the process at each stage. However, the process is potentially very lengthy, which could deter some potential Applicants from commencing the process.

National Rail is of the view that in an access arbitration an arbitrator should also be required to take into account:

- The interests of persons who want access.
- The importance of uniformity with inter-connecting networks and the need for seamless service.
- The direct costs of providing access.

Q. *Are the powers, functions and jurisdictions of the dispute resolution bodies appropriate and clearly defined?*

The draft Undertaking does not contain explicit provisions for the Arbitrator to obtain access to relevant information held by the parties, but it does contain adequate provision for protection of confidential information. The power of the Arbitrator to obtain information should be clearly stated.

Q. *Are the enforcement mechanisms adequate and clearly defined?*

The draft Undertaking simply states that "the decision of the arbitrator shall be final and binding on the parties" (paragraph 3.11.4 (viii)). Although no specific mechanism for enforcement is provided, the final and binding nature of decisions should be sufficient.

For instances where there is refusal or unreasonable delay in complying with arbitral decision, the aggrieved party should be able to seek an order for specific performance by the ACCC.

Q. *Are the time frames involved at each stage of the process of an appropriate length? Does the overall approach provide an appropriate balance between the need for timeliness, on the one hand, and efficient and fair outcomes, on the other?*

As mentioned above, the process is potentially very lengthy, although it is described in the Explanatory Guide as "quick". In fact, dispute resolution could progress from Negotiation to Mediation to Arbitration, in a series of steps, which could result in a delay of up to 100 days if there is disagreement at every step up to the completion of commercial arbitration. The parties to the dispute have the option of appointing (by agreement) a commercial arbitrator or the ACCC to determine the dispute; where they cannot agree, then the dispute goes to commercial arbitration.

The process seems very cumbersome and potentially drawn out. There are two issues:

- There is no means to progress directly to Arbitration unless agreed by the parties. Unless otherwise agreed by the parties, they must undertake Mediation. If unsuccessful, the process of Mediation can incur a delay of up to eleven weeks before progressing to Arbitration.

- After Mediation is exhausted, the process provides an excessive number of decision 'branches' before appointment of an Arbitrator. Unless the parties agree to appoint the ACCC to 'determine' he dispute, a further two weeks can be wasted before the process moves automatically to commercial arbitration. The selection and appointment of a commercial Arbitrator would then require more time.

The QCA has sanctioned a simpler process for dispute resolution in the QR Access Undertaking. As in the proposed ARTC Undertaking, it is a three-tiered process commencing with attempted resolution by chief executives or their nominees. However, failing agreement at that point (three weeks from notification of a dispute), either party can refer the dispute for determination by the QCA. An intermediate step, referral to an Expert, is available, but is not required. There is no option for referral of the dispute to commercial arbitration.

This portion of the proposed Undertaking should be reconsidered, with a view to providing a more direct path to Arbitration, and determination of all unresolved disputes by the ACCC.

5. PART 4 'PRICING PRINCIPLES'

The pricing principles in the draft Undertaking must to be considered taking into account two facts:

- Virtually all current (and probably almost all future) users of access services provided by ARTC are using the Reference Tariff, which is the schedule of Indicative Prices currently offered by the ARTC to all seeking access. Access negotiations have been largely concerned with other terms and conditions that affect the extent to which these can be used to commercial advantage. In other words, for most access users the Undertaking will in reality be 'price-capped', rather than 'revenue-capped'.

  With this in mind, the quantification of WACC, DORC and the definitions of 'floor' and 'ceiling' revenues diminish in importance, but the value of 'X' in the proposed 'CPI-X' escalation of the Reference Tariff (paragraph 4.6(c)) is critically important. This is not a reason however to pass over issues related to DORC, WACC, etc.

- The network now controlled by the ARTC is incomplete, and is anticipated will be substantially extended to encompass those portions of the Interstate Network in NSW and/or WA. This point has been explored earlier in this submission.

  Because the level of required future investment and the potential for efficiency gains in these prospective future additions to the network are substantially greater than in the network now controlled by the ARTC, there is a need to carefully consider the escalation formulas proposed for DORC, and also for 'X' (as applied in the CPI-X escalation of the Reference Tariff).

The issues relating to Pricing Principles which we would like to explore in this submission are:

- Proposed annual revision of DORC in line with CPI
- Need for an explicit date for fixing the risk-free return on investment used in CAPM.
- Need to explicitly state the value of WACC to be used in 'ceiling'
- Need for periodic review of WACC
- Need for annual revision of 'X' in 'CPI-X' escalation of Reference Tariff
- Need for an explicit start date for escalation of the Reference Tariff and for CPI
- Review of the Reference Tariff.

5.1 Annual revision of DORC in line with CPI

The ARTC states in its *Explanatory Guide* (page 13) that it believes the Booz-Allen Hamilton (BAH) valuation of DORC understates the value of the Network by not fully addressing its future demand characteristics. However, it provides no analysis or quantification to support this view.

Network users, including National Rail, have publicly given strong support to the findings of the ARTC's recently released Network Audit (also conducted by BAH) proposing investment of $507 million in the network. It should be noted however, that only a small portion of this amount (approximately a quarter) would be invested in that portion of the Defined Interstate Rail Network which is the subject of this Undertaking.[11]

Clearly a 'CPI-X' approach to DORC (where CPI has no logical relationship to future investment and where X = zero) is an arbitrary and unsatisfactory way to make up a shortfall in notional future network investment. A more acceptable approach to this issue would be:

[11] ARTC, *Interstate Rail Network Audit*, Booz-Allen & Hamilton, April 2001, page 17. The investment proposed in the Audit report is market-based, not aimed at implementing the 'standards' agreed by ATC in November 1997, as stated in the *Explanatory Guide* (this would not have been known when the Undertaking and *Explanatory Guide* were written).

- Immediately upscale the BAH DORC valuation to take account of the portion of the proposed 'Audit' investment program which applies to the ARTC-controlled network, and
- Formally review the DORC at the end of 2004[12], to incorporate any other actually or planned investment in the ARTC controlled network.

5.2 Explicit date for fixing the risk-free return on investment used in CAPM

This is left hanging in the draft Undertaking. The date on which the long-term Commonwealth Bond Rate has been based was 23 January 2001. By the time this Undertaking gains ACCC approval that date will be many months old, and the Bond Rate will have changed considerably.

It should be stated explicitly in the Undertaking, or in the ACCC approval, that the date for fixing this parameter value to be used in the CAPM quantification of WACC is the date of approval of the Undertaking. This is the approach taken by the QCA.[13]

5.3 WACC to be used in 'ceiling' not stated

The WACC to be used for calculating the 'ceiling' is not explicitly stated in the *Explanatory Guide* (page 13-14). Two issues need clarification:

- The WACC should be 'real pre-tax', in keeping with current accepted practice; and
- The value adopted should be the mid-point determined by CAPM (i.e. 7.5%).

5.4 Periodic review of WACC

The Undertaking does not provide for periodic review of the WACC. The ARTC is a new organisation, with no borrowings, in an industry sector with an uncertain risk profile in capital markets, making quantification of key parameter values for CAPM very uncertain. It is our view therefore, that WACC should be subject to review annually.

The Undertaking as currently written would effectively leave the initial WACC in place for five years. The Western Australian Rail Access Code (Sch 4, clause 3) provides for annual revision of the WACC.

5.5 Annual revision of 'X' factor in 'CPI-X' escalation of Indicative Tariff

To give incentive for productivity gains, the factor 'X' should share benefits from provider efficiency gains between access provider and users. Paragraph 4.6 (c) provides for Indicative Access Prices to escalate by CPI-X, where X would be a constant 2%. This suggests potential for efficiency gains of greater than 2%, which is broadly in line with historical experience reported by the Productivity Commission.

To ensure benefit sharing continues to occur, there should be a requirement for review of this parameter value ('X') after say 2 years, to ensure it is not understating the underlying assumption about actual efficiency gains. If the network covered by this Undertaking were to expand, say into NSW, the potential efficiency gains to be achieved by ARTC, and hence the appropriate value of 'X', would be much higher.

Alternatively, there should be provision for a regular review of the Reference Tariff.

[12] We are proposing this date, as the current National Rail (and presumably other) access agreements provide for a review of charges on and from 1 January 2005 (ARTC/NRC Agreement, clause 4.11).
[13] QCA, *Draft Decision on QR's Draft Undertaking*, Volume 3 – Reference Tariffs (Dec 2000), page 43.

5.6 Explicit start date for escalation of the Reference Tariff and for CPI

As with the date for fixing the long-term Commonwealth Bond Rate, there must be dates fixed for application of the CPI-X escalation of the Reference Tariff, in particular:

- A date for commencement of the Reference Tariff in the Undertaking; this should fix the first escalation date one year later. It is our view that the Reference Tariff advertised in the ARTC's Internet Website should be the tariff to apply from the commencement of the Undertaking.
- A date for the CPI %-age to use to apply to the CPI-X formula. Because of the lag in availability of this statistic, it is generally acceptable to specify the Quarterly Index published two quarters prior to the date from which the escalation will apply. If the first review point were in July 2002, say six months out from the likely range of dates for approval of the Undertaking, the Quarterly CPI to apply would be that for the 4th Quarter of 2001, i.e. very close to the approval date – too soon in our view. This argues for the review date to be fixed at 12 months from the date of approval, and annually thereafter.

Q. *Does the general approach to access pricing achieve the stated objective of striking a balance between the business interests of ARTC, access seekers and the general public?*

Yes, provided the various issues we have described in this section of our submission are fully addressed.

Paragraph 5.6 of Schedule D of the Undertaking (Conduct of ARTC) provides useful safeguards against unwarranted price discrimination. The provisions contained in paragraph 5.6(d) to (f) should be incorporated into the Undertaking.

Q. *Are the definitions of "floor" and "ceiling" revenues appropriate?*

In our view the definitions of 'floor' and 'ceiling' revenues are appropriate. We believe it would be inappropriate to make provision for both a combinatorial and individual tests in relation to floor and ceiling, as the ARTC is not proposing that it have significant scope for price discrimination. This is appropriate in the relatively homogeneous and higher competitive market served by the ARTC.

Q. *Are ceiling revenues defined in such a way that ARTC cannot exercise market power?*

The market power of ARTC is constrained by competition from road transport. This is illustrated by the large gap between the 'ceiling' and the current Reference Tariff.

Q. *Do the pricing principles contain sufficient incentives for the economically efficient use of tracks by operators and efficient maintenance and investment in the infrastructure by ARTC?*

The proposed Undertaking contains both a 'price cap' (the CPI-X provisions in paragraph 4.6(c)) and a 'revenue cap' (the floor/ceiling limits in paragraph 4.4). These purport to contain efficiency incentives for the ARTC. For operators, the main incentives are the take-or-pay nature of the flag-fall component of the access charge (paragraph 4.5 (a)(ii)), and the standard train specifications for the Indicative Access Charge described in paragraph 4.6 (a). Operators economic interests are best served by maximum utilisation of the path, both in terms of frequency of use and maximizing permissible train size, speed and mass limits. We regard these as satisfactory, and they reflect current access agreements negotiated between operators and the ARTC.

There are several issues with regard to provider (ARTC) incentives where we believe the draft Undertaking is deficient or ambiguous, and these have been mentioned above.

Q. *If access prices are only approximately set on the basis of costs, does this mean that ARTC has little incentive to seek efficiencies and reduce costs over time?*

The widely used Reference Tariff provides incentive to push down costs and improve system utilisation.

Q. *What is the likely effect of the proposed approach to access pricing on intra and inter modal competition? Are there any elements that could hinder competition?*

We believe it will promote continuation of the current balance between stability for existing rail operators and relative ease of new entry, as demonstrated by the history of ARTC corridors in the past six years.

Q. *Does the Indicative Access Charge provide a reasonable basis for the setting of indicative access prices?*

Yes, it is used by agreement with most operators.

Q. *Is there sufficient clarity about how ARTC will deal with deviations from the Indicative Access charge?*

The Undertaking is not clear on this matter. However, National Rail's current ARTC access agreements (and presumably those with other operators), clause 5.6(c) provides for a qualified 'most favoured nation' arrangement, which would lower the rate charged to National Rail to that of any other operator known to be charged a lesser rate for a "like train path"; standard arbitration provisions apply in the event of dispute over the 'like train path' requirement or other aspects. A paragraph similar to the above quoted clause should be inserted into the ARTC Undertaking.

Q. *Are the fixed and variable components of the access charge set appropriately? Is the allocation of unattributable costs soundly based and does it contribute to efficient outcomes?*

Yes**.**

Q. *Has the Capital Asset Pricing Model been properly used to arrive at the Weighted Average Cost of Capital for ARTC? How appropriate are the assumptions that have been used to derive the various parameters?*

In broad terms, yes. We have examined the parameter values used for *market risk premium*, *gamma* and *beta*. These parameter values can of course be questioned, but we believe the values proposed by the ARTC draft Undertaking are appropriate and should not be altered until the first occasion when the WACC is reviewed.

Q. *Is DORC the appropriate valuation methodology to apply in the case of ARTC's assets? Are there other models that should be used to value ARTC's assets, such as historical cost, replacement cost or reproduction cost?*

Yes. A number of alternative methods have been described briefly in the ACCC 1999 Guide. It is National Rail's firm view that DORC is the most appropriate method of capital valuation. It is realistically based on current costs while also taking account of the age and condition of the actual asset in use, and therefore the level of service it can produce in return for the access charges paid by users.

Q. *Is there sufficient detail provided to assess the methodology employed to arrive at a DORC valuation and does the evidence suggest that the methodology is appropriate?*

Yes.

Q. *Does the proposed method for determining depreciation realistically reflect the expected decline in the economic value of assets*?

Yes.

Q. *For those assets for which depreciation has been calculated, is there sufficient detail on the valuation approach used?*

Yes.

6. PART 5 'MANAGEMENT OF CAPACITY'

6.1 Capacity Analysis

Q. *Does the undertaking provide sufficient detail on how ARTC proposes to assess capacity? Can operators be satisfied that the approach taken by ARTC to assess capacity is appropriate?*

No. This issue has been discussed previously in this submission. There is a need for a detailed description of the factors and processes involved in assessing Capacity. We are not advocating the inclusion in the Undertaking of a 'formula' approach to quantifying and allocating Capacity. What National Rail would like to see included in the Undertaking is identification of the factors including constraints which affect the Capacity of corridors at specific times of day.

6.2 Capacity Allocation

Q. *Is there sufficient transparency about the process that ARTC will use to assign access rights in the case of applications for mutually exclusive rights?*

No. This results from:

- The lack of definition of Capacity; see above.
- Lack of definition of the factors and process for assessing the "most favourable" Applicant pursuant to clause 3.9 (d)(ii). The assessment is to be based on "the highest present value returns to ARTC after considering all risks associated with the Access Agreement". The key issue is the assessment of risk, and lack of process by which the Applicant can have any input to this assessment; this is especially relevant where the Applicant might have been unaware that it was effectively engaged in an auction while negotiating terms and conditions for an agreement.
- These difficulties are aggravated by the lack of accountability of the ARTC for failure to inform Applicants of potentially mutually exclusive Access requests (see above).

Q. *Is the proposed method of granting access on the basis of the "highest present value of future returns" appropriate?*

As indicated above, this process is not specified and needs to be, especially with respect to the identification and quantification of risk, and how risk factors are used to modify the 'present value' of a proposed Access Agreement.

Paragraphs 3.9 and 5.2 must be redrafted to require the ARTC to conduct its assessment of "present value" in a transparent way, including identification and quantification of risk, and to make it more accountable for failure to notify of a potential mutually exclusive application.

6.3 Capacity Transfer

Q. *Are sufficient details provided about the circumstances in which ARTC will withdraw access rights?*

No. In paragraph 5.3 of the draft Undertaking, the term 'under-utilised' is not defined. Nor is it clear whether ARTC has the right to implement a decision to remove particular Train Paths before dispute resolution.

Paragraphs 9.4 to 9.8 of Schedule D contain detailed provisions relating to removal of train paths for under-utilisation and other causes. These clauses include for review of scheduled train paths and benchmarks for the timing of notice of cancellation of train paths. These clauses demonstrate the practicality of reducing such matters to enforceable terms and conditions.

Paragraph 5.3 should be amended to include criteria and a transparent process for assessing 'under-utilisation'. ARTC should not have a right to cancel paths before the conclusion of dispute resolution.

6.4 Re-negotiation of Long-Term contracted paths

Provisions exist in paragraph 2.8 of Schedule D giving a right to the Operator to renew long-term contracted train paths. The same rights should be incorporated where relevant in the Undertaking.

7. PART 6 - 'NETWORK CONNECTIONS AND ADDITIONS TO CAPACITY'

Q. *Is there sufficient detail provided on how ARTC proposes to determine the need for additional capacity to meet an operator's needs as opposed to new investment to meet ARTC's own overall requirements?*

No, there is no detail on this matter. In part this is owing to the lack of definition of the term Capacity. It is also unclear in paragraph 6.1(a)(iii) what the words 'extension to the network' mean, in the context of 'Additional Capacity'. The method for Capacity Analysis should enable the distinction to be made between additional capacity for an individual operator and for system requirements.

Q. *Is the undertaking clear on whether the access pricing principles that will apply in respect of additional capacity will be the same as for existing facilities?*

No. Pricing principles for all capacity on the ARTC network should be the same.

7.1 Connections to the network

The interaction between ARTC and the 'Other Track Owner' is not clear. The role, responsibility and authority of the 'Controller' are also not clear. The interaction of different Track Owners is essential to providing an 'efficient and seamless access to the interstate railway network' as referred to in the Preamble. Clear procedures and protocols must be established in relation to Other Track and the relationships between Track Owners with a view to meeting this requirement.

8. PART 7 - 'NETWORK TRANSIT MANAGEMENT'

Q. *Are the Network Management Principles clearly stipulated and likely to be well understood by operators? Are they generally conducive to efficient management of traffic movements?*

Yes, these are well set out and have been in use for some time, understood and accepted.

9. SCHEDULES

Q. *Is it appropriate for the Indicative Track Access Agreement to be part of the undertaking?*

No. Major terms must be in the Undertaking to ensure they are enforceable by the ACCC.

Q. *Are the terms and conditions in the Indicative Track Access Agreement appropriate and consistent with the access undertaking?*

The proforma Access Agreement is considered to be strongly weighted in favour of ARTC particularly in those clauses dealing with the following:

- Track standard
- Indemnities
- Renegotiation of long term train paths
- Track extensions
- Rolling stock standards
- Monitoring equipment
- Flagfall relief
- Security
- Assignment
- Removal of train paths
- Review of access charges
- Renewal of train paths