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TRANSCRIPT OF PROCEEDINGS

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AUSTRALIAN COMPETITION

AND CONSUMER COMMISSION

COMMISSIONER J. MARTIN, Chairperson

WORKSHOP ON AUSTRALIAN RAIL TRACK CORPORATION UNDERTAKING

MELBOURNE

9.00 AM, THURSDAY, 16 AUGUST 2001

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THE CHAIRPERSON: Well, ladies and gentlemen I would like to welcome you all to today's discussion forum on the proposed undertaking from the Australian Track Corporation, ARTC, in respect of access to rail infrastructure under tits control in South Australia and Victoria. I think it is a good sign that we actually started a little bit before time, so we are right on time, which is I think a good signal for the industry and I recall the saying, if the trains are running on time everything is sweet.

My name is John Martin, I am a Commissioner with the Australian Competition and Consumer Commission. Among my responsibilities is that of Chairman of the Commission's Transport Committee. The Committee oversees our role, among other things, in respect of rail and airports. As you know these are functions the Commission has taken on in recent years as part of its role in the area of access and regulation in a range of sectors, including gas, electricity, telecommunications and so forth.

I must say that from my observation the rail area is one that seems to perhaps excite a little more interest for observing some of the members of staff when they get an opportunity to go out and do site visits. So perhaps it reflects the propensity that we all have to like playing with trains. I had better not make the sexist comments about boys liking playing with trains. Certainly we welcome you all here today and the purpose of today's workshop is to discuss issues arising from the Commission's assessment of the undertaking submitted by the ARTC.

The Commission has received from the ARTC an access undertaking under Part IIIA of the Trade Practices Act. The undertaking covers terms and conditions of access to rail tracks owned or leased by the ARTC. The tracks are part of the interstate mainline standard gauge track linking Kalgoorlie in Western Australia, Adelaide and Woolsey in South Australia, Broken Hill in New South Wales, and Melbourne and Wodonga in Victoria. ARTC was established pursuant to an inter-governmental agreement signed by all governments in 1997.

One of the key elements of the IGA was to facilitate a co-ordinated approach to rail reform. ARTCs primary objective is to promote use of Australia's national rail network linking all capital cities by providing a single point of access to providers of rail freight services whose operations traverse State jurisdictions. ARTC owns the line in South Australia, including the line to Kalgoorlie in WA, and have control over the track in Victoria where it has a lease agreement in place.

Pursuant to section 44ZZA(4) of the Trade Practices Act, the Commission must go through a public consultation process before accepting an

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undertaking. As part of that process the Commission has distributed and issues paper to interested parties inviting comments and submissions on the ARTC access undertaking. The Commission has received submissions from several key organisations in the rail industry. These comments will be taken into account and consideration by the Commission in its assessment of the undertaking.

Today's forum forms and important part of the public consultation process. Section 44ZZA in Part III of the Trade Practices Act details the criteria the Commission has to follow to assess undertakings. Sean Riordan from the Commission's legal unit will be elaborating on the legal issues that are important in this process. It should be pointed out that if the ACCC accepts the undertaking then the services covered by the undertaking cannot be declared. This removes the opportunity for access seekers to have the ACCC arbitrate access disputes in relation to services covered by the ARTC undertaking as a first option.

Acceptance of the ARTC undertaking means that the undertaking forms the basis for access. Access to parts of the interstate network owned by Queensland, New South Wales and Western Australia are subject to access regimes in those States. Presently the regime covering access in the proposed Tarcoola, Darwin rail link is the only certified effective regime under Part IIIA of the Trade Practices Act.

There are many important issues arising from this undertaking. Now you have, I hope, a copy of the draft agenda which was circulated for today's forum and which has been, I believe, slightly updated at the last minute, and hopefully you have got the updated version. We are covering four key areas of discussion. Firstly, the legal framework, including interface issues. Secondly, the access pricing regime. Thirdly, access - sorry, issues relating to the negotiation provisions of the undertaking including the dispute resolution mechanisms - we hope they are not revolutions - dispute resolution mechanisms.

And finally, in the last session we will consider the important issue of service standards. The agenda that we have agreed on sets out as our discussion under actually five sessions, allowing two on access pricing with a break for morning tea in the middle of that one. And we also will have, at - after my opening remarks, some overview comments by John Fullerton of National Rail representing the interstate rail operators group. And John has also requested an opportunity to make some comments at the end, and certainly that opportunity is available to David Marchant from ARTC to make those sort of general comments as well as the ones that David will be making in the specific sessions.

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So that is the format. Timing will be tight and I have got to stress that, during the day, so we will be sticking as tightly as possible to the timetable. But maybe, if needs be, we can make adjustments between different sessions if that is the way the discussion is going. But as usual, I know many of you have to catch planes - it would be nice to think you had to catch fast trains somewhere - but catch planes and we will be cognisant of that.

I should say at the outset the Commission has not yet reached a position on the issues that we will discuss today. The purpose of today is to give an opportunity to interested parties to exchange views in a public and transparent forum. So please, use the discussions and the opportunities in that spirit. Also use the breaks to further discuss issues with other parties and Commission staff. This is an important exercise, not just to the parties involved, that is ARTC as the provider of access, and rail freight service operators as seekers of access.

It is also of significance because this undertaking is the first undertaking submitted to the Commission under Part IIIA of the TPA in respect of rail infrastructure. So the ways the Commission assesses this undertaking is undoubtedly important to all of you here today, but it is equally important to us as an organisation to ensure that it is developed in a way that provides a good framework for access to the tracks managed by ARTC. Today's format of the forum will be that a representative of the ARTC, and I think mainly, or fully, it will be David Marchant will make brief remarks to kick off each of the sessions.

This will be followed by comments and responses from nominated respondents. Then we will open the remainder of each session to discussion, during which we will take questions and comments from the floor, thus allowing issues to be explored. I would ask that you use the fixed microphone there to ask the questions, and as we are having a transcript of proceedings today, please identify yourself and your organisation.

We are hoping that comments will be kept brief, preferably in the range of no more than five minutes or so, but, I mean if needs be we are not going to hold you to that if you have really got something important to say on a subject. Given that we have such a tight timetable I will, however, pay attention to the issue of us not going over and over the same ground, or engaging in argumentation unnecessarily. We are assuming that participants here today have read submissions and that comments will largely give us some added value, in terms of the issues involved.

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As I have said, we do want to see the discussion succinct and to the point. For the benefit of all participants, we need to make sure that discussion remains relevant and I will take it on as my task to help do that. We had an open forum last year on Sydney Airport, where we had some real protagonists, and I pointed out to people that I had been a rugby referee in my time, so I certainly don't want to have to hand out yellow cards or red cards but I won't be shy about coming in and cutting off the discussion if it is not contributing.

Our challenge today is to identify ways to get commercially workable outcomes which strike a realistic balance in terms of consistency, differing jurisdictional circumstances, and certainty for interested parties. That said, we know the - I hope that has set something of a scene. I, first of all then, it being right on time, or maybe I have slipped a minute over, will introduce John Fullerton of National Rail to give a brief overview from the point of view of interstate rail operator groups. So John if you would like to - - -

MR FULLERTON: Well thanks, John. Certainly on behalf of all the interstate operators we would like to thank the ACCC for, first of all, organising this forum. I think it is a very useful start to developing an access regime that will serve the industry long into the future, so thank you for that opportunity. And also for providing, at the last minute, Margaret in particular an opportunity just to give us some overview comments before we start those proceedings today.

I think the reality is, and it has been quoted in the press, it has been discussed privately with all operators, that track access is singularly the most important issue facing rail operators as they build their business today. I think it is well known and well regarded within the industry. I think that the reality is that the cost of access, the quality of access, and the availability of suitable train paths remain key issue for operators. And I think it is no doubt that these issues will drive the level of investment by operators in the industry.

Certainly in rolling stock assets, in terminal infrastructure and no doubt will ultimately increase the competitiveness of rail and lead to market share, positive market share results. An effective access regime will increase competition in a transport market that is still dominated by road, and we even now see the sea industry emerging as a serious challenger to competition in the transport market. I guess in terms of the ARTC Access Undertaking submitted, and the one that we are going to discuss today, there are some, I guess, overview comments that I would like to make on behalf of operators.

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I think the first point is that rail is currently disadvantaged in the formulation of access pricing compared to road. And it's a key issue that we face. The second one is that the CPI escalation formula as presented will progressively diminish rail's competitiveness. Service standards and track quality must be linked to price. It is those issues that affect the cost of operations, and our ability to compete is a key issue. I think another point of concern amongst operators is that the undertaking itself does not fully reflect the inter-operability between other jurisdictions.

I think as John made in his opening comments this morning, we operate on a national highway. This access regime is confined to a segment of that national highway and any undertaking must be cognisant of the need to develop a streamline access regime across Australia. I think another point is that the cost of access of a significant portion of operating a rail business. And operators need mechanisms in an access regime to reduce the cost of access, not increase it. I think one of the final comments I would like to make that access is important, as I said in my opening remarks.

There has been a poor track record in getting access agreements finalised to the satisfaction of operators. All of us have been negotiating access regimes in various jurisdictions now for some years, with little productive outcome. I guess that is indicative of our concerns and frustrations with the current terms and conditions, and our strong desire through this process to develop an access undertaking and an access regime that can deliver benefits for the industry and increase rail's market share.

And finally, we would certainly like to encourage the ACCC to facilitate and drive this process to its conclusion, and certainly remain as the arbitrator in dealing with the disputes and issues which may emerge. This is a start to the process. The outcome is critical to the future of our respective businesses. So thank you, John, for that opportunity.

[9.17am]

THE CHAIRPERSON: Thanks, John. I will now introduce Sean Riordan, from the Commission's legal unit, who will speak to us about the legal aspects of the undertaking and after that I will then pass straight on to David Marchant, Managing Director of ARTC, who will make a brief introductory statement and lead us into the first session. So I have just realised, I had to turn my mobile phone off, so I would invite you to do the same if you, like me, forgot to do it. Sean.

MR RIORDAN: Thanks, John. Well, I am a lawyer with ACCC's Regulatory Affairs Legal Unit and I am here to talk to you about ACCC's

understanding of the law that concerns its assessment of this undertaking. I will also touch on what that may mean for what has been described as interface issues. I have been asked to keep this brief, but as I get through the presentation, I will be referring to a more extensive publication that the Commission which you may be interested in reading through subsequent to this. Please remember that what I am about to say is an overview of ACCC's understanding of the law only and it is not intended to comprise legal advice to yourselves.

As has been noted already, you shouldn't infer from anything that the Commission says today, that what follows means that that ACCC has made up its mind on any particular issue that is confronting it. The relevant law that the Commission is dealing with in assessing this undertaking, is set out in section 44ZZA of the Trade Practices Act. The first sub-section identifies the types of matters which can be made subject to an access undertaking and in a nutshell, they are the terms and conditions upon which access to the service are to be given and the procedures by which access is to be negotiated.

There is also some other more narrow examples of the types of obligations that can be imposed. That can be obligations on the access provided to give information concerning how it conducts its business; there is an obligation on it to perhaps provide - sorry, structure its business in a particular way which is conducive to access being given. Now when considering what the ACCC can do, it is important that you remember that the Commission's discretion in this matter is quite limited. The Commission can only determine whether or not to accept the undertaking as proposed. It has no other discretion and in particular, it has no power to re-write the undertaking.

So what this means is that while ACCC may make suggestions to ARTC about particular issues that its proposed undertaking raises, it can not expressly require ARTC to modify the terms of it. The terms of the undertaking are always a matter for ARTC to propose to the Commission. If the Commission were to accept this undertaking, then its terms will be binding on ARTC until its expiry date. It can only be varied within that period with ACCC consent. If ARTC were to breach the undertaking that it had proposed and which ACCC had accepted, then ACCC may apply to the Federal Court for orders and those orders could require ARTC to subsequently comply with the terms and also to compensate any person who may have suffered loss as a result of the breach.

So if we just take that into account, essentially what the undertaking is doing, it is setting out the terms and conditions upon which ARTC will stand in the market and will give access. Now there are particular

considerations that ACCC must have regard to in determining whether or not to accept the undertaking. They - for present purposes, they are set out in sub-section 3 of the section and the matters are of a broad scope. I may just identify them to you and give you a little bit of an example of how they may be put into the context of this undertaking.

The first matter the Commission must have regard to is the legitimate business interests of the provider and what that means is that the provider would be entitled to a normal commercial return on its assets that are the subject of the undertaking. That is to be contrasted with what is commonly described as a monopoly profit. The Commission's position is that access prices shouldn't have embedded within them the sorts of returns that a monopolist would obtain. The next matter the Commission must have regard to is the public interest and that includes the public interest in having competition in markets.

You might ask yourself what particular markets that is. Essentially it is the markets that are either upstream or downstream but in the context of this undertaking I think we are talking about downstream markets, so the market for rail services that run along the track and perhaps also the markets associated with that such as the freight market. The next matter the Commission must have regard to is interests of persons who want access to the service and if it is not apparent to you already that the Commission is involved hearing a weighing exercise of competing interests, I think that should make it clear to you all that the Commission is required to do that.

That what is in the interests of an access seeker will often not be in the interests of an access provider, at least in the short term. The Commission must also have regard to whether or not the service is already the subject of an access regime, whether it is in respect to an access code. Now those matters aren't really relevant here. But the Commission is also empowered to have regard to any other matter that it considers relevant, so there is a broad scope there. Because of that, the Commission has published its views on matters that touch upon the exercise of the discretion, and it is in the form of the ACCC's Guide to Access Undertakings which was published in September '99.

If any of you do want further information about how the Commission views that section of the law and the sorts of considerations that it thinks it should have regard to, then they are listed in that guide. If you don't have a copy of it, they are available for purchase. I think they are available at the cost of $10 and if you are interested in purchasing that, then you can look at first instance on the ACCC web site which will provide you with details

about how to go about ordering one. If I could just briefly touch upon the interface issues.

As has already been pointed out, the ARTC undertaking does not relate to the use of all the interstate rail truck and some of you have submitted to us that there is very good reasons why it should. Unfortunately from your perspective, there would appear no legal basis for ARTC to give an undertaking that relates to the entire interstate rail network and that is because the law sets out as a pre-condition for giving an undertaking, that the person giving it must be or must expect to be the provider of the service that is the subject of the undertaking. The rationale for the provision is that it would be futile for a person to give an undertaking which it undertook, for instance, to give access to a rail segment at a particular price, when it in reality had no control over that price or whether the time path would be available.

ACCC understands that as matters currently are, ARTC is not now the operator of any service, apart from the service comprising the use of the rail track that is the subject of the proposed undertaking. Now having said that, although the current undertaking as matters stand can not express the concern, the terms of access to the additional segments of the interstate track, this doesn't mean it can not have regard for the fact that trains will often originate and terminate on those other segments. ARTC's current undertaking could, for instance, include an obligation on it to propose to ACCC a further undertaking should it subsequently become the operator of an additional segment of the interstate track.

That further undertaking would then concern that segment. The current undertaking could also include obligations on ARTC in respect of matters such as the appointment of particular arbitrators, where the dispute is one where ARTC is advised that the rail operator in involved in a corresponding dispute with an operator of another segment of the interstate network. The current undertaking could require it to appoint one person who could administer both those arbitrations. Just to emphasise a point though, I am just raising these matters as examples of the sort of interface issues. They are not meant to be exhaustive and they are not meant to indicate that the Commission has made any view upon the suitability or otherwise of those examples that I have given to you. I hope that has been of assistance to you, although I have probably taken up an extra few minutes of your time already.

THE CHAIRPERSON: Thank you, Sean. Well, we are sticking pretty much on time and that leads us into the first session and I would now ask David Marchant to come up and lead us fully from the ARTC point of view.

MR MARCHANT: Thanks, John. If I could just - before I go into the legal issues session, just do the - a quick opening on the background and then go quickly into it. The voluntary undertaking incorporates terms and conditions arising from extensive negotiations and consultations between the asset owner and operators over a period of two years. It does not represent a unanimous view of terms and conditions as some would hope for, but rather the culmination of various trade-offs between the parties over the last two years.

It certainly does not reflect an application ARTC would have made two years ago, nor does it represent a stereotype of a monopolistic asset owner wishing to exploit the marketplace. The application does not reflect a ground zero proposal. It would not satisfy ARTC's desires fully or, for that matter, train operators desires fully, as it arises from trade-offs and negotiations. Although a number of valid arguments exist as to the need or requirement for an application by the ARTC in the transport market and in the environment in which ARTC exists, an application has been made to reflect ARTC's desire to provide confidence and certainty in the marketplace, while still providing room for innovation and reasonable commercial negotiation by ARTC and access seekers.

The undertaking seeks to establish the parameters for a market-based open access regime, aimed at giving confidence in the rail market for growth, reasonable certainty and recognising a like service will be treated in like terms. The regime seeks to establish a balance of risks and obligations on the parties according to the sources of the risk and the ability to manage and mitigate it. Some would have the asset owner assume greater obligations, including the obligations of the train operators own assets and have the risks absorbed by the track owner and effectively subsidised by all operators.

The undertaking is aimed to contribute to growing the rail market, with the asset owner sharing market risk. It is not, however, aimed to subsidise above rail competition for the sake of competition, but rather establish parameters for an even playing field for operators in like markets and with like services. Under this framework, each operator competes on their own merits with each other rather than having an exercise where one may be smart enough to get better terms and conditions out of the access provider.

With regard to session 1, Chairman, on the legal issues, ARTC doesn't intend to repeat its submission, but rather just take up some of the issues we have been cognisant of from the submissions made to the ACCC, and I will do that very succinctly and shortly, rather than take up time. The undertaking is applicable to the jurisdictions under ARTC's control only, as a legal officer for the ACCC mentioned. It is not possible for ARTC,

at this point in time, to put an undertaking forward that deals with other jurisdictions.

Other truck owners will be, in fact, seeking access regimes for certification, in our view, over the next period and this will actually establish some sort of benchmark for that to be worked on. I can give this unequivocal commitment, Commissioner. If other areas are incorporated into ARTC's effective control, that an access application will be submitted for those areas for consultation and approval by the ACCC. The legal status of the undertaking is, it is obviously enforceable by law, but the undertaking does not affect existing contracted access rights.

One of the major things out of the submissions, Chairman, was issues with regard to the status of the indicative access agreement and the attachments to the undertaking. It is ARTC's understanding of its undertaking, that the attachments form a fundamental part of the undertaking and that attachment D, the indicative access agreement, is in fact a part of the undertaking and in the event that ARTC during negotiations moves from that indicative access regime against that indicative access service, and there was in fact a dispute on that, that in our understanding the mediator or arbitrator of that dispute would actually seek from us some justification for our variance on that access agreement and we would, in fact, have to justify why we have moved away from the one we have put as an indicative one to this undertaking.

And therefore we have actually seen the attachments as a fundamental part of the undertaking and to give a mediator or an arbitrator the option and, in fact, the desire to be able to question ARTC if, in fact, it has deviated from those indicative attachments, and to justify such a deviation, if in fact, it was seen by the applicant as being harmful to them. On another side issue in the submissions, Chairman, there was concern re passenger services. The undertaking does not seek to differentiate between freight and passenger services. It deals basically with rail services. Although it does mention in our objectives, a desire to grow the rail freight market, I would be happy to amend it to say and grow the rail market.

It is not ARTC's intention, nor does the undertaking seek to discriminate or subsidise any category of trains. ARTC is not in a position to provide community service obligation for passenger services, nor does it seek to do so. Governments may do that. The access provider is not in a position to do that. ARTC sees its role in a social sense with regard to the safe and reliability range of services, and provides a premium cost for a pathing of passenger services over and above other services. Subsidy as a passenger services, is a policy for governments and not a matter for ARTC.

[9.35am]

THE CHAIRPERSON: Thank you David. Well, we - we move on to others who - who would like to say - have comments in this area. I have listed first off, Michael Houston from Freight Australia.

MR HOUSTON: Thank you, Chairman. Yes, just repeating, I am Mike Houston from Freight Australia and I want to say at the outset that Freight Australia, in general, supports the ARTC undertaking. And we say this because Freight Australia is both an access provider and a rail freight operator and it has an interest, I suppose, in both camps. We have applied for a declaration of the - the facility in Victoria for provision of rail freight, for provision of rail services to the National Competition Council and in our application for declaration we have stated that we believe that there ought to be consistency amongst access regimes in Australia and if we are to be successful in our application we see that there will be at least some consistency in the Federal jurisdiction between the ARTC regime and the regime existing in Victoria.

But I really want to speak about the - about the interface arrangements. Currently, Freight Australia is a customer of ARTC on the inter-state network in Victoria for intra-state traffic and my reading of the - of the undertaking is that it does not necessarily cater for the peculiarities of intra state traffic. It is important in Victoria but it could also be important if the ARTC were to gain control of the inter-state network in New South Wales, for instance, where similar situations will arise, where we have traffic moving on and off the ARTC network on basically conditional train paths.

Our traffic is quite different from the standard traffic, if you like, which runs on the ARTC network which are basically scheduled point to point trains, running to timetables. Our traffic, which is principally grain traffic moving from the north western part of the state to the Port of Portland runs on train paths which are, to a certain extent, dictated by the grain shipping shipment program and I don't believe that the - that the access agreement, as it is currently attached to the undertaking, deals adequately with this, although I note that David Marchant was saying that existing contractual arrangements will remain in place.

There are also - conditions exist where traffic moves off sidings on to the on to the network - sidings which are owned by other track owners, such as ASI in South Australia and Freight Australia in Victoria and I - I am not sure, I am not convinced that the undertaking necessarily deals with those sort of movements either. However, I simply would like to conclude by saying that we - we support the ARTC undertaking, in principle, but would

want to be assured that the - those sort of interfaces which I have talked about are addressed in the final wash up. Thank you.

[9.35am]

THE CHAIRPERSON: Thanks, Michael. And now passing on to Robert Jeremy from TOLL.

MR JEREMY: Thank you, John. Robert Jeremy from the TOLL group. I will just start by talking, I think, principally about the importance of the access agreement. The access agreement is the underpinning of the operators access rights and it is terribly important that we get it right. In my view of the two documents, the access undertaking itself and the track access agreement, I would rather see that we got the track access agreement right.

In my experience, and I have been involved in this now for six or seven years, the negotiation of an access agreement is probably the most frustrating and exhausting enterprise that any man or woman can undertake. It is not unusual for negotiation processes to take 12 to 24 months and still have issues left unresolved. Although it is true that a consultation process did take place between ARTC and a number of operators, in relation to the access agreement offered by ARTC and although it is true that those discussions fruitfully resolved a range of issues, it is also true that a number of material issues were left open and I think I would speak on behalf of certainly the operators in the inter-state rail operators group when I say that the way in which those open issues have been reflected in the document before the ACCC is not as operators would like - is not as operators would like to see it.

The market in which we operate - harking back to the comments of opening remarks from the ACCC is the transport market as a whole in the intermodal market. It is served by various modes, road, rail, sea, and air to some extent. It is our customers that matter and we are talking about a diverse range of customers but we might be talking about Woolworths or Coles who are trying to get the baked beans on the shelves. Ultimately the consumer benefits from an efficient transport market. It is simply unacceptable for access negotiations to take place over a period of two years. The customer will go elsewhere.

It is very important then, that we get the track access agreement right so that we can provide - we can get access, we can get it competitively, we can get it commercially and we can get the baked beans on the shelves. Interface issues, I think, are not so much about asking ARTC to do the

impossible, that is offer access undertakings over New South Wales or Western Australia, or Queensland, that is not the point. The point is the way in which the ARTC network interfaces with those other networks.

We still suffer from a regulatory point of view, break of gauge issues across every border. If a train is running late because of the access providers' failures in Western Australia, then we will arrive late in ARTC territory and that will impact our service in ARTC territory. The way in which ARTC train control interfaces with Westnet train control, RIC train control is critical to us. These are not easy issues, but we operate on a national highway as John Fullerton said and this may sound glib, but I mean it, it is really not our problem that there is an artificial regulatory break of gauge at Kalgoorlie or at Albury-Wodonga and we need assistance from the track owners, including ARTC to - to manage that regulatory issue.

The other point is that not only may we be late into ARTC territory as a result of another operators - another track owners failures, but we may suffer damage to our equipment as a result of track in another territory. That damage to our equipment may cause damage to ARTC track. Again, from a legal and regulatory point of view, not an easy issue to solve, but again, it is an issue that needs to be recognised. So there are some difficult issues within this, but first and foremost I think we do need to get the track access agreement right and we need to have a process which gives us commercial outcomes for our customers.

THE CHAIRPERSON: Thank you. And moving on to Martin Svikis, is it from SCT? Thanks, Martin.

MR SVIKIS: Martin Svikis, Specialised Container Transport, one of the east-west rail operators. A couple of para-phrasing comments up front before I start which go across for today, is that the comments we have got here today are after - over two years in negotiation with the ARTC on trying to sign up an access agreement, plus we have read almost every submission that has been put forward to the ACCC ourselves, we have chosen not to go up Collins Street and get a hired gun. Mark McAvoy and myself as Chief Executive have done all the work ourselves and in other words we are not looking for technicalities or weasel words or ways out, we believe sincerely that what we are about to say is the truth.

However, that - we are not beyond making a mistake, we certainly allow for the fact that we might have made a mistake but then again after this extensive period of homework and research, if we are still making mistakes we may also wish to draw your attention to the fact that this is a complex

and unique position and it may not be as clear as some people may wish to think it is.

Okay. My comments will go along roughly the points set out in the agenda, the original agenda and basically we start off with the legal and interface issues, Session 1 and in particular Clarity and Enforceability. We have chosen to comment on three particular issues there, to put forward a case that suggests that the clarify and enforceability is not there. First of all, price. The floor and ceiling prices in the agreement are separated by sometimes up to 3 to 400 per cent. And therefore we do not believe that those floor and ceiling reference tariffs give us clarify on what the price might be.

In addition, the formulae used to create them is quite complex. We have more to say about that later. Also we note that the price still can be changed at the ARTC's discretion for a number of different reasons. We therefore believe that the pricing is not clear. Access, the second major topic. The undertaking is not specific in itself, however, the standard terms are far more specific. In terms of that, we also see that the standard terms can be modified again at the ARTC's discretion. We therefore believe that the terms of access are not clear.

We also believe that the standard terms should be part of the undertaking and that might help to clarify some of those aspects in the undertaking itself. We understand that is still an open issue and therefore makes it difficult for us to be final on that point. The third major point we wish to comment on in terms of clarity and enforceability is a level playing field concept. That was restated again here today in the opening remarks of the ARTC. We also have a major with that. We believe that the tests that have been put forward are so specific and so detailed that you can actually make any path seem different.

A path can be made not like - if a path can be made not like, then the whole plausibility of a level playing field gets destroyed. We believe that the level playing field to date has been a major part of creating the industry at which it is today and we think this undertaking is going to undermine it directly. For example, one of the tests might be market value. Anybody can say that a different path will have different market value. If you can establish it as different market value, it is not a like path. How can we have a level playing field. Particularly, when we consider that at the moment the prices for access are published on the internet, an initiative taken by the ARTC, which we applaud but we wonder why this would seek to be changed.

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In conclusion therefore, we would say if things are not clear they are difficult to enforce. Some of that difficulty of enforcement might also relate to some of the ambiguity that also exists in the standard terms. I am no lawyer, but I do find that difficult - the agreement is difficult to read. Mark McAvoy, one of my colleagues is a lawyer. He also finds it difficult to read after two years. If we have an agreement that is ambiguous and may even be poorly drafted, that could just end up in one long blue for a long period of time which none of us wish to have.

We also believe, from a point of enforceability, that it is particularly one sided. I guess the proof of the one-sided nature might also be our attempt to sign an agreement over two years. We have a number of outstanding matters with that agreement which have been submitted and are available for anybody to read if you wish. I guess therefore, in conclusion, with three major planks in the agreements, price, access and a level playing field being not clear, we feel that we are in an uncertain environment and our interests have not been properly catered for in a fair way.

As far as the legal status is concerned our broad comments are that we are still open on the legal status there. We are still talking to the ARTC to try and resolve our outstanding positions but we have noted those. Yes, we certainly believe the standard terms should be part of the undertaking. However, we need negotiating power in that process as well and therefore feel again that we are not on a level playing field for non-price as well as price issues.

We also have a couple of questions regarding the legal status and the standard terms of access and those questions are: What if we sign an agreement which exceeds the term of an undertaking which may or may not be, for example, ruled upon by the ACCC. If we sign that agreement before an undertaking, and the term of that agreement exceeds the undertaking term itself, what would take precedence? What would happen if we signed an agreement first and the undertaking provides for more favourable terms than the agreement we have signed? Will we be able to access those? We cannot - we need guidance on that point.

We also hear the term "access seekers" being used in a legal sense and we ask again how does that relate to access users, and we see ourselves as a user and a seeker. Is that a different term or is that the same term? As far as interfacing with other access regimes are concerned, the interfacing does not appear to exist. We certainly like other speakers do not wish to have interfacing issues in corridors. In addition, we are still not clear on how the ARTC could, or might, relate to Westnet in the proposed wholesale agreement.

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In summary then, as far as we are concerned, we have a confusion and lack of clarity with the legal status relating to the points raised on the agenda. We have other matters but we have tried to keep to those three points. Thank you.

THE CHAIRPERSON: Thanks, Martin. Well, I think we might extend now to comments from others and I don't know if David Marchant wants to respond to some of the comments, but can I have an indication of anyone who - else who wants to raise matters.

[9.53am]

MR HARRISON: Michael Harrison from FreightCorp. I am a lawyer. Just a point of clarification, the only issue that I cover will concentrate on legal issues. I am going to take the issues in the order in which they are tabled in the agenda by ACCC. Firstly clarity and enforceability of the undertaking. Consistent with the approach the ACCC wants us to take today, I am not going to refer to the detailed clarificatory issues that we raised or are raised in the various submissions, in particular the Joint Toll/FreightCorp submission but I think I would just like to make a general point and it picks up on a point that Martin has just made, that the undertaking and the terms of the indicative access agreement need to be clear and certain for them to be enforceable. That is more important, I contend, for access seekers than it is for ARTC. Why? Because it is more likely that the access seeker is going to seek to enforce than ARTC is. That is just the way of the world. We are seeking access on terms; the issue for us is what do those terms mean so I would argue that any lack of clarity, lack of certainty, works against the access seeker.

Legal status of the Track Access Agreement. David has provided clarification. It is intended to be part of the access undertaking. Why is it intended to be part of the access undertaking? The access undertaking itself states why. That is because any access agreement we seek to negotiate must, this is taken from clause 3(10)(b) of the draft access undertaking, the access agreement - all access agreements must, unless otherwise agreed between ARTC and the applicant, be consistent with the principles outlined in the indicative access agreement and must address at least the matters set out in schedule C.

Picking up on points that have been made by Robert Jeremy, also by Martin, it is important not only that the indicative access agreement is clear but also that it represents a reasonable starting point for both ARTC and for access seekers. Like others in this room, I have been involved in negotiation of track access agreements now for over half a decade; I actually started negotiating with Railtrack in the UK years ago and track

access agreements take a long time to negotiate. One thing I suggest we should try and spend most of our time on is to try and reach a standard position in terms of an indicative access agreement that is a reasonable agreement. Why? I have already made the point. It is more important, I would contend, for access seekers that the base point, the indicative access agreement, be a reasonable agreement because there is no reason whatsoever for ARTC to move away from that base case. Why? Because the access undertaking as stated here says that unless it is agreed otherwise between ARTC and the applicant, then all access agreements must be consistent with the indicative access agreement.

It is an important dynamic to note and those who have been involved in negotiation of track access agreements will know that it is very difficult to get the access provider to move away from any position that they want to take because it automatically defaults to the position that they take unless you want to arbitrate and again picking up on points that have been made, but I think it is helpful to just understand what we are trying to do. Access seekers want to get to the market quickly. In order to do that they have to have an access agreement that is on reasonable terms to them, that does not disadvantage them and does not involve them in costly dispute resolution to achieve reasonable terms and conditions.

Finally, the interface with other access regimes. Robert Jeremy has already dealt with the interface at a practical level and I think it has been noted by others that the access undertaking as it stands does not anticipate expressly either the physical interface with other infrastructure operators nor does it actually anticipate the legal interface in terms of the possibility of ARTC becoming the owner-operator of other infrastructure and a suggestion was made this morning that it may be sensible to include in the ARTC access undertaking a clear statement, clear obligation that if ARTC becomes the owner-operator of other interstate infrastructure, then it must apply for an amended access undertaking under the Trade Practices Act. That is all I have to say for the time being.

THE CHAIRPERSON: Thank you. Other comments? I think we have certainly had some issues raised. David, did you want to make any responses on any of that? I think to some extent your comments on the indicative regime we have had a few points made about a range of things. Did you want to - okay, well I think then we are a little ahead of time, I think. I thank those who made comments and we will move on to the second session of access pricing. Before I do, clearly the whole issue of the legal and interface issues are fundamental ones and as David says, some of the comments flow into the - certainly the areas that we are now going to discuss and including the access, whole pricing issue but this one

is clearly one that gets us down to some of the nitty gritty and I will ask David to introduce the ARTC position.

DAVID MARCHANT: Thank you, Chairman. Again, I don't wish to recite or go through the papers and the submissions we have made but rather deal with some of the issues arising from the submissions. Firstly with regard to certainty, the pricing for a reference service, which is in fact the service that has 70 per cent plus of the volume across our corridor, is for a 21 tonne axle load train running at you know, a maximum of 110 etcetera. That is the representative service of the great bulk of services operating in our system and I would like to deal specifically with the issues that Martin raised on that with regard to certainty.

This access undertaking provides a reference price for that service which is absolutely certain. It is capped, it is clear and it can only escalate by the CPI minus X factor. There should be no doubt from this undertaking that that reference service's price in the term of this undertaking is abundantly clear and capped. It is capped at the maximum. The floor and ceiling arrangement does have no bearing on the reference service in the undertaking. The floor and ceiling arrangement deals with totally different matters. The capped framework for the reference service provides absolute certainty at its maximum price for the whole term of the undertaking. The indicative price negotiated in that reference service actually flows from a 1995 industry consultation when new operators came onto the former AN track access arrangement and that price was based then on the basis of getting a recovery with regard to both a recovery above rail profits as well as below, although when AN track access days, that price of access actually was at a significant loss to its owner of some $35 to $40 million per annum, per year. The price was set to enable competitiveness on above rail. The prices have not increased nominally since 1995 and in fact there was price reduction of one or two per cent in 1998 so the basic price, the reference service price, the increased infrastructure, capacity and improvements in above rail productivity have resulted in reduced above rail unit costs as well as cost of access to operators between the fixed and variable, by train lengths, loads, etcetera.

One of the concerns of an infrastructure owner in these sort of submissions, having in fact capped out completely the great, most dominant market and the pressures that exist in a competitive market is it can result in increases in freight margins being competed away in rail on rail competition against road and varying to some extent depending on the market, that can lead to even greater prices on the access provider to in fact subsidise that rail on rail competition, not the competition between roads and effectively, some of the debate about rail pricing on the Melbourne to Perth corridor is actually related to the rail on rail competition, not the rail versus road

competition. The rail price in that market is quite below the road price for the Melbourne Perth corridor so the basis of the pricing for the intermodal pricing and a reference service goes back to a framework of the 1995 agreement and has been nominally held that way.

The CPI escalation, that is the CPI escalator has two parts to it and it provides a certainty and capped part with regard to the reference service and it is proposed in this undertaking to give that very certainty and as is in fact historically the case, it has not been a situation where ARTC has sought to necessarily escalate that and in fact this year is the first time we have even gone near doing that. It is transparent because it is actually clearly in the documentation and the reference service but it is not intended in any of our submissions to act as a productivity incentive.
The CPI minus X is not, for the reference service, a surrogate for productivity. It was put against the reference service price to provide certainty, clarity and capping so that the market could actually have a transparent base to deal with against the indicative access service agreement so on the second issue, then, relates to the DORC with regard to the CPI and the DORC actually comes from a slightly different angle with regard to those issues. It is quite simply dealt with a CPI minus X basis - a CPI basis I should say and is not there again as a surrogate for the productivity.

The DORC was undertaken by Booze Allen Hamilton; the number of assets included in the DORC are outlined in the documentation but I would like to point out that the DORC proposal actually excludes a number of assets that would normally form part of a DORC. It was never ARTC's intention in putting the DORC in to actually try and maximise what its asset value may be in a normal regulatory environment. The reason for that is that in the market ARTC is in, the market can't afford to pay the asset replenishment value framework under a DORC so it would have been a waste of time putting one in to get a nice ceiling for the purposes only of this regulatory effort.

The point I am making is the DORC is not, in fact, a fiercely presented DORC for an access undertaking for a ceiling; it excludes every piece of land that ARTC actually owns in South Australia; it doesn't give it any value whatsoever; it doesn't even attempt to give it value; it is valued at zero, so we don't get into a DORC DAC sort of argument such as the Sydney Airport application you had recently where the very issues of the DORC versus a DAC for a land value for an easement. This doesn't have one dollar of value against that land, including land in the middle of Adelaide so I would point out that the DORC is in fact an underrepresented surrogate for the purposes of the floor ceiling discussion. It takes a narrow view of future demand and traffic growth generally and ARTC's view has

always been that DORC is undervalued, however it is of no benefit for us to present a DORC which is at the true value given the market that we are in.

The leased assets in Victoria became an issue in one submission and I would just want to touch on that for the Commission's benefit and for those who have read the submissions. There is one or two submissions suggested that the leased assets in Victoria should not be dealt with under the DORC arrangement but should be dealt with at its real cost and I am happy to go through graphics of this, Chairman, from people later but the problems for that on an intellectual level is that you could actually get the reverse of that. You could get a lease value which is far superior to the DORC and get passed on expense so it works both ways.
We actually pay a lease in Victoria of a minimal amount of 2 million point something a year, increased at full CPI for each year and 20 per cent of our nominal operating profits go as a surrogate for lease values in the state of Victoria. If, in fact, we moved away from the DORC in Victoria and moved to a cost based framework, the actual price in Victoria on the north east line, for example, would go up by 25 or 30 percent. That is, if we went to cost recovery plus weighted cost of capital the price would actually go up and if we didn't go on a DORC and took market risk, our present value there under the DORC and the way we have priced it is closer to a floor, but it is nowhere near a cost recovery model and we are happy to go through the numbers on that to demonstrate it.

There is another issue, though, about that and again I am only trying to reflect that we are taking some market risk in that corridor, knowing that pricing it up is not going to be of any value to the market place but if you moved away from a DORC and you went to actual costs, then unfortunately the prices would increase.

The second part of that DORC value is you get an obtuse framework if you move away from the DORC framework in this area and that is, depending on whose ownership the asset is in at any particular point in time, you can actually get a situation that if it moves from a lease back to the owner, prices could escalate at a massive rate because they would be entitled to the DORC. What we have tried to seek here is a traditional, transparent framework of using the DORC as a surrogate all the way through and the floor ceiling leaving the transparency.

I only raise that because it did come up in the submissions but it wasn't raised today and I very much doubt that it is a - well, it may be but I very much doubt that it is a major issue for today. It is just that one of the submissions took a gifted asset approach and probably didn't recognise what the difference between the actual cost ..... would be in Victoria and

probably wasn't aware of the actual real cost to us of the lease in Victoria against the operating expense plus the profit share but we have done numbers on that and we are happy to share that but if we went to a non DORC and a cost recovery basis, the present published price would actually go up because we are trying to take market risks there to grow the market.

The other major issue that came up in the pricing area, and I am only trying to deal with those issues that came up in the submissions rather than re-argue how ..... justified ARTC's very reasonable prices are. It was a mutually exclusive rights framework and that was that there was, in our view, a misunderstanding with regard to what happens in the event that two operators apply for the same exclusive path and imaginations went riot with regard to ARTC's desire to auction.

Chairman, I want to assure you that ARTC's desire to auction is well within the bosom of our heart but it is not in this application. In this five years, we have sought a situation where the pricing framework in floor and ceiling and the indicative reference service price for the services that Martin was referring to were very clear and transparent. In the event that two applications are for the exact same path, which can happen and has happened to us a couple of times, we have not sought an auction process because the process is that an indicative access agreement is put and the indicative access agreement may not be for a similar, like service; there could be two different services applying so their net value and charges may be quite different.

The net present value may be different because of the length of the contract proposed between the operators and the rest so it is not a proposal where, in fact, we put out and say you give us your best price. It goes with terms and conditions and with regard to the type and nature of service. Our first, our first exercise in this is to try and get both operators on and get revenue from both and try and actually negotiate a situation where they could both go on because our objective would be get the revenue from both of them but the net present value calculations are based on capacity on the network, it cannot be met, both applicants are advised of existence of competing claims, we can currently negotiate with each party.

If satisfactory outcomes can't be achieved, we then go for formal proposals from a party with regard to what they are prepared to contract for and that could be quite different in net present value terms. I think many of the submissions thought they might be similar. If in fact it is an 80 k freight service for four years against an intermodal service for eight years etcetera, then effectively, you know, the NPV of those will be different without

anywhere going near an auctioning on price because the prices are generally published.

Now, our traditional approach has been that if, in fact, both services are bidding for the same contract, which has happened a couple of times, we have indicated to both applicants that the person who is successful with the contract will have the path and we have sometimes indicated to both of them that, you know, if the end user is happy we will give them both an indicative proposal and if they are successful with their contract that there will be a path there so we have tried to overcome those things but the mutually exclusive rights provision isn't an option, as some have suggested.

The temptation was great but the body wouldn't go with it at this point in time so effectively, I think, that deals with most of the arguments that came up in the submissions we saw about the base pricing, the misunderstanding of the CPI minus X in the reference service price as being a surrogate for productivity and lastly the DORC because I don't think people generally are aware that we haven't sought to put in a DORC that maximised our value. We just sought to put in a DORC because of the surrogate ceiling. If ARTC got anywhere near the ceiling, the industry would be overwhelmingly doing a bonzer and highly unlikely on present predictions.

THE CHAIRPERSON: Well, we do have a range of discussants and we will start with Robert Jeremy from Toll.

[10.15am]

MR JEREMY: Thank you, John. Robert Jeremy from the Toll Group. I am going to approach this from a fairly bit picture point of view. I think, firstly, particularly when it comes to things like DORC and DAC and stuff like that, I am not qualified to talk about it. I don't know that weird science. And I just don't think we have time to get into a lot of details so I want to try and provide a perspective from Toll in relation to the matters on this next item of the agenda. I want to go back in time to the time before rail reform, which is about '95 when TNT, where I was, with Colin Eggleston, was trying to start a rail service from Melbourne to Perth.

SCT were doing the same thing. David described that as an industry consultation process. It felt like real knock them down, drag them out negotiations to me. Since that time we are told that we have enjoyed rail reform at a state level and a Federal level. Formation of ARTC, more competition, so on and so forth. I will just take you back - sorry, I am out of focus. When we were trying to negotiate our way from Melbourne to Perth with three different track owners who were not really interested in getting us from one network into the other and trying to make the three

networks, Western Australian, South Australian, Victorian networks connect.

These were the big issues that we had to deal with and they are the same issues we are talking about today. Where do you get that access price from. How do you derive it. You say you want a CPI escalator every year. What has CPI got to do with anything in then transport industry in which you are a part. What service do we get for our money. And repeatedly the response every time from the track owners, who are generally Government-owned authorities at that time, was in relation to the access price, it is really none of your business, or it is what I can get from you today.

I am just going to gouge you as much as I can until you start to scream. In relation to CPI, honestly it was just blank looks. I mean, of course, it is CPI, what else could it possibly be, year on year. And in relation to the question, what service do we get for our money, quite honestly the response usually was, look, the track is in very bad condition, you can't seriously think we would guarantee the performance of the track. You will take it as you find it and we are going to give you a track path but we could change it tomorrow.

No, it doesn't matter that that won't suit your customer that we might change your train path but we want to be able to fiddle with the train paths in any way we see fit for the general benefit of the overall network. Now, we have made some progress since those times in relating to pathing. I think we do have much more certainty and a much greater understanding from the track owners that paths connect to customers and to markets and you can't just fiddle around with them without destroying businesses.

But we still have the issues about access price and we still have the issues about CPI. One comment, just picking up from something that David said, it may be that the price that was offered by track owners in those times, about point 3 or 3 cents, however you want to characterise it, did deliver them a loss. But whose problem is that. If I am a Government or a series of Governments and I am silly enough to build two competing transport infrastructures, one road, one rail, and I am silly enough to heavily subsidise the road users, then I think it is a reasonable commercial outcome for me to suffer a loss in the track network.

If that were done in private - by a private network owner, then would he be surprised if he suffered a loss in his rail network; no. These policy distortions are relevant - I will come to them later. We used to talk about the access price being inside a black box. We could never see inside the black box. Then quite - it wasn't a consultation process at all. Each

jurisdiction negotiated a price. There was no transparency about how they derived that price. So the price we have today is the legacy of some strange accounting systems of which - in which the industry has not participated.

It is relatively uniform across jurisdictions now, but, I think that is more accident rather than science. In those days - and I still think we have it today - there were different rate structures for different operators and there were different rates for different operators. And we still had the legacy of some of that in some jurisdictions, not ARTC. So, we didn't have a common negotiated rate in those days. We had no posted prices in Western Australia, Victoria, New South Wales or Queensland and we still suffer some of that. Ramsey pricing methodology was used, that is, I will take what I can get out of you.

Or the big pot methodology, which I suspect is probably the closest thing to science that we had, which was, I have got this big pot of railway assets, I have got track, I have got drivers, some are in the country, some are in the cities. I have got a whole bunch of other rail gear. I have got some property; it all adds up to this. You are going to use X per cent of it, you will pay X per cent without regard to market, efficiency or the relevance of that costing to the actual service being offered. At the end of the day through Government policy decisions, road, on what we can calculate, pays about 2 per cent of its operating cost in access charges.

I am including CPT insurance in that. Okay, so it is lower. Rail pays 30 cents of the operating dollar in track access. It is a market distortion that is created by Government policy. If track owners suffer a loss as a result because they cannot offer a competitive access price to rail that is not surprising. But should we subsidise that loss. Should we pay for that loss; no. We are entitled to know how the access price is made up. We are entitled to know whether it is based on efficient cost and we are entitled to know that it is a competitive price.

Now, we don't know these things. We get assurance, but we don't know them. And I really don't think that we have moved far ahead since those days of rail reform. We still have those significant issues and we still have the lack of understanding on operator's part. And we still have the issue about distortion between road and rail access pricing. CPI - freight rates have been trending down in the industry, road and rail, for years and years and years. There is a cost down mentality in our customer bases. They do not want to see costs going up. We have to offer cost reductions year after year after year.

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You cannot have access prices going up year on year and rates to the customers going down year on year. Something is going to give at some point or another. You don't have to be a rocket scientist to work that out. Our customers - some will accept CPI, some won't. If they are accepting CPI they are confident in the base rate. They are confident they are getting a competitive rate. If they are not confident, they will go out into the market and get a competitive rate. We are not confident in the base rate. We are nervous about a CPI increase because of the cost pressures that we are facing in the market place.

I dived into the ABS website and looked at the last June quarter CPI. These were the major factors driving CPI in the last quarter. Fuel - and I am talking fuel for motor cars - I don't think that would be a very high cost driver in ARTC's network. And everything through to beef and veal, women's outer wear, whatever that is, take-away foods, toiletries, overseas holidays, furniture, motor vehicles - the cost of a Ford Falcon. Nothing there, except possibly rental, is relevant to ARTC's cost base. So why are we being asked to pay for those things let alone two thirds of them.

That is our fundamental problem. If we understood the cost base, if we understood the price, if we had confidence in those things, maybe some percentage or CPI discounted formula would be an appropriate, quick and dirty way of getting there but we don't have those levels of confidence. And the fact that beef and veal contributed 9 per cent to the CPI doesn't make me want to pay two thirds of CPI. Let us get on to asset valuation and I preface my remarks by saying that I am not an economist by training; I struggle with this stuff.

But, from what I have read in the ARTC undertaking and in the papers issues by the NCC and the ACCC and so on, I just really question what relevance DORC has to us - or - not DORC generally, but ARTC's DORC, 1.4 billion dollars. It is almost laughable. The asset can never recover against that valuation in the freight market in which we operate. The assets were transferred to ARTC at an agreed value, or some expert valuation done, which is reflected in their books at the moment. My understanding - I might be wrong - is that the assets were transferred out of AN and into ARTC at some sort of agreed value. Why did the Commonwealth decide to transfer them in at that value? Was there a policy decision behind that? Was it a policy decision designed to give ARTC an asset base that could deliver, at least, some hope of competitive pricing to the market place?

Why create irrelevant floors and ceilings? The access price is too high now. Why create an environment which ARTC is chasing returns that are unrealistic and can never be delivered? We have a valuation based on asset

condition as far as I can understand; an engineering based valuation. But what about the asset performance. The asset is not performing. ARTC has done a lot to increase the performance of the asset but its own track audit done recently shows that it is not delivering some basic performance standards that the industry needs in order to compete with other modes.

What value would it be if you valued it on a performance based criteria? I think it would be a lot lower than 1.4 billion dollars because it cannot deliver the sort of service that the users need to compete with other modes. And what will follow from asking users to pay uncompetitive prices to fund future network improvements. It is a recipe for failure, and although I hear what David says, and I hear his assurances that they are aware of what will happen - what is happening in the market place, and they are aware that they may not even be able to price to the floor, there is nothing in the undertaking which guarantees us modest pricing behaviour in the future.

If ARTC is chasing a DORC - its DORC valuation - it maybe five years or it maybe six years before they start to behave irrationally. It maybe David's successor, it maybe a new board, but what is to protect us in the future from irrational pricing behaviour based on an unrealistic DORC. It may be that the Commonwealth requires it of ARTC. It may be Government policy. It may have nothing to do with commercial behaviour. And we are very concerned about the unknown in terms of the influence that DORC might have on ARTC's future pricing behaviour. That is all I have to say.

THE CHAIRPERSON: Thanks very much, Robert, that has given us some interesting thoughts there. I will move on to Martin who is going to present. I might say we are going to break for coffee so perhaps it would be an appropriate time after Martin has his say, that we might break for coffee and then restart because I think, clearly this is an area where we are going to have quite a lot of discussion and the coffee break may be an opportunity for us to sound these things out.

[10.28am]

MR SVIKIS: Martin Svikis, Specialised Container Transport. I guess for fear of, and Mr Chairman please stop me, for fear of picking up an exchange here, a public exchange on views, I guess I would probably open my remarks again on this session with some opening remarks of last session. In that we find that the clarity of the agreement and what has been put forward is difficult to understand. Some comments that I made appear - appeared not to be representative. I assure you after two years talking this through we still are not clear about it.

If it is as simple as that, and the assurances are correct, why can't the agreements be as simple as that. In terms of the level and structure of reference tariffs, we would like to make the following comments in order of the agenda. First of all, the current fixed variable ratio is satisfactory, in our view. Having a relatively high fixed component actually helps the arguments in other parts of the undertaking and the agreement. In terms of it keeps you fairly honest. If you enter the track with a high fixed component and with one wagon and try and run a service with that, you will not be profitable.

So there is a natural tendency there to be cautious about taking on paths that as an operator you may not have proper utilisation for. That would also therefore avoid a lot of the other elements of the agreement in terms of penalties, under-utilisation clauses, etcetera. It is a simple dead straight mechanism that keeps people honest from a utilisation point of view. We will talk more about the penalties later. We still feel that there is no real reflection of economies of scale, or benefit sharing in the pricing or valuation proposals.

If we look again the pricing table, it can only go up, in a sense. The other one that particularly concerns us is the opportunity to discriminate, and I guess this is where we come back to, maybe in apparent confusion on our part, maybe a mistake, but we don't think so. We think that selling paths to the highest present value to the ARTC may not be an auctioning process but, you know, a process that allows the highest price to be gained for a service, will probably be construed without much imagination into that.

We think there are other means of being able to distribute paths fairly, and certainly on the basis of high flagfall means you have got to be pretty honest about what you want to do before you enter that track. Also this allocation of pathways comes up in scarce resources, which I will talk about, and capacity, which I will talk about later. In other words, you can't look at one element on its own. You have to look at all these elements in the context of the whole agreement. Either way, highest present value favours larger operators and therefore limits competition. One of the things we have witnessed over the last five to six years in this industry is the entrance of new - entry of new people into this business that has created competition and kept all above rail operators very, very honest. And that has been the driving force between the freight shift from road onto rail, competition.

So the highest present value means - favours bigger companies. Bigger companies, less entrants. Less entrants, less competition. Also highest present value does not necessarily affect the cost of providing the track which has been noted by previous speakers. It is not necessarily linked at

all. CPI, very quickly. It is not necessarily representative of the ARTC cost mix. Other formulas might be. Again the CPI does not reflect economies of scale. And the CPI does not provide for registered price to go down. Not for a while in Australia to come, I would imagine.

Technically it does, I guess. Floor and ceiling. It is difficult for us to comment again, like other speakers, it is a complex valuation process. One of many, we believe, and even Booze Allen I think themselves said that there are many different ways to skin that cat. That doesn't make it wrong though. We note also though in the valuation process that non-segment specific costs can be added. There is wording to effect that in the agreement and that leaves us open to wondering what that might be.

However, as far as the process is concerned, and also the agenda today on pricing, and Robert just touched on it a little bit there before, it is not so much the price, in a way. It's what will the revenue be used for. What about the reinvestment of that revenue back into the track? We think again that the agreement is fairly light and the undertaking is fairly light on those particular matters. All of us have a concern about the New Zealand experiences and the Great Britain experiences. I have not been there first hand to see them, but the conversations I have with my customers who, say, operate in New Zealand, don't talk very well of those experiences.

So again, we emphasise, it is not just about revenue collection. It is about making appropriate investment decisions that give real benefits to track operators and hopefully in the long run reduce the access price, even for the standard 21 tonne business. As far as also the 21 tonne operations are concerned, again if that caters for most of the market, what is the relevance then of all of the other aspects and mechanisms that have been put forward.

As far as we are concerned we are commenting not just on what we do today in this business, but what we might have to do tomorrow. Therefore our thinking is not limited on merely what happens today, and we will be commenting on all aspects of the agreement as if they were going to apply for the next 20 years in the industry for things that have yet to come up. And we will continue to comment on that way as well. As far as flexibility versus transparency, we note that they have been put forward in the agenda as contradictory outcomes, one versus the other. They do not have to be. We feel that is a limiting way of looking at it. They are not opposing outcomes. That you can have flexibility, but while you maintain like for like, the concept I think all of us want to see in the industry.

In other words, let's look at things differently but let's make sure that everybody can equal that different thing - access that different thing in the same way. They are not opposing outcomes. They is an item there on

scarce capacity pricing. Define scarce. Prove scarce. We have to link that concept to the other concepts and comments about capacity themselves. When we talk about capacity it can be created in two different ways. One, by spending more money, say on passing loops. You get more capacity.

But you can also get more capacity on the same railway line on the same passing loops by better management of that capacity. Absolutely no doubt. That is probably one of the biggest improvements we have seen. We have certainly seen investments, but we have also seen better management of capacity. If capacity is not clear and transparent because it is going to be taken on a case by case basis, then you could actually manufacture scarcity. If you can manufacture scarcity and you ask for the opportunity to price it up if it is scarce, to the highest present value, then what do you do?

That's a good business. That's a great business. Capacity, pricing, they all go together. You can't take one away from the other and say, look at that. You don't have a problem. Scarcity also implies high usage, otherwise it wouldn't be scarce. High usage implies economies of scale. Why couldn't we argue that if you have scarcity and high usage you have economies of sale and therefore drop the price. Don't put it up. Pricing for scarcity should reduce the price. And that is basically it for pricing for us. Thank you.

THE CHAIRPERSON: Well, on that note I think we are now close enough to the time that we allocated for morning tea, so I suggest we take about a 20 minute break and will then pass on to the other discussants, and in the lead up to lunch, review the whole pricing issue. Thank you.

MORNING BREAK [10.37am]

RESUMED [11.07am]

THE CHAIRPERSON: Well if everybody can resume their seats. We let the break run a little longer than we had scheduled. I think it is useful for us to have these side discussions, and clearly we have already provoked some of that, and will not resume the discussion related to access pricing. And Michael Houston from Freight Australia will be the next discussant.

MR HOUSTON: Thank you, Chairman. Mike Houston from Freight Australia. I want to address three issues which have already been mentioned this morning. One is the appropriateness of DORC. Second is

the appropriateness of CPI. And the third, which was I think just touched on by Martin, that - pricing at a level sufficient to be able to reinvest in the facility. I won't deal at length with DORC. I think it has been covered by the previous two speakers. But I am interested in the comments made by David in talking about the difference in pricing if the appropriate rate of return had been used, instead of DORC, and the increase which that might incur.

And I say this in the context that in Victoria, the Victorian Government is proposes to complete standardisation of the north-east corridor and under those circumstances one imagines that we would relinquish control of that corridor to ARTC and we would become an access customer in that area. And I would certainly like to take up David's invitation at some stage to discuss the relative merits of DORC versus return on investment in that corridor, when the time comes.

In terms of CPI, yes, I agree with Robert Jeremy's slide that there didn't seem to be much in the basket of goodies, which is used to measure the Consumer Price Index, which relates much to provision of access services. In a discussion we had with ARTC in Adelaide a few weeks ago we raised the question of what are the real cost drivers for provision of access as far as the ARTC is concerned. I think as customers we need to understand what those cost drivers are, and what factors influence movements in those cost drivers.

And then we would be better able to appreciate when a claim came in for increase in access charges that it was based on something that was actually related to costs which are actually incurred by the access provider. Obviously all customers are going to be intuitively opposed to price increases of any sort. However, I would have to say that - picking up on Martin's - Martin Svikis' comments on pricing, I think just towards the end he did say that the revenue which is gained from access needs to be returned, at least in some measure to reinvestment in the facility.

And Freight Australia will certainly endorse that. There has to be a level of access charging which does permit the access owner to reinvest in the facility, whether it be in terms of upgraded infrastructure, improved technology, or other aspects of provision of access which - better train management, which enables the access user to introduce efficiencies and run their own business more effectively. And I would like to leave my contribution at that point. Thank you.

THE CHAIRPERSON: Thanks, Michael. If we could then pass on to Gary Camp who is going to - from Patrick Rail, somebody who knows about intermodal connections.

[11.13am]

MR CAMP: Thanks, Mr Chairman. Patrick Rail is a relatively new entrant to the interstate network and we have a number of things that interest us in the undertaking. Primarily, we look at the price and performance. They are the key drivers to us in running an interstate service. We obviously endorse the comments of the other speakers to date and we would just like to add a few brief comments, particularly in this session on the price, access pricing. Just as an example, we believe that the ARTC when they talk about the track, specify that they are operating or selling to the access seekers and train operators.

They mention a 21 tonne axle load and 110 kilometre per hour paths, and also 80 kilometre per hour average transits. That is a super freighter path. Now, we have a super freighter path and currently if we average 60 kilometres per hour on that path we are doing quite well. But we don't get a discount in the rate for the sub-standard path and I don't think anyone else does at this stage. So there is an issue in terms of what is being sold or what the prices are for what is being sold, and actually what is being delivered.

In terms of the undertaking itself ARTC do indicate and forecast that they are looking at cost reductions over the next few years in terms of track maintenance and train control. We assume these reductions are due to efficiencies they will be implementing and we would hope to actually see some of that pass back to the operator. It would appear looking at the graphs in the undertaking this would not be the case. All of the graphs seem to trend upwards rather than downwards. Now, for rail operators that is a negative position as far as we are concerned because in the markets that we operate most of our customers are always seeking a cost down exercise in terms of the prices that we charge them.

This really means that whilst ARTC rates would be increasing, we are trying to seek a decrease in our operating costs to pass that to our customer. It also doesn't really take into account the efforts of the above rail operators in terms of increasing the business and bringing additional volumes to ARTC, which directly improves their income. So I guess what we are saying really is that at the end of the day the business increases that we bring to ARTC we would like to see some benefit derived back to the operators from that exercise.

We see that ARTC are currently making a substantial profit in terms of their operating costs and that they pay dividends to their shareholders, which no doubt it is good for the shareholders and it is good for the ARTC. There is no formula disclosed in terms to what that return to the

shareholders should be, or if there is any cap on that, or whether some of that profit should maybe be pushed back into the track; in other words, reinvesting to improve the track work so that we can get better transit times, maybe higher axle loads, better transits and, therefore, reduce our own costs in operating the trains.

The other aspect as far as we are concerned is the comparison against road because that is a market that we compete against, and again, it is a matter at the level playing field in relation to road and rail. This means that we really need to see the market driving the costs and the prices charged. We can't afford to lose pace against road. This leads us to the point of saying that although the position has been put that it be cost based and capped by CPI, we believe it is really a market driven base rate that is currently being proposed, but how is that actually derived, and we can't see how that figure is actually achieved.

And also, the CPI in terms of capping of the CPI we are not sure that is a valid price variant, and again, it can probably lead to just increasing costs year by year to a point that the operators can't sustain. The other issue that we had was in terms of the indicative access charges and the potential for deviation from those as to what would be the pricing mechanism that would change that indicative access charge. That is basically our comments.

THE CHAIRMAN: Thanks, Gary. I have already had an indication of others who wish to speak so I think we will continue and then maybe if we can have interchange, or if David wants to respond to any points. The next person I have was Ian Rhodes from Great Southern Rail.

MR RHODES: Thank you. I would just like to add a couple of brief points to what has been said. The first one is very brief; it is really just to disagree with something that Martin from SCT said in relation to the relationship between flag fall prices and variable components for price. Just to make the point, as a passenger operator, passenger operators are in many ways similar to freight operators but there are a number of key differences. Having a high flag fall component actually discriminates against a passenger operator because the economics of the passenger business tend to say that you like to have smaller trains because the demand is for smaller trains, so a high - and a high flag fall component discriminates against a smaller train.

The second issue really comes back to the general issue of what prices were about and as we see it we are really about setting what is a fair price, and at the end of the day you have got to be satisfied that the price is fair. Now, where I come on that is I read through the submission and like

Robert from Toll I don't understand DORC and DAC and alphas and betas either, but every time I read it I find it very persuasive and I understand it, and then I listen to David and David is equally persuasive and I think, yes, it must be fair, but you come back to two - what we say is two fundamental tests of fairness at the end and they seem to be absent at the moment from the undertaking.

We think the undertaking to be demonstrably fair has got to reconcile the outputs of the price setting process to what actually happens. If you set some prices in a theoretical mechanism, which in theory sounds reasonable, you have to test against the outcomes at the end. And I think one of the outcomes at the end, Gary has just alluded to that. But I will come back. There is really, we say, two tests of fairness. One would be overall ..... in the rail business and at the end of the day that produces a cake of a certain size which we need to share in a fair way between us. And there is nothing in the Access Undertaking at the moment that says the cake is shared overall in a fair basis between the operators and the truck owners.

The second thing is if you wanted to be fair, ARTC obviously needs cash to maintain and run the track and develop the track. What is not clear is whether the prices they are charging today, and the revenues they are generating today, and the profits they are generating, is more, less or equal to the amount that is required. If my understanding of DORC is correct that is the aim of it, but surely there should be a reconciliation with the outcome that you get at the end that said are David's profits of 20 million dollars on 80 million dollars' worth of revenue the right number to generate that or not? That is all I - - -

THE CHAIRMAN: Thanks. And, Peter Miller, is it, from FreightCorp.

MR MILLER: Thank you, Mr Chairman. I too will be very brief. I would like to echo many of the comments that have been made here already this morning of the need for transparency and certainty in the access pricing. Unfortunately, the undertaking as it stands now delivers none of that, and if I could just demonstrate very quickly by reading a short section. ARTC in their undertaking have said:

In formulating its charges ARTC will not differentiate between applicants in circumstances where the characteristics of the services are alike.

All well and good for as far as it goes. But if you read a little bit further it says:

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For the purposes of this clause ARTC shall determine whether the characteristics of two services are alike, having regard to matters including, but without limitation, location, duration, quality of the train path.

Etcetera, etcetera. So first off there are a number of ways in which a train path could be different, or a service could be different under this undertaking, but even more amazingly the phrase "but without limitation" means all these factors can be taken into consideration, or anything else could be taken into consideration. So it is an incredibly open-ended way of looking at access charges.

It is FreightCorp's view if we want transparency and certainty and if we are still going to try and include all these potential ways that services could be different, we would like to have it detailed in a very definite way how each of these characteristics would modify the access charges. If the time of the day is different, how will that move access charges? If it is on a Friday, does that mean it is more expensive or less expensive? By how much?

In an earlier part of the undertaking, it looks at credit risk associated with the business. How is credit risk assessed? What is the direct relationship between risk and price? None of these questions are answered, and I would suggest it allows ARTC to come up with almost any charge. Furthermore, without that certainty or understanding of how the charge can change, there are no price signals given to an access seeker, and without those price signals, train operators don't have the ability to package their paths or their services differently to try and maximise the benefit to themselves.

It is FreightCorp's view that - and I think in fact we are aligned with Mr Marchant on this fact - that we want to be competing on above rail services with the other operators. We don't want to be competing with someone who happened to somehow get lucky and get a lower access charge. To that end, we believe that all access charges that any seeker should be able to obtain, should be disclosed publicly.

Furthermore, we have introduced the concept of a most favoured nation status which, in a simple summary viewpoint, suggests that if any access seeker can get a certain access charge, then other access seekers should be able to make benefit of that charge. If the regime or the undertaking allowed access charges to be more publicly available, and that most favoured nation clause or concept was in place, we think that the undertaking would go a long way to providing transparency and certainty. Thanks.

THE CHAIRPERSON: Thanks very much, Peter. Before I take any further questions, clearly there has been some fairly consistent issues raised from the starting price issue and clarity as to where that is derived from, issues about the CPI, floor and ceiling, questions about the application of DORC and lack of clear price signals. I just wondered, David, did you want to make some responses at this stage and we might get more or an interaction going.

[11.26am]

MR MARCHANT: Chairman, I don't wish to respond to every detail and I am sure you in the audience don't want me to respond to every detail, either. The - if I can firstly deal with like services, effectively this access undertaking including its appendices provides for a situation that in the event of a dispute about ARTC's view of the like service, it can be resolved by the mediator or arbitrator. ARTC's view of it is a view that is able to be reviewed by an independent arbitrator or by mediation. It is, in fact, an area that is able to be reviewed.

We recognised, as others do, that like-for-like is a very difficult concept in an industry where there are changing characteristics of services and we have specifically made provision of the judgment that ARTC may make with regard to like-for-like on each asset is able to be reviewed and really in that review process it is up to ARTC to demonstrate to the arbitrator, not the applicant who feels they have been discriminated against, it is up to the ARTC really to distinguish between that like for like to that arbitrator based on this undertaking.

Secondly, on the same issue, with regard to the conduct of ARTC and providing a service, it is ARTC's view and the whole basis of this undertaking to actually open up an open market access undertaking. There haven't been any real open access regimes and undertakings around, they are mainly forced third-party access undertakings and therefore the comments just a second ago by FreightCorp, Peter, I totally agree with and that is that if ARTC makes an access agreement without identifying who the access applicant is ARTC should publish the nature of the prices and the nature of the service and the nature of the terms of that agreement.

I agree with that 100 per cent because that actually makes it possible for people to actually seek a review or to seek to go to the like-for-like servicing and that is why under clause 5.6 under the conduct of ARTC in the agreement, it deals with ARTCs actual doing of that and clause 2.6(b) of the undertaking specifically has ARTC committing to publish on its web site those very details. So I agree totally with you with regard to those issues, 2.6, 2.6(b) of the undertaking.

You will see in that clause if you read down it, the things that ARTC undertakes to publish on its web site, www.artc.com.au - just helping Peter look it up that is all. The - you will see that specifically in that clause ARTC undertakes to publish an access agreement, well the terms of an access arrangement that is entered into on its web site and to go through the very characteristics of the services you mentioned. Now it is our intention in the undertaking as well as our practice in reality to do exactly that transparency otherwise you wouldn't have a situation where people would know whether there was a like-for-like type of concept floating through.

Without information in the market it wouldn't be possible and we agree totally with that. The way of keeping an asset owner transparent and honest is, in fact, publishing information that enables people to actually see the difference between those things. With regard to performance standards, and it comes up later today, we have obviously submitted a proposed measurement framework which we would publish on our web site both on a quarterly basis and otherwise and that will come up in a session this afternoon.

But in addition to that, in our individual access agreements, there are provisions there for KPIs and the rest, which we have been only too willing to try and match up with operators over time. But on the individual track performance for an individual customer there is provision that enables that we commit to contracting to a certain path, given certain characteristics, so there are some generic things in the undertaking and there are specific things that are able to be done in the actual access contract itself.

It obviously isn't a situation where there is a homogenous track performance framework for all types of services and therefore each individual contract can actually tailor that. The - for example, in Patrick's example of its service, it may be that one day, if we get to a contract, there may be a different price for such a service or maybe that we agree on a path that actually achieves the same as the others. So like-for-like is able to be a mediated and arbitrated and people raised in their submissions that mediation and arbitration may be slow process and we will offer this afternoon to amend the undertaking to enable mediation to be thrown aside if, in fact, either party wishes to go directly to arbitration to help cut through some of that time scale although that was never our intention to slow the process down, we just wanted to be exceptionally fair if possible, we want the revenue from people, as much as we can get them.

The path access jurisdictions where a number of comments have been made with regard to the inter-operability of paths between jurisdictions outside ARTC's undertaking. It is not possible for us, in this undertaking, to make

commitments for things outside our jurisdiction but, in practice, we have been working with operators and RIC and Westrail to try and come together and have common date master train plans developed up across the country to enable at least an informed inter-operability or at least a well informed non-inter-operability
between different jurisdictions.

It is not an issue that we can solve in this undertaking but it is, in practice, an issue that we are administratively working with people to try and solve. And we will obviously continue to do that. The issue that we haven't canvassed in this undertaking comes down to the CPI issues. There seems to be a range of issues about CPI being a surrogate for escalation based on costs. In fact the CPI minus X in the indicative access service price was a surrogate to cap out the maximum that could take place.

It is not, in fact, a written-in escalator, the thing has very clearly that ARTC may, it may also may not, in fact, in hasn't historically except for this year and there is a process in the application framework, there is a process for ARTC's Board before even considering dealing with the indicative access service change, in our access undertaking there is a process of 60 days notice and for operators to, in fact, put their submissions to ARTC's Board with regard to what their view of the effect on the market will be.

The bottom line of it is that ARTC, on the pricing, has not submitted a cost-plus pricing proposal, it has submitted a proposal with a floor and ceiling and, in fact, where it tries to drive a market price between that floor and ceiling, the present prices in the great bulk of the area, is very close to the floor. The down side of a cost-base framework is it could be more expensive than the present price. The DORC is actually being used as only a surrogate for the ceiling and it is not, in fact, a thing that we are measuring a rate of return on. It is a surrogate for putting a framework around the bookends with regard to where those prices could be set in the marketplace.

And then in addition to that bookend, we put an indicative access service which represents those services that are competing directly with road on intermodal, we put that as an indicative service with a maximum cap out of price increase, so we have tried to do a bit of both, we have tried to get certainty for a certain types of services and then bookends with regard to negotiating for new types of services that may or may not arise or services that come in.

And so we have tried to get that balance, which I think Martin was referring to, between you can't - it is not necessarily a contradiction

between having certainty and having flexibility and we have been trying to do that in a complex legal document. Trying to give certainty with regard to the intermodal services, the maximum price but through floor and ceiling provide to give flexibility in a market to come up with novel and innovative frameworks and it is a difficult blend but it is a blend that we have been trying to seek.

So, Chairman, like-for-like, is both arbitral, mediatral and, in fact, there are published summaries of the like-for-like services that enable it to take place. There have been some suggestions, not raised today, that somehow we should publish the net present value differences between one operator and the next. By publishing the like-for-like we actually give - people can assume that. We are very cautious about publishing how we came to a net present value difference between two operators and give the other operator how we worked out the other - their opponent's net present value because effectively that actually tells the other operator exactly what the economic costs of their opponent are and what their appetite in the market is and I am not sure people would be too excited by actually that.

But in each it is appealable anyway, it is arbitral anyway. Performance standards we have agreed to have measures published on our web site as part of this undertaking. We have submitted an amendment to the undertaking to address that across a whole range of categories. There is also an arrangement within the contract because the contract actually has a performance requirement related to the schedules behind the contract and the market-based response framework is, in fact, the fundamental basis of why we have tried to go to a floor/ceiling framework because if we went on a cost-based framework, it is highly likely prices would significantly increase.

We are taking some market risk on that. The framework of this is to try and get a setting that enables to be dealt with in a context by the access owner.

THE CHAIRPERSON: David, we also, while you are there, we also had some interesting comments on pricing for scarce capacity, did you want to make some comment on that. There may be, I figure, while we have got you, there may be sort of a chance to -

MR MARCHANT: There are three things with regard to scarce capacity, one, the undertaking has within it two things. One - if there is a requirement for additional capacity for a service, there is a mechanism to work through what the price of that additional capacity is to enable that to be undertaken and there is a mechanism which has a range of options for formula for capacity enhancement to overcome a scarcity of capacity. That

is one side of it. The second thing which we were going to raise this afternoon, in that section, was we are happy to publish and amend this undertaking to publish the master train plans on the web site without identifying the operator, so operators can actually see the master train plans and actually see what the pathing of contracted paths are and those conditionally paths that we may have contracted for grain and bulk.

So there are three things - one, there is a methodology of dealing with additional capacity requirements in the event of capacity constraint, there is a framework there for mathematical working through the price mechanisms of dealing with that constraint and that is also open to arbitration and mediation in the event that - in the event that by some surprising nature we are not able to come to agreement about what means. So that deals with the capacity framework.

Secondly in the event that it is brought about by management incompetence, that is, you could actually drive the capacity in there faster if you just remodelled the way you did your train paths within a signal thing, we are prepared to amend the undertaking to actually have the master train plan without identifying each path by operator by identifying the paths contracted, we are happy to publish that so that people can actually see what that capacity contracted is including though, those ad hoc but contracted paths, that were raised by Freight Australia, of which, you know, we would put in the model temporary paths and there is nothing in this undertaking which would aberrate or abrogate that as a concept at all.

We have not distinguished between intra and inter, we have talked about rail operations and the schedules to this contract can deal with contracted non full time paths and options around those in any form. This does not prohibit that framework in any way whatsoever and, in fact, we assume that would take place in a number of cases, certainly in South Australia and Victoria. So they are the two mechanisms plus the publication of the new master train plan without identifying the operators' paths would enable operators to see whether management is managing with efficiency with regard to the number of paths in that framework.

So I think those three things should enable people to be informed and be able to go to a marketplace and to mediate an arbitrator and argue their case.

THE CHAIRPERSON: Now, further comments? We sound as though we have given the pricing regime a good coverage. I have one - if you can just - - -

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MR RODGERS: It is Matt Rodgers from the Queensland Competition Authority. Just listening to the comments that have been made by a number of the operators. We planned our final decision on Queensland Rail's draft undertaking a short while ago and this whole issue of transparency, particularly of pricing and capacity sort of, was one of the one of the most contentious issues that kept arising. In terms of the decision we put out, we decided in the - for the Queensland Rail coal network that they would actually disclose, Queensland Rail would have to disclose any access agreements that were signed with operators.

Basically once the agreement was signed it would go on the QCA web site, all other operators could see it. The impression we got when we were working on the decision was that operators, and may be and users, in the non coal part of the network didn't want that sort of disclosure. So in the end we said "well okay for the coal agreements, we will make them disclose but for the non-coal we won't."

And I am just interested, listening to some of the people here talking today, whether the only way that we will really resolve this whole issue of like train paths and the other things is that they actually basically move down that path of disclosure because I can't see how things like working out the like train path, how you are going to do it unless basically everybody can see the sort of the prices that have been set for everybody else because I have a lot of sympathy with the - the track manager, you know, in terms of trying to come up with the list of things as to how you are going to work out like train paths or if it is like or it isn't like.

And the only way you can do it if, in fact, everybody can just see well this is - these are the terms and conditions, this is a price and all the other operators can see that but I am not sure whether the operators are actually that comfortable about seeing what everyone else is doing.

THE CHAIRPERSON: Were they uncomfortable on the basis that they would be identified or just the fact that - - -

MR RODGERS: Well, uncomfortable because I think they - well, look, I don't want to speak on their behalf, I am just, in was more because I don't think they wanted to seek what the prices the operators were getting. I mean they are sort of worried about the discrimination, about no discrimination but were worried about may be commercial information being revealed to their competitors. That was the impression we got.

THE CHAIRPERSON: Okay. Well maybe Jeremy Roberts.

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MR RODGERS: And, sorry, can I just say one other thing also about the capacity, sorry, just one other thing about the capacity. I mean in terms of the decision we put down, I mean, we have gone quite a long way, I understand a cure - I mean I am not totally happy with it in terms of actually disclosing the capacity - like, the master train plans, daily train plans, train control diagrams. I mean, we have actually moved quite a long way down that path to let people actually see what is going on in the network.

But again, once you start moving down that path, obviously other operators, in the end, will probably end of seeing what other operators - what paths they have got, perhaps what capacity entitlements and all those other things. And, again, this whole issue of, you know, confidentiality, all that, you know, issue arises. And, I mean, I am still a bit unsure in my own mind just what - perhaps what the operators want in that area. Whether they do want to see what each other's, sort of, capacity entitlements are and see what paths they have got.

And all that, sort of, stuff. So, I would be interested to hear what they - if they had any views on that.

THE CHAIRPERSON: Well, we have got a few takers here, I think, starting with Robert. Thanks for the point, that is good.

[11.44am]

MR JEREMY: Robert Jeremy from Toll. The views I am about to express are those of my own and not necessarily those of other operators. Perhaps it might be worth just putting it in context again. I think the hesitancy amongst operators about disclosure is a legacy of the practices of the past. As I said earlier, there was a fair amount of arbitrage by track owners between various operators.

There is no doubt that different operators were getting different terms and conditions, different access prices, different rate structures in various jurisdictions. I have to say that ARTC territory is the cleanest of territories when it comes to that but we are still suffering from that and so there is a bargaining culture that has been developed. It is not healthy. I think if we can have a suitable standard of terms of track access, suitable clarity of pricing structures and transparency of rate derivations, then I don't think, certainly on Toll's part, we would have no objection whatsoever to disclosure.

It is conceivable that there may be, for example, you might have a track access agreement which relates particularly to a specific customer and a

specific parcel of work for a particular customer in industry, say the automotive industry. There may be elements of that that your customer may not want disclosed because it may affect them in the marketplace. You might have a situation where you are doing some work for General Motors and there may be elements of that track access deal that they wouldn't want disclosed to Ford. But as a general rule I would have no problem as long as we get the settings right.

THE CHAIRPERSON: Thanks. Martin, first off.

MR SVIKIS: We certainly support Robert's views but let us look at the practical commonsense aspects here. We all have our prices published now. The standard terms as they apply are all available now courtesy of the website which is a very powerful tool. But the practicality of it is, for example, we are not nervous about it because our new terminal in Adelaide is actually right next to NR's terminal in Adelaide - Mr John Fullerton is over here. If I want to know what he was doing, what time he came in, what time he came out, I just train one of the video cameras at my terminal on his train and work it out straight away.

So, like, what are we doing? We are worried about something I don't think in reality is really going to be a problem. There is also a philosophical issue here that has really got to be - - -

THE CHAIRPERSON: Maybe it's a Queensland thing.

MR SVIKIS: They are probably not used to - actually, it is an interesting thing. It could be, because they might not be used to the other people coming into their territory and we look at it - NR has been in the territory, we came into their territory and Toll has joined us. So, yes, right, we are actually used to arguing for a long time amongst each other, but commonsense still applies as well. But, philosophically, though there is another very important issue here about what does a level playing field achieve?

We are saying here, as SCT, we don't mind if John knows what time that train is in because he will find it anyway. We don't mind knowing how much access we pay because he can see that now anyway and we successfully competed, that's a point of fact. We successfully competed on that basis already. What we are actually saying here, though, is philosophically we would like to spend our time differentiating ourselves against our competitors on non-access issues.

Now, if Robert Jeremy said to me: Mark, do you mind if I have a look at your technical innovations and your e-commerce strategies? I'd say: Get

stuffed. Don't even dream of it, you know. Now, if John Fullerton wanted to look at, you know, our internal training program, develop our management team towards a better service ethic, no way in the world, John, get out of here. In other words, philosophically, I think we are also saying to ourselves we would rather differentiate on the things that really count in the final retail end of the marketplace, okay? Because a railway line is pretty simple and I think the message coming across here, too, certainly from us is: Keep it simple, it's not simple enough. Let's get on with it. The entrepreneurs are on the market end of the business. Thanks.

THE CHAIRPERSON: Thanks. Peter.

MR MILLER: Agree with all those comments made by Martin then on disclosure of capacity and price. And, if I may, just a brief comment on David's words that under 2.6(b)(iv) that prices for which access has been granted together with general description of the services to which such prices relate are on the website, well, that may be. However, if you look at that that is a very general description. It doesn't detail on what grounds or what characteristics any prices may vary and by how much are the prices varying for each characteristic.

Furthermore, the ability to go to arbitration is not much comfort for us. One, because - with only a general description we are not sure whether we should go to arbitration or not in the first place. And, second, if we do, as the undertaking is written at the moment, all that ARTC will have to show is that the characteristics of the services are different somehow which is not a very difficult test to prove, it is just - thanks.

THE CHAIRPERSON: John.

MR FULLERTON: I guess from National Rail's point of view I think is similar to the other speakers that we don't see, I guess, below rail as the means to compete. I think, our strong interest is to get the below rail operation reliable and consistent because I think it is the above rail initiatives in terms of the freight market that can build volume on the rail. So I think it is an important distinction to make that our whole focus as operators, our whole focus as an industry is to get the below rail operation delivering a service quality that the industry can build on and delivering a cost of access that the industry can build on.

And I think picking up Martin's point, the reality is that if you are an operator out there at the moment you know what paths exist. I mean, sure, take David's point, putting it on the website only will confirm what actually people know because if you are out there running trains you know who you are passing, who you are waiting for - and trains, it is very

difficult to hide a long train at 1800 metres long. So I think - that's our perspective, really, just focusing on getting a stable, high quality operation below rail.

THE CHAIRPERSON: Yes.

MR McAVOY: I am Mark McAvoy from SCT. Just two points. Just reiterate what Peter Miller said. For two years we have been negotiating with ARTC in relation to like for like paths. The simple fact of the matter is that ARTC is saying that operators will be comforted by a dispute resolution procedure but the practical matter is that once it comes to it, it is a Clayton's review if you do not have the proper parameters or the criteria for an arbitrator to consider when making its decision.

And the simple fact of the matter is, is that the arbitrator - if you look carefully at the clauses in the agreement it is quite clear that clause 5.6(b) allows the ART train path with another one if, for example, the nature of the ..... is different and that will be the argument which ARTC will pursue at an arbitration or dispute resolution. So that is a problem which we have had for about two years now. The second point is in relation to the access - - -

THE CHAIRPERSON: Can I ask, is there a learning curve on this?

MR McAVOY: I think we are just basically - it's - - -

THE CHAIRPERSON: Has it been flat or getting better or?

MR McAVOY: Sorry. When you mean a learning curve - as to how we can get past the point - - -

THE CHAIRPERSON: No, well, in the negotiation process. Is it the same now as it was two years - - -

MR McAVOY: I think the last correspondence we had from the ARTC was that this will be a grey area - this is a grey area. So, that's a problem. The second point I would like to make in relation to access pricing is that I think ARTC inferred before - David in particular - that with the indicative access charge operators probably won't have to go to the floor/ceiling limit because of clause 4.6 in the agreement. The problem with that clause is that I guess - well, it is a question - it leads to the uncertainty of the undertaking is - is that indicative access charge going to change during the course of the undertaking? If not, why is it called an indicative access charge? Why not just call it an access charge? And another point to that question is, why does the indicative access charge as

defined in the definitions quite clearly say that that charge may vary from time to time? That is the sort of uncertainty that operators are left with when meeting this sort of document.

THE CHAIRPERSON: Thank you. We will have response from below rail and where it - we are sounding - - -

MR MARCHANT: Usually described, Chairman, as a humble track owner trying to do the right thing by the customer. Three things that came up. One is that on Peter's issue with regard to transparency, it has been our practice and our undertaking in this and if it needs better expression given that five lawyers have different views about it including those that have had two years to go through it, have different views of how to interpret the legal drafting.

It has, in fact, been our practice that if there are any proposed amendments to an access agreement and that we intend to execute those agreements and those amendments, that we actually circulate them to all contract companies and (b) we even circulate those to those that aren't contracted with us. And the framework has been that any contract operator can take up the choice of that amended clause in their existing contract. So, effectively, ARTC in negotiating variations to the indicative access contract is mindful that in having given that variation it has an obligation under its contract to offer it to all and therefore the cost benefit of that particular thing is available to all. And some customers can choose to take that amendment up or they may like their contract in its present form.

Now, certainly, there are variations in the drafting that can help refine that but that, in fact, is what the present access contract does and the access undertaking, 2.6, is just an overview of that. Now, if that requires refinement I am happy to look at different drafting of that but I am really not, frankly, interested to go through seven different lawyers just because they have different techniques.

MR MILLER: When was the last time you ..... clause?

MR MARCHANT: Last Friday. In fact, there were nine different proposals in it. The - - -

MR MILLER: So you are saying that the proposed access agreement or the current access agreement - - -

MR MARCHANT: For any proposed contracts we intend to execute or are about to execute where the clauses are amended differently or drafted differently to an indicative one we send those to all to see if they wish to

amend theirs to take on those new clauses. We have actually done that a few times, probably about four I think. The last lot was only last week. And that will be our continuing practice. What I am trying to get at is that (a) that any change to what we have called the indicative access contract here - we have worked on the transparent framework of - that change is then circulated to all operators and if they wish to amend their contract they will take that up.

In addition to that we will publish on our website those very variations. Now, some people may not wish to take those changes up and wish to stick to their existing one. That is fine, that is their opportunity, cost and choice. Secondly, on the publication of the master train plan and the debate the QCA issue raised, we have come from three positions. One, that we will publish on a website indicative access frameworks and charges and variations to that - any framework around that, that is transparent.

Two, move to the master train plan being published so people can see that. Three, that if in the event there was a like-for-like framework or a different set gets published it doesn't take long then to work out who that is if you have seen the amendment to the access agreement you have seen the like for-like framework and it would actually only take you a few minutes to work out the fundamental differences that may have taken place in the market on that particular application.

Now, we have deliberately come from a position that differs on the Queensland thing and that is that we are not dealing with major coal frameworks here, we are dealing with a range of above rail competitors who basically do know who is running around the track if they haven't run into them and been beside them or otherwise. But the issue is that we are publishing it, not because people don't know who they are, but to take up Martin's point and that is if I am after an additional path and the track access company actually argues that they haven't got capacity because they are too lazy to be more efficient at managing those paths between the things, then you are informed enough to be able to challenge whether they are acting efficiently and then go to arbitration on that.

So the publication wasn't so that everybody could see everybody else's paths, they probably know them. It is to enable the issue of capacity to be addressed in the event that someone is after additional path. And I think I have missed something in those three points after that because I know that was two of them, but I think that will do, I will catch it up later, I am sure.

THE CHAIRPERSON: Do we have any more comment on specifics of access pricing? Well, I think that has certainly given us some very useful feedback on issues and responses from ARTC. Does anyone from State

regimes or - David Cousins is now with us, one of our other Commissioners - wish to make any comment? Well, I am amazed to say that it is 12 o'clock and we had said that we would have lunch at 12 o'clock which I didn't believe we ever would finish by 12 o'clock, but thank you for the comments this morning.

We will now break for lunch. We are aiming for that to be over about one hour. We have some lunch being brought in so it is not necessary that you go out anywhere. Certainly, continue the discussion and we will see you all back here at 1 o'clock reasonably sharply, given that when you get in front of timing on these things you always suddenly find the opposite later. So thanks very much.

LUNCH [12.00noon]

RESUMED [1.10pm]

THE CHAIRPERSON: If I could just welcome everybody back from from the lunch break and arrange to resume our - our forum for today. Before passing on to the Session number 4, on Negotiation and Dispute Resolution, there were a couple of matters that did come up just at the end of the last session on access pricing and I understand Mark McAvoy has got a point he wishes to make and there was a further issue raised about the - the extent to which ARTC has been going out in the past, in relation to new clauses under arrangements and we might just get some clarification on that as well, but Mark, if you are - - -

MR McAVOY: Thanks, John. Just on the second point before lunch, concerning the indicative access charge it would just sort of be well worth while spending about a minute on it, just as an illustrative purpose as to the clarity of this document and what operators are looking at. Once again, as I said, the indicative - clause 4.6 provides that the - an indicative access charge will apply for an axle load of 21 tonnes, 110 average speed, 80km and it gives the various train lengths.

I guess the issue which we are looking at - and then that may be escalated pursuant to CPI. The issue we are looking at and I think David - or David said earlier in the morning perhaps we need not be so concerned with floor and ceiling limits given that this indicative access charge provision is within the agreement.

I guess the - I guess the concern we have got is can that indicative access charge during - change during the term of the agreement. I guess related to that is if - why is it called "indicative" and not why is it just not called an access charge. Secondly, the wording where it says, at the beginning, "As part of this undertaking", why not say "During the term of this undertaking the access charge will be", and probably more importantly the - the term indicative access charge is actually a defined term and if you look at that defined term it - it allows for that indicative charge to be varied so should we be - should we be looking at that charge varying during the term of the agreement and if so, in what circumstances.

THE CHAIRPERSON: Okay. Well, perhaps David, if you can respond to that and there was that other issue of the sort of most favoured notion.

MR MARCHANT: I will do both.

THE CHAIRPERSON: Right.

MR MARCHANT: Firstly, the indicative - indicative access clause 4.6. Basically, you know, apart from reading it 4.6(a) goes through the nature of the indicative service which is the intermodal characteristics and it does say that an indicative access charge may be varied annually by ARTC. And then it goes on to say:

If a variation is to occur the indicative access charges will be varied by multiplying them by the greater of CPI less 2 per cent, or two thirds of CPI, such variations if made will be effective from 1 July in each year the variation occurs.

Now, the variation that may occur both in the definition and in this clause is capped by clause C(i) and (ii). I mean it clearly - it says:

If a variation is to occur the indicative charge will be varied by multiplying them by the greater of ....

You know, it clearly relates that back to that - to - to the only variation must be capped at those levels and the reason the lawyers amended the definition - or the definition of indicative access charge is to actually pick up the variation that occur under that clause and that is you know - I think that caps it out reasonably clearly.

The wording as part of the undertaking or any variation to that to be very frank with you, Mark, I actually don't think it makes any difference, it is just legal drafting. I mean it is part of the undertaking, it is clearly

expressed by us as being part of the undertaking. Let me add three other things to it which - which hopefully will give you comfort.

One is this: we have already signed contracts for these types of services. Those contracts clearly have, within them, a capping in these terms. If a new access seeker or in fact another access user saw us provide a price for this indicative service intermodal, 21 tonne, etcetera, they could get us under the like for like provisions and be in the arbitrator within minutes and - and quite frankly you know, it would not be difficult to do us over.

So, apart from the capping under this clause if, by some chance, some unscrupulous Chief Executive of ARTC of which I doubt there would be any of those, but if by some chance some unscrupulous CEO on Board decided to charge a - a lower rate for an intermodal service, 21 tonnes, with these characteristics, and used this clause to do it then others would actually then seek retribution under the like for like clause, right and I expect in reality because they would not want to spend a few months doing it, they would probably go straight to the ACCC on a breach of the undertaking and then expose us to, I am not actually sure - your legal officer has gone - what is the fines for breaching the undertaking, is it 10 million for a corporation and a million for an individual, or something?

MR JEREMY: Not for an undertaking.

MR MARCHANT: Isn't it?

MR JEREMY: No.

MR MARCHANT: Well, what is it, Robert, if you can give me free legal advice it?

MR JEREMY: I think the Commission takes you to Court.

MR MARCHANT: Takes us to Court. So it could be exposed to more.

MR JEREMY: No, an injunction.

MR MARCHANT: Injunction.

MR JEREMY: Injunction, civil remedies.

MR MARCHANT: Civil remedies.

THE CHAIRPERSON: We have lost our lawyers. Probably some of our - some of the people who spoke earlier would be happy, but now we need them.

MR MARCHANT: Well, I am sure the civil remedies - - -

MR JEREMY: I may be wrong, but I don't think it is a criminal - - -

MR MARCHANT: Yes. But I am sure the civil remedies will also deal with any economic loss to a party affected by our misuse of our undertaking in - you know I have got a feeling that we would be exposed to a few bucks and you know, a few bucks for a legal case isn't worth it. The - the next thing though is that, you know, the reality is that when we went to go and get another undertaking we would be belted anyway. There are more than at least three different remedies to - to an exercise of misuse of this clause.

You have got the like for like remedy. You have got this clause remedy and then you have got the mediation, arbitration process against the principles which I am going to touch on in a second, of the CPI Act itself.

MR MCAVOY: David, that was just my one point, with the clarity of the document you have this clause - I mean that definition should basically say "as varied, pursuant to the escalated clause in the second part of that clause" and in our remedy as to like for like. Once again if the train consists - the nature of the train consists - is different, well then they are not like for like paths under the agreement, or you may very well argue that they are not like for like paths and - and - - -

MR MARCHANT: I - I may very well argue it, but it may not successful. Let me give you a very good example. It is plausible that someone will want to come on to the track and - and go for a 200 metre intermodal maximum length carrier, all right, for a whole range of reasons and - and they may seek to be charged the same as the indicative intermodal rates. Now, you know, the opportunity cost of having 200 metres taken up of a 20 kilometre section of track would mean that you would have to think about it, if that was the maximum length they ever wanted to go to. It would - have a think about what the rate should be for that opportunity cost, but it actually - it actually is at the expense of another operator, operating at a longer length.

Now, I mean those things you know would come to bear, but in the end if we acted irrationally on that an unjustifiably we would have to - you know - we would have to prove that to an arbitrator, but I am happy to look at the clause dealing with the definition of an indicative access service

variability because it is linked back to this and if it is a drafting issue then I am happy to look at that, but - but I think it is really difficult in a - in an access undertaking to envisage like for like in a simplistic form as is being suggested. It ignores innovation and otherwise it may come to the market with services that are not envisaged by the drafters of this undertaking or my - or with respect, the present rail operators.

I may be that new innovative rail operators may come in with a whole different concept of which - of which the characteristics of that we may not get right in this. What this enables is - is a situation of attempting to evaluate that and the event the evaluation goes wrong, an arbitrator determining it. Now, I mean it is the catch 22 of you are trying to predict what like for like is for years to come and you know, you cannot be certain, but you know, it is more likely that this will be interpreted the way I think you and I interpret it and that is it is a like for like because it has a - the same reasonable characteristics.

If it is 1500 or 1800 it really is the maximum length they want to go to not the actual length they are going at, it is the length they actually require. If we actually went for the letter of this on 1800, none of our present operators would succeed because they have not got to 1800 even though the - even though we have allayed - even though we have paid for that capacity on the track to enable it to happen. It is up to that level, as distinct to exactly that level.

MR MCAVOY: Perhaps an alternative is for the mediator be given more more you know, more criteria and allow the mediator to be basically not constrained by the pressing forces within the agreement. If the mediator varied - - -

MR MARCHANT: We are all seeking certainty in these things and the arbitrator requires the same - - -

THE CHAIRPERSON: One of the problems is we are not picking up some of the things. Hopefully we will pick them up, but if - you make in a session maybe just say - - -

MR McAVOY: The point I was making is that perhaps we should be giving the mediator or the arbitrator some latitude in his mediation and determine what is the like path so he is not constrained by certain clauses in the agreement which specifically states that a path may not be a like path if the nature of the consists is different, if the longevity of the access agreement, if there is arrival and departure times which are different. I mean the mediator and the arbitrator will be looking to those clauses when he is making his decision. That is the only point I am making.

MR MARCHANT: Yes, I think both points, Mark, are probably right. You want some certainty but you also want to envisage the future and - and what I might do now is move to the negotiation arbitration and I hope to give you some certainty about the mediator's and arbitrator's ability to look behind just the beautifully drafted proposal we will put forward because there are some other things he can take into account - which he can take into account but I think, you know, it is hard to have absoluteness and flexibility and - and striving to get that balance, I agree, is a tough call.

Chairman, just on the other two things.

THE CHAIRPERSON: Yes.

MR MARCHANT: I will just touch quickly on the pricing and then go into the next session, if that is all right.

THE CHAIRPERSON: It is. Yes.

MR MARCHANT: On the pricing thing, we have actually been publishing versions of - of access undertakings and we are up to version 5 in this access undertaking.

THE CHAIRPERSON: Yes.

MR MARCHANT: In Version 5 in the draft that is with us - in addition to that we have actually published, last Friday, a range of other amendments that people may or may not wish to take up in their contracts and - and that is - and that is what our continued practice will be. Once the Commission - if the Commission agree to an undertaking, or if ARTC agrees to continue with an undertaking then - then what we envisage happening is the undertaking at the date of the agreement would be published on our web site as being the undertaking at the date of the agreement and any new changes brought about by negotiation with us by individual operators will also be published under 2.6 and will also be continued on the web site under a section so they can see the one at the time of the undertaking and variations to that subsequently.

In the meantime, what we have been doing, is putting out versions 1, 2, 3, 4, 5 and the version that went out last week is version 6 and attached to that version are stand alone amendments that we have offered to operators that we are offering now to all operators if they wish to convert across, either in their present contracts or in the indicative framework.

On the negotiation/arbitration section of the agenda, will I go into that?

THE CHAIRPERSON: Yes, please.

MR MARCHANT: The length of process was raised in a number of submissions. It is obviously not in ARTC's commercial interest to draw out the process. To maximise the opportunities, to resolve through a negotiation, rather than arbitration has certainly been our objective but the concern raised in the submissions has been that in fact if you are forced to go through each of the steps, sorry - negotiation, referral to the CEO's for negotiation, then mediation, then arbitration etcetera, that it could end up being a very long and drawn out exercise and that potentially could be the case if all those avenues were used.

ARTC is willing to amend the undertaking to make the mediation process a voluntary step only rather than a compulsory step, although we would prefer mediation, recognising that - that the process as documented could become long winded and in fact self-defeating. We would be happy to make mediation only a voluntary process, rather than a compulsory one and that is up to both parties in regard to that or they go straight to arbitration.

So we would be happy, Commissioner, to amend the undertaking to take that step out or leave that step at the discretion of the parties. Given the experience of the past two years, ARTC agrees that a drawn out negotiation process is in nobody's best interests.

The next part which is a provision of capacity information was in fact another major issue in the - in the submissions to the ACCC and ARTC has agreed and will agree in writing in the undertaking to publish, on our web site, a graphical representation of the committed path entitlements as scheduled with ARTC and update that on a regular basis.
Secondly, to publish what is already published, but publish on the web site section running times of indicative services over each section of the track so people can actually see the indicative section running times for that type of service and lastly something that is already published, but we will put it as part of the undertaking, the route standards for the sections of the track, across the ARTC undertaking area.

In addition to those issues, the next major issue that was raised in the submissions, were factors for the arbitrator to consider and especially people were concerned about whether the access principles in the competition principles agreement were reflected, especially principles 6.4(i) and (j). 6.4 - I hesitate to do it, but 6.4(i) and (j) not only are repeated but are practically absolutely duplicated word for word and I certainly hope the Commonwealth of Australia does not have some sort of copyright over it. It says:

In determinations that with regard to deciding a dispute, an arbitrator must take into account under section 3.11.4(vi) in deciding the dispute the arbitrator must take into account the principles, methodologies and provisions set out in this undertaking. Secondly, the objectives and principles enunciated in part 3A of the Act and the competition principle agreement

and then goes on and in my other hand I actually have the access principles and the competition principles agreement. If - if you want I could read them, but they are word for word - in - in (i) of 6.5 it says:

The owner's legitimate business interests and investment in the facility.

And in ARTC's clause 7C it says:

ARTC's legitimate business interests and investment in the network.

(ii) the costs of the owner providing access

and it goes on. It says:

All costs that ARTC incurs in providing access, including any costs of extending the network

They are basically word for word all the way through, so I actually do think the thing does reflect the principles, not only in their intent but practically in their absolute wording.

The next part of that was that the concern and interests of the applicant was not reflected in that clause 3.11.4. 3.11.4(vi)(b) says:

The objectives and principles enunciated in part 3 of the TPA and the Competition Principle Agreements.

and (a) says:

The principles and provisions of the undertaking itself.

I draw your attention to clause 1.2(c)(iii), page 2 of the undertaking itself, and 1.2 clause (c) says:

(c)(iii) the interests of the applicant wanting access to the network:
(a) providing access to the network on fair and reasonable terms and;

(b) providing access in an open, efficient and non-discriminatory manner.

I think although, you know, referenced in a number of places, not only have we attempted to address the principles by the very - by the very words but also the - but also taken the objectives of the Act itself by incorporating that in the objectives of this agreement and therefore the arbitrator is required to consider those in any arbitration and just extending that point slightly to the point we were just discussing with regard to the indicative access charge and to like for like services, the arbitrator therefore not only has to look at that exact clause on like for like but then has to address the very principle interests of the applicant and the non discriminatory nature so again, the very tests for the arbitrator are to go through and see if, in fact, our definition of like for like is only hypothetically - and this would only be hypothetical, Mark, I am sure you would agree, but it would only be hypothetical that we may mischievously define like for like.

The obligation on the arbitrator under both those clauses is yes, we may present that as if it was like for like but their objective is then to go through the interests of the applicant and then go through those very principles and see whether in fact our presentation of it is a mischievous distortion of what like for like means in accordance with the principles of the TPA Act and the very objectives of the CPA.

I agree with your potential for concern. We think it has been balanced out by giving the arbitrator not only the specifics of this undertaking, but then brought into the specifics of the undertaking the very principles of the statute that created the very regime itself and therefore give the arbiter both choices to come out with a fair and reasonable result. In doing an undertaking, you don't have to do that. We didn't have to actually put the competition principles into the TPA. They are actually tests that are made against our application.

What we have done is actually put the very principles as part of our application so the arbitrator can actually look behind a mischievous, truculent, smart alec track owner who actually tries to get like for like distorted out for their own commercial interests. He actually can look behind it and therefore the track owner won't achieve very much in a fair arbitration and let us face it, the fair arbitration, if in the even the arbiter was not fair, there is then appeal on both process and substance to the ACCC in the event that the arbitrator was not well principled in that so I agree with your concern and these things are hard to balance out in all this stuff but I think the arbitrator has enormous potential to actually come up with any result they think is fair under the principles to be frank. I think

this exposes the asset owner to a much greater risk than it does the access seeker, by far. I think the asset owner in this case has actually gone well further than a rational, commercially oriented access owner would do and thinking about it now, I think we have probably gone far past the post and I should pull it back a bit but in the spirit of cooperation, I think we will leave it the way it is.

THE CHAIRPERSON: Thanks very much, David. Well we have some people listed to comment and then we will open it to the floor. I think the first one was Martin from SCT.

MR SVIKIS: Martin Svikis, SCT. I guess a couple of opening remarks before I want to cover probably six major comments on negotiation of disputes, is that when we hear the ARTC explain the meaning of the clauses, we get a far higher degree of comfort from them than compared to when we read them and I mean that quite seriously, quite seriously, because I guess we keep on going back to the remarks we had at the beginning of the session from SCT along the lines that it is not clear and regrettably I have, and maybe a number of other people in this room, have been in a situation some time in their careers when they have been at the receiving end of mischievous interpretation of a contract. We have recently.

We have inherited old agreements; some of them - quite old in a lot of cases. We have inherited old agreements. We have had some very - nothing to do with the ARTC of course, but some very difficult dealings with agreements that were interpreted in a way that they were meant. That is very, very fresh in our mind when we look at the undertaking in the standard access agreement as well and we do ask - I guess re-emphasising that point to the ARTC and maybe there is a bigger drafting issue than might be apparent.

Certainly that can also lead to - and I don't use this loosely, our imagination running away from us. David, you made that point and it is a valid point but we have sat down and looked at all the different ways somebody could get those words and turn them around. We have done that and we think that is a reasonable way of looking at an agreement.

Okay, as far as dispute resolution is concerned, we still feel - although hearing David's points made, we take those on board, we still feel though, largely, that if you have got an agreement with clauses in it, the arbitrator has got to say well, you signed it, you read the clauses, we hear the tests are applicable but you signed it knowingly so those clauses had to have meaning to you and you can't sit hear and cry trade practices to me as an arbitrator when you knew what you signed, so although there is a balance

there, to say that you have got opportunities to seek fairness, there has also got to be weighted off by the fact that we signed a legally binding agreement and we wonder how balanced that might just be. In other words, if we disagreed with the clauses in the first place, the simplest way with dealing with that matter is to get the clauses right and then we don't have to worry about arbitration and we will never be here wearing out the carpet in the ACCC.

As far as mediation is concerned and the timeframe, we support that mediation should be taken out of the agreement and that if the two parties can't get on with life and sort it out sensibly, then probably the best place to be is back here. In that regard, we support the fact that the ACCC should be the arbitrator. If a successful undertaking has been properly debated in this forum, then the proper people to sort it out, if it goes off the rails, excuse the pun, are the people that helped put it together. They would also, therefore, have the most amount of experience to hear the case reasonably.

We feel that the undertaking and the clauses in it don't necessarily reflect our interests of existing or future investments down the track and therefore we don't necessarily feel it is as balanced as it could have been, hence our opening remarks in the first session. As far as bare capacity allocation is concerned, that was one of our issues and the publication of pathways etcetera could go a long way towards relieving some concerns in that area as well. Thank you.

THE CHAIRPERSON: Thank you. And Robert Jeremy from Toll is also listed.

MR JEREMY: Thanks, John. The last thing I want to do is engage David in the detail but just having a quick look at it then, all those fancy principles are embodied in the undertaking but not in the access agreement itself and there is nothing in the access agreement that says when you are arbitrating under the access agreement, the arbitrator has to have regard to what is in the undertaking so that is untidy and it should be fixed.

I agree with Martin that to the maximum extent possible, the ACCC should be involved in the role as mediator and or arbitrator. I think it is very important that we have a professional body that can develop learning and precedent on matters affecting access in the rail industry and preferably will make its findings public to avoid further misunderstandings and disputes in the future. It would be untidy and inefficient to have individual arbitrators dealing with matters on a piecemeal basis for each individual party and perhaps receiving inconsistent results but having said all that, I think the negotiate arbitrate model is fundamentally flawed in the

environment in which we are working. The transport sector moves very quickly. Customers move very quickly and the customers are not going to wait around for the results of an arbitration process and unfortunately, Toll Rail is involved in one arbitration process at the moment. It has been going - the dispute has been running since May 2000, probably slightly before that time. Once we had been through the negotiate, mediate, arbitrate model I would be surprised if we would be out of that by May 2002. It is very unsatisfactory.

I disagree with David in relation to the balance of commercial interest. I think that if an operator comes to him with a proposal with which he disagrees which ARTC finds, for its own reasons uncommercial, which ARTC simply does not want to do, then it is in ARTC's interests to mediate and arbitrate. It rarely would be in an operator's interests to go through that process because they have customers to service; they will either let the customers go or compromise in order to serve the customer.

I don't know what model we could use as a substitute but one thing that strikes me about this undertaking - and I am not sure if one can be accommodated under this process, is the lack of a regulator. In all the models considered by the NCC, Trish will correct me if I am wrong, there has been a regulatory role and if there hasn't been one, then the NCC has either insisted on one or rejected the undertaking for lack of one.

We need someone - and perhaps through the undertaking process the ACCC could adopt this role, who is able to make quick decisions. They may be right or they may be wrong but at least they would be quick and in my view, in a commercial environment, often it is better to be quick than to be right and it may be that there is some appeal process over and above that. If it is that important, people can wait for two years and then the decision could be reviewed but I would rather have someone who comes in and bashes heads together and gets a quick result than go through the cumbersome, unproductive, expensive process of arbitration and remember it is very expensive to arbitrate. It is a quasi Court proceeding, quasi legal proceeding. For some odd reason it has to be conducted in South Australia under South Australian legislation, very parochial, and given the margins in which the transport industry operates and in the rail sector they are very slim, I doubt that you will see very many of them.

The other point I want to make is that when it comes to pricing, there is no recourse to any third party review. ARTC says that the review process is conducted by the Board; the Board is ARTC; they are one and the same so when it comes to pricing there is a set formula and there is no method for review and I think that is a fundamental deficiency in the undertaking. That is all I have to say.

THE CHAIRPERSON: Well, I open the forum for further questions or comments.

MR HALL: Bruce Hall from FreightCorp. Just to support Robert in the difficulties of working in this - in a negotiate arbitrate model, FreightCorp, and it is in the public domain, have had a specific example of that in the Queensland area where customers were infinitely patient but at the 18th month, necessarily had to go and do business elsewhere. It was 18 months of ineffective negotiation for an access agreement so it is real; there is a history out there of frustration where customers have simply had to make their commercial decisions and cannot hang around for prolonged, unsatisfactory negotiation.

I might add that backing that into arbitration that is only ever going to be invoked by access seekers, in my view, and once invoked could find exposing a seeker to a 6, 12 month exercise and a very expensive exercise at that, is also not going to resolve our problem of trying to get our potential customer to sit still while this process goes on.

[1.45pm]

THE CHAIRPERSON: David, did you want to respond on the time issue and the difficulties associating with negotiate/arbitrate with some of the suggestions that have been made?

MR MARCHANT: Firstly, I would like to indicate that we have listened to the submissions in writing to the Commission about that very issue of negotiate/arbitrate taking up time and again indicate that we are prepared to amend the undertaking to the Commission to make mediation an option for the access seeker in the event that during the process of the 30 days, etcetera, and we can't come to an agreement, then it goes straight to arbitration. So, I actually think we have taken out the mediation/arbitration catch-all there by taking mediation out as a compulsory activity at all and therefore you could go straight to arbitration hearing both the written submissions and the comments today.

There is no problem with us going straight to an arbitration framework. Like, Robert, it is hard to come up with a whole range of commercial things that actually satisfied speed. But I am mindful that two operators have approached us in the last 12 months to take on services in competition with operators here and have actually had an access agreement and a path in less than two weeks and have started operation after that. So it is only obviously - this is only worthwhile in the event there is a dispute such as the one raised by FeightCorp in Queensland.

By taking out the mediation process it does open up to go to quick arbitration in the event that people are not negotiating reasonably. There are a range of ways to go to the arbitrator including ARTC, the access provider, just being tardy in its good faith negotiations. There is time periods there of 30 day responses but there is a tardiness provision as well which you can go to the arbitrator on. On pricing I actually missed a little bit but in the process of negotiation, including pricing, that part of the negotiation, all of which is open to the arbitrator to review in the event there is a dispute - and that includes a dispute on price - the only issue with regard to ARTC's board is not the issue of price but the issue of whether the board was interested in using the escalator against the indicative access service.

And that is using it to actually go to the cap provided for in the undertaking. It is not an option for the board to go above that indicative access cap. It is, even if they were thinking of doing up to two thirds of CPI in any one year, they would have to listen to submissions. But prices brought about by negotiation for a range of services are in fact open to review by the arbitrator and not the board, by the arbitrator. So, I hope that the mediation process aside - put that aside - you then go to arbitration. I hope that at least takes away that time period people are worried about.

THE CHAIRPERSON: There seemed to be a wider comment about the nature of the arbitrator - south - - -

MR MARCHANT: Look, from our - - -

MR MARCHANT: - - - perspective it actually doesn't worry us if the ACCC was in fact the arbitrator. To be very frank with you, Commissioner, the reason it is not in here, we understood the ACCC didn't want to be the arbitrator and wanted to have a situation where someone else was an arbitrator and it was there in the event there was a flawed process brought about by the arbitrator. If in fact the ACCC wanted to be the arbitrator under this we would not only - it would save us a lot of time, effort and frigging around.

So it is not an issue that we raised as a tactical one of not being the ACCC. Quite frankly, if that was the process it wouldn't worry us one bit and we would be happy if that did take place, that we would seek with those customers who have contracted with us to seek if they would like to have their contracts amended to remove the arbitrator appointed by the Law Society of South Australia of which practising certificates in South Australia are available to lawyers in other states, Robert.

The - that effectively if the ACCC wish to stand as the arbitrator under this agreement - - -

THE CHAIRPERSON: I don't think we are volunteering at this stage.

MR MARCHANT: But if it did, we would seek that that would be passed on to those who have contracted with us as well as an option in lieu of the one that we have got there as a commercial arbitration process. The reason we didn't put it is, with respect, we actually thought that the ACCC was reticent to get into that part of the ball game early and hold itself back in the event that there was a real ball game after. On the issue of the difference between the process of arbitration between the undertaking, Robert, and the indicative access agreement, we will have a close look at the indicative access agreement.

It is not our intention to have situations where the undertaking is not fulfilled to its express provision through the access agreement.

THE CHAIRPERSON: Thanks, David. Are there any other comments certainly on that arbitration issue, we would - I think our preference would be to see a process where we were - if the ACCC role was a safety net rather than a direct player but there have been views expressed by the operators, so, clearly, we will listen to them. I think, given that - we sort have - while it is an important issue, we have gone reasonably quickly through the negotiation dispute resolution part. If there aren't any further comments, and the fact that we are moving on, that we might go on to the next session, the service standards and other issues.

Sorry, David, to be dragging you back on to your feet so quickly but - and it may well be, that given the progress we are making, we will finish quite a bit earlier than the scheduled time. But one should never say that because that is when the debate becomes intense and we spend a lot of time. So, session five is service standards and other issues, relating to the ARTC service quality obligations, etcetera. We do have a few people who have put up their hand to make comments once David has given his outline on the ARTC view. So, we will get you back up again, David, if that is okay, thank you.

MR MARCHANT: Chairman, the service standards framework are, firstly, just for those who may not have received it, we did in fact place with the ACCC an amended undertaking with regard to service quality performance reporting, which I think - I hope everybody has had a chance to get hold of prior to this meeting. The - it goes without saying that ARTC recognises the need to maintain and improve overall service levels

and I think, probably without dispute, that is exactly what we have been trying to do for three years without seeking price increases.

I mean, the - to put some context on that, when we took over the Victorian track two years ago, 38 per cent of that truck was under speed restrictions. To date it hasn't been higher than 2 per cent. In fact the maximum axle load in Victoria was 19 tonnes. Today it is 21 tonnes and we have an application to go to 23 tonnes, maximum axle load. So, I mean, we are seeking to improve standards all the time. Maximum speed in 77 per cent of the Victorian track was 85 kilometres. Maximum speed in 50 per cent of the track is now 100 and going up to 110.

So, I mean, we are striving to improve overall service levels as well. We have a commercial incentive to do that because to strive to improve those quality - actually hopes to get us more revenue by getting more business on to rail. And we obviously are just as much a part of the process of providing effective competition against road by the service that we offer. But to provide greater confidence in the market place regarding our performance and the performance generally we are happy to commit in the agreement to maintain, not only the infrastructure on the three levels that are in the document, but to also add a clause that it is fit for purpose, to actually give comfort just in case - in the undertaking itself - to give comfort that the other three clauses there don't go far enough in some people's view.

Secondly, we are committing to published data in relation to our performance and the performance across our sector by publishing a range of data on reliability on a quarterly, and if not, more regularly. The number and percentage of healthy services that exit the network with intolerance, the number and percentage of unhealthy services, etcetera, and I think everybody has got a copy of those measurements that we are proposing. Transit time, again, there are five measures proposed there. The track condition itself and the quality index measure against the twist and service levels of the track on a quarterly basis.

And obviously, in addition to those issues, continue to publish infrastructure making its cost by both track kilometres and by dollar per duty K annually. Train control costs by both absolute dollars against train kilometres annually. Train control and operational costs both by dollars and train kilometre annually. And to publish those on the website so they are obviously available. I mean, they are available now but we will formally amend the undertaking to make them absolutely - absolutely undertaking to publish on the website and to publish on those, sort of, time periods.

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So, effectively, on service standards as a generic exercise, I think those measures will help give the market comfort and transparency with regard to what the track condition is on an ongoing basis and therefore help access seekers to be able to be informed negotiators with regard to those exercises. Recognising that we are coming from the view that, an access undertaking is there to help a market seeker have an informed basis to do a negotiation and to actually do that in a way which enables them to negotiate for the services that they want, which may not be the generic services that people here today are talking about.

There may be other services. This gives them a basis to be able to do that. In addition to that the contracts themselves actually put a commitment around the entry and exit path for people we have contracted with. And provisions there for both the network management principles around those paths and with regard to the performance of that overall path. We do expose ourselves and those contracts to a situation, that if in fact the track performance does not enable that contract to be honoured, that we are able to be sued.

And the way the track access agreement is presently drafted enables that to take place. So, over and above the access undertaking generic measures, which enable an informed market, the access agreement itself has specific provisions in with it with regard to network management and standards of track framework. And then the actual access agreement has attached to it paths with exit and entry times and a range of structures for healthy and unhealthy services. So, in an industry where it would be fair to say that bottom line performances on both track and above rail have not been well measured over time in a way which is transparent, this is definitely an attempt to develop those transparent measures in an industry that has only just been separated above and below in the last few years of which there hasn't been a lot of data gathering about the performance of the industry as a whole.

And about some of the causation of that. So I think we are trying to make reasonably public and open steps in publishing that material but also attempting to back it up with regard to the framework. Is - does the undertaking give an absolute guarantee the track will be at X or Y standard for the period of the undertaking. No, it does not. That comes with the access agreement. What it does is give a measure of the track on an ongoing basis and becomes blatantly obvious if in fact the track condition is in fact a different condition than the market expects to those who have not contracted to us.

THE CHAIRPERSON: Thanks, David. Well, as I say, we have some listed discussions. Robert Jeremy from Toll.

[1.58pm]

MR JEREMY: John, if it is all right with you, and I notice that we are a little bit ahead of time, I was proposing that I would make some introductory remarks and then Colin Eggleston would speak for Toll.

THE CHAIRPERSON: Sure, we have got plenty of time.

MR JEREMY: We are dealing with a few things on the run here because ARTC has put a couple of proposals on the table just today. So I will try and work in around those. I think firstly I would just like to make a very general comment. I think it is important that those reviewing this undertaking and issues relating to service - current service quality and service standards have regard to the fact that the Adelaide to Perth corridor is a naturally efficient corridor for rail.

It is for two reasons. It is a long haul, and you can double stack the train. So when it comes to issues of service standard compared to road and to the general efficiency of the corridor, it is a naturally efficient corridor. And that is not to say that in the period of ARTC stewardship a lot of improvements haven't been made. They have. But the reason it is important is that when you start to look at some other corridors, such as Melbourne/Adelaide and the north/south corridors between Melbourne and Brisbane, they are not naturally efficient corridors.

They are the ones that are suffering particularly adversely from road competition and a number of those corridors are in poor condition. In that context and in the context of Commonwealth Government policy for ARTC to become the one stop shop, I think it is important that we have an undertaking that can leach into new jurisdictions as and when they take over that track and deal with performance issues on a consistent basis.

David undertook to make an amendment to the contract in relation to the track being fit for purpose. I will come back to that in a moment. I think that is an important commitment. But until now, when it came to track condition, all we had was the commitment in clause 6.1 of the Track Access Agreement which is the sort of thing we were faced with in 1995 when we started to negotiate. And really, I would defy anyone to spot a service commitment in that clause.

It is a commitment to provide track at the - in a condition at the standard existing at the date I commence operations, which could be different to the date that someone else can start at operations and sign their agreement. Or, whatever they need for their accreditation. I don't know the answer

to that and that might change from year to year. Or something else that we might agree. You will remember in my opening remarks I said the track owner said to us "Well, you just take it as you find it. You walk the track. You have a look". And really that is not good enough.

Apart from anything else it is just far too vague. I mean, I would not like to arbitrate or go to Court or take ARTC to court and try to find a service commitment or a condition commitment in that clause that I could hold ARTC accountable to. Having said that, and then it's a while since I have practised law, but some untidiness exists because you then go to the next clause which says, "well having said all that we can stop your train, we can slow down your train, and we can do that for any period that we like". Now again, we hear the commitments made in forums like this that we wouldn't do that, it is not in our interests, and so on.

But there it is in black and white and that is what we would be having to operate under if we were in an arbitration or in Court proceedings. And there is nothing much there that you can hang on to. Now today we have a commitment to say that the track will be fit for purpose. That is a step forward. It may not be good enough but it is a step forward. But it's back to the future. Because that is what we negotiated so hard for in 1995 when faced with this. And we got it then, and here we are presented with an undertaking which doesn't include it.

So we are worse off after reform. We are no better off after reform. We are worse off. Take me back to the old days. Still, we need that commitment, that it is fit for purpose may not be enough. The measurement KPIs that ARTC have put forward are well and good. But what accountability, what accountability should attach to those KPIs. We are not in favour of a penalty system of the kind that applies in the UK. But it goes back to that question. Are we getting a service that is reasonable, having regard to the price we pay?

And what objective standard of service are we entitled to expect for the money that we pay? There is no immediate answer to that. I haven't - I don't have it here, but it is a hell of a lot more than we find in the black and white text in front of us now. I am going to hand over to Colin to talk more about service standards. There is just one thing I would like to say before that which I should have raised earlier. In relation to service, price and other issues, there is an inflexibility in the model here which says that we encourage long trains.

If it is not a long train, we really don't want to know about it. And that is the flagfall variable component, and the ARTC standards that underline what the work being done on the infrastructure. It is a very odd result in

the transport sector. If I am operating in the road sector I have got vans, I have got four tonne trucks, I have got rigid vehicles, I have got B doubles, I have got B triples to suit what the customer needs. If I am in the air and I am moving passengers I have got twin-engined prop, turbo prop planes, I have got everything right through to a jumbo jet, to suit the market.

The trouble with this model is that to be successful you have to find 1800 metre licks of freight, or 1500 metre licks of freight. And you have got to consolidate that and get it on a train. If I have got 1600 metres of freight or 1900 metres of freight, what do I do with that other 100 metres. I put it on a truck. If I have got one extra container I will put it on a truck. We need a model which will allow us to run shorter - short trains, long trains, medium sized trains, to attract new business and to put greater flexibility into the system.

There are other spin-off benefits. If I am running a shorter train, then I can have a smaller terminal, and less infrastructure cost. So there is a service price issue there that really needs to be - and it is an inflexibility that really needs to be thought through. It has been driven by not just ARTC, it has been driven by Government policy. But I don't really understand why we have to have that inflexibility in this mode. I am just going to hand over to Colin.

MR EGGLESTON: Commissioner, Colin Eggleston from Toll Rail. Commissioner, I understand what you mean by a yellow card so if I tend to waiver off the track here, please flag it. But I am going to talk on - - -

THE CHAIRPERSON: We are in the second half now so you are probably safe.

MR EGGLESTON: I am going to talk about key operating issues. Now in this room today I think there is only three people here that are operating trains on a daily basis. And by that I mean, interfacing, running on the ARTC track in an operating capacity. So please bear with me if I mention some word or terminologies that may not be understood here but I will try and be as brief, to the point. Key operating issues to Toll Rail. And it is not necessarily in this order, but as has been touched on this morning through Robert's address, track access cost.

30 cents in every operating dollar I have got goes to track access. And you saw what figure was put up there for road. Now I am not going to argue the merits of if there is money to be made in it or if there is not money made in it. That is not an issue here. But 30 cents in every dollar I have got goes to track access, and I do not understand the make- up of that.

And out of all the costs that I have got I understand exactly what the cost make-ups are, but I don't understand this 30 per cent. That 30 per cent, I have 13 contracts to get a train to go from Melbourne/Adelaide to Perth, made up of a variety of tasks. Two of those contracts relate to track access, Westnet and ARTC. In the 11 other contracts I can seek competitive bids for, but I cannot seek competitive bids for track access, which I reiterate again is 30 cents in my dollar.

Point 2. It has been pointed out today that 70 per cent of the ARTC revenue is structured, rigid, timetabled, etcetera. The only reason I run a train, and please, I come from a trucking background. But the only reason that Toll runs a train is they are reacting to a market requirement. And once again, specifically on this corridor, and I will come back to why I don't operate on other corridors, but on the east/west corridor the market is not rigid in the intermodal business. And once again, please, intermodal.

The market fluctuates to seasonal demands, fluctuates for all sorts of reasons. But it is not rigid. And I would suggest we have heard a number of people today requesting that the model that currently sits on the table does not allow for flexibility. So how is rail going to go ahead if there is no flexibility? Robert touched on long train/short train syndrome and I guess this is one of the aspects of the rigidity that is there. But please, if I could leave with you, when you do have the wonderful position of having more freight than you can carry, we just cannot leave it at the terminal.

The market would not allow you to leave it at the terminal. So what do you do with it? And of course we have to move the freight so we seek another mode. You allow a customer to trial another mode and you are tempting him to perhaps stay with that mode. And a lot of topic today has been on road competition, but let me suggest to you on the east/west corridor shipping is a growing, emerging competitor. 14 per cent of the business that I carried in the previous financial year has gone to sea in this last financial year.

Point 3. TNT/Toll. For five years we have been trying to achieve a commercial train path, Melbourne/Sydney/Brisbane. Part of that is with David, part of that is in New South Wales, and part of that is in Queensland. For whatever reason, we have been absolutely 100 per cent unsuccessful in being able to start a train service on that corridor. And that is being driven by rail access. Now, you say "what does that mean to me?" I go out into the marketplace and I go to customer XYZ, and I say that I can handle your freight, and I can handle your freight on the east/west corridor and I have got a train.

And we can do it because of certain reasons that would be, perhaps advantageous for you to use that service. And he says "Well what about up the eastern seaboard?" And I've said "I'm sorry, I can't do that." And so what does he say? He said "Well then I will go with a supplier that can." And today there is only one supplier that can do that. And I would suggest to you that is highly uncompetitive. Timetable change. By having different access regimes we can have the situation that developed last year and has been mooted for 1 October or for daylight saving this year, which has now been put back to 1 February, as I understand it, for next year, a timetable change on the east/west corridor.

And here we have the interface between ARTC and Westnet and today we still have the black hole of Calcutta between Parkeston and Kalgoorlie. Now the trains that I send out have four man crews, four drivers. We run a relay operation, Adelaide to Perth. And this is just from a purely domestic issue, with drivers in train. We ask them to drive all the way to Kalgoorlie under a protocol set by ARTC. And basically if you are 20 minutes off your schedule you become unhealthy. If you are unhealthy then you can be put away anywhere on the system, and you will be retrieved at ARTCs convenience.

You can guess that if that happened more than a couple of times you wont' have any business, trailing behind the locomotive, to be in business for tomorrow. Anyway, you get to Kalgoorlie, and today we sit there for up to two hours depending on which schedule it is, at a signal, before we gain entry into Westnet. Four guys that have driven as per the protocol of doing the right thing by the book and all of a sudden there is a signal at stop that won't let them go any further. and what I am suggesting here is we have two systems that are absolutely working against each other in trying to provide a service to a customer.

If I may go on on that particular issue, Westnet are currently providing extra length crossing loops so they can handle these 1800 metre trains. So when we hear 1800 metres mentioned, please don't go away and think that every train that departs Adelaide, that goes to Perth, or goes from Perth to Adelaide, can be 1800 metres. It can only be 1800 metres where the rail access unit can handle it on a given time. And Toll does not have the ability to send, on the current access arrangement, an 1800 metre train to Perth and get it returned.

Think of the inefficiency of what that means to the industry. Think of what it means in just trying to manage your assets and get them back in place so that you can do the same movement again next week. Number 7, if we talk about the incongruency on this particular corridor, Melbourne to Adelaide is single stack, as we have heard. It is 1500 metres and it is

3300 tonne. In Adelaide, the train can be 1800 metres and can be 5000 tonne. That suggests that there is a gross inefficiency on the track to be able to move a transport mode from A to Z. We have to facilitate largening that train in Adelaide, which is not a great provider of goods, may I suggest, as compared to Melbourne, or do you have to get two trains to Adelaide to make up one train to go Adelaide to Perth but once again, it is a gross inefficiency. The other two operators in this room have to do exactly the same and you don't only do it going that way, but you do it coming east bound as well.

We talk about standard of track; that is point number 8. We talk about gaining time but let me go back to the market. The market for rail is third day delivery in Perth or for people that do enjoy freight from Perth to Melbourne, third day back in Melbourne. Our current service arrives in Perth on third day, 2.45 am, even with the two hour sit at Kalgoorlie but if I was to get two hours improvement on the timetable, the market doesn't want it two hours earlier. If you gave it 24 hours earlier, yes but not two hours earlier so what do you do with the train?

In turn, coming back we gain two hours. Now, I am not in the fortunate position to own my own terminal in Melbourne but I am fortunate, through a provider, to be able to operate into a terminal but if I come back two hours earlier, I am not going to be able to go into that terminal so where else do I put the train? I am talking purely as an operator but let me suggest to you, as a way around this, do we have to travel and 110 km an hour on the total journey? Do we?

And it is fascinating because if you look at a locomotive when it is in its eighth notch, which means that its foot is flat to the floor but it is in two notches back, then you are using half the fuel to drive the train and I have worked out a little model where in Barton, coming out of the sand hills going west to Kitchener, you have got 828 kilometres without a blade of grass there to speak so if you have a double stack train like John runs, like we run, the wind coming off the bight hits you and the speed of the train is immediately dropped back and so we come back to about 90 kilometres an hour. We could bring it back to 80 and you could have a standard of track to take 80 kilometres and in that 828 kilometres, you are going to lose two hours.

Does that impact the market? No. Does not impact the market one iota but let me suggest to you we are talking thousands of dollars in saving in fuel and you say why doesn't TOLL do it on their ownsome? Why? Because if I put my timetable back, then my timetable goes back to the back of the field; if I am at the back of the field in the type of market that I am in when I am competing against John's steel trains etcetera, etcetera,

then I don't have a market to work for so unless the whole pack comes back, and I say to you why do we have a standard for 110 out there? Is it because of a couple of passenger trains? Is it because there is a couple of trailer rail trains out there that do have a high sensitivity to time? Therefore, does the intermodal market have to substantiate that small market? Commissioner, I hope I haven't strayed too much. They are the issues which I see as key operating issues to TOLL. Thank you.

THE CHAIRPERSON: Thanks very much. Well we will keep moving down the list. I think the next one is Martin Svikis.

MR SVIKIS: John, we have actually comments on service standards as a separate block, and then I have got some comments on other unrelated matters. Do you want me to go straight through - - -

THE CHAIRPERSON: I think so.

MR SVIKIS: - - - or reserve those other matters until later?

THE CHAIRPERSON: No. I think go through now, Martin.

MR SVIKIS: Just listening to Colin, there was a couple of points there that we think are major topics. There is the interface there at the black hole of Kalgoorlie, or Calcutta, there is no doubt about that. But every time the ARTC comes up with a better initiative to get us into - across the desert quicker, we have to ring up Westnet and say "Can we come through please?" It will be a growing problem and it does make it difficult, and we are keen to understand from a service point of view how the wholesale arrangements are going with Westnet and whether that is sort of - those negotiations can iron out some of the - our perceived problems.

That was always part of that arrangement and from a service point of view we are still unclear on that point. The other interesting thing that Colin hit on too was in terms of the inter-relationship between operator needs and the provided service levels. And I think at a meeting in Adelaide over a week ago we agreed some forum could be conducted on that to make sure that we are aligned more closely. Which was a major point, because we feel the same way as Colin that we have got to have a very close working relationship in terms of determining, well, what is service?

You know, what is a good standard? What do we need? And there are some very strong elements where small elements of time do not necessarily make a big difference. And therefore are we spending money on creating things that are not quantum leaps. In terms of the undertaking and the standard agreement, we have dug out what we perceive to be two

standards. And we take on board David's comments today, and likewise, will consider more of them. The comments I am about to make now were written prior to hearing those comments today.

We have identified the two standards as being firstly, one: that the track must be kept at least in original condition. We identified that as a minimum, not an optimum, not a maximum. And so the performance standard is just the way it was. If we weren't there when the track was taken over and didn't have an idea of how to define what it was, then it would be very difficult to make sure that at least that minimum was being met from a certainty and transparency point of view.

The second commitment we found was that the ARTC will maintain its accreditation. We all have accreditation and all under AS4292, so track owners and operators all basically speak the same language. The problem with accreditation is that it does not preclude significant faults or significant issues. And accreditation simply describes the behaviour you must take when something goes wrong. It doesn't stop it going wrong and therefore is not a standard. It certainly does not describe, in a significant way, the degree of quality of track that has to be offered.

For example, if track is not in good condition, the accreditation would say to the operator "make sure the train" - the track owner I should say, "make sure the trains go over that track safely", and that could be achieved by slowing the train down. So there is no real force there under the accreditation standard offer that we found to insist on a service standard which underpins the price that we pay. Again, the original condition commitment has no bearing on optimum cost benefit ratios. That is what we must continually seek in any business.

Colin also quite rightly pointed out that access is one cost out of many costs that we have in our supply chain, to get a train across the desert. Also optimum itself, the word optimum has come up within correspondence from the ARTC. It was particularly used again in the ARTC audit documentation, which I have had an opportunity to read twice. And again, not being qualified in the area, I am still struggling to define what optimum really is and how it translates back to benefits for track operators.

Also another point that came up that we have had - noted anyway earlier on was from Ian. And the fact that the passenger requirements may be different to freight requirements. There is no real distinguishment in the service standards, from our view, to that difference. That begs the question: are the passenger - is the passenger subset market getting treated unfairly because of us big freight blokes. Are the freight guys' income going towards setting passenger rail standards to make sure people don't

get woken up when they go across on the Indian Pacific at night time on bad rail.

Are we paying for that? It is an awfully difficult one to work out and I wouldn't like to be the ARTC to try and work that one out. But we do want to note the fact that that isn't really open and transparent and the effects of each on each are not really determined. Not being a passenger operator though it is difficult for us to understand the degree of issue, if any. We received the KPI document yesterday, effectively, or the day before yesterday? Yesterday, to study it, and we do think it is an improvement on what we have read so far. However the KPI is still lacking in a sense that they are not quantified at the moment. We have not agreed - not that the ARTC would have to agree with us, but we have not really identified what the minimum numbers should be in that document.

If you look through it, the quantifications - they are not benchmarked, in other words, they are not filled in. So that has got to become a powerful tool but it has got to be filled in first to make it powerful. The other thing about KPIs though is that we would also like to see a mechanism where the KPIs translate back into the service standard. And what incentive does the ARTC have to continue to meet the standards set for those benchmark KPIs.

So how does it link back into the package? Not an easy one again. Especially considering the range of them. That's good from a visibility point of view. But it has got to relate back otherwise it ends up being a document which stands alone in fresh air. We had made notes on previous days leading up to this from a service point of view about the capacity in pathing creation without further investment. Those comments were raised earlier on, and David has also put forward a solution which seems at least more transparent than the one that existed prior to today.

But again we want to emphasise that from a service point of view, to have more paths for no more assets has got to be one of the biggest opportunities for all of us, and up until today, was not properly addressed at all. In terms of other issues, we have listed 10. Some of them that we believe are really quite significant and have not appeared on the agenda offered by the ACCC today. And forgive me if they have appeared in some way but we have read it not to appear.

Term. There has been some debate about how long all this should go for. If we are not confident we would go for two weeks, and we will see you again at about that time. If however we end up with what we should end up, with a professional relationship which gives certainty to the ARTC for its investment programs and to us individual operators, then we want a long

term. We have to be very careful when we consider that too. In the sense that although the ARTC would not do things to damage the rail industry, the very body it gets its income from, that is not the point.

That is not the whole argument. When we go to the bank to go and get more money for more rolling stock for another terminal the bank looks at the risk on us. It doesn't take any comfort from the fact that the ARTC will not do things to damage the industry. Individual operators must have protection as individual operators. Income shifts is not - wouldn't even be considered by us as being a comfort issue, and it is just wrong to have it even tabled. They are comments that were made to us, for example, by the Productivity Commission in Brisbane, during their investigation into access in the rail industry, and we rejected those comments outright for very obvious reasons. I say again, when we go to the NAB to get more dough for more rolling stock, they are not worried about the industry. They are only worried about us.

During a site visit recently we had representatives from the ACCC out to inspect our terminal. One of the things we pointed out, I guess it was the bleeding obvious, "it's a rail terminal". It's not much good for anything else. We raised another issue this morning which has yet to be responded to and which is in terms of can an agreement exceed an undertaking term. And if it can, can the agreement be varied if more favourable terms come up. We would still appreciate an answer to that. I guess we are probably more looking at the ACCC for that, but I am not too sure.

Cancellation penalties. We are in the business for a long time, so we will take a long term pathway. That is what you would do, especially if you had the $50,000,000 worth of terminals that we have, and equipment, including the property value. If for example, we take a pathway and we don't - no longer want it any more because the Toll boys have started an aggressive marketing campaign and we have lost all our freight because we didn't get out service levels right.

To the best of our knowledge from the reading of our agreement, and it is that view is disputed today of course - we don't have to pay the ARTC the flagfall for two years. 2 million bucks. ARTC keeps the revenue of course, because Toll got it. So their income stream hasn't been affected. And we are paying $2,000,000 for two years. That is a pretty heavy penalty. Why? Because it will stop us misusing pathways. But we have pointed out this morning that given the fixed costs and variable - fixed versus variable ratios here, you wouldn't go out on that pathway unless you knew what you were doing in the first place, I assure you.

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There are also other remedies to sort that process out. If you don't use it, you don't take it back. There is nothing wrong with that either. But double count - those penalties are double counting the income. The same income for the same freight. Good business to be in.

There is also a paragraph in the undertaking or the agreement, I can't remember which, re turnouts, that basically reads - and it could be another misinterpretation of ours. Well, not another one, maybe a misinterpretation of ours. I am not admitting to anything just yet. But it is to do with turnouts. And we are not admitting to any. Someone get that on the record. What is a turnout. A turnout is the bit that joins the terminal to the main track. We have got one turnout now in Melbourne, one in Adelaide, one in Perth, which is the Westnet one, I should say.

[2.30pm]

But, let us say, we want another one. If we look at the wording of the turnout it could be read - if we use our imagination - to say that the ARTC has got the right to refuse more turnouts if those turnouts limit the capacity of the network. A turnout by definition must limit the capacity of a network. Because, it is like putting another driveway on the highway. Sooner or later something is going to come out of it and stop the traffic. So, again, we look at the words that have been chosen there to describe these things and extra words like, and this will not be unreasonably withheld, for example, would make the issue far simpler to deal with.

But at the moment we have a major problem in Melbourne where the ARTC have already agreed to give us a turnout, but say they didn't, they could limit the economic viability of our current terminal. It has already got one turnout, we want another one out of that factor. So, a few words buried in many, many words are just as powerful, and we again, ask to have a good look at the detail in these agreements. Liability provisions. The liability provisions, in our view, are onerous and lack clarity. They have been used in a sense as an umbrella catch-all, that if we do something wrong, if we don't get you on clause number one, we will get you in the liability.

The ARTC are very familiar with conversations on those matters. We also note that we reserve the right to be found guilty and not have to sign up to being guilty, regardless, that is one of the key issues with liability that we don't have in the current wording. There is another major problem with the agreement and the undertaking the way it stands. The ARTC basically take the view that as long as it maintains its accreditation and has done the right measuring jobs on the track that they are all right. They are beyond blame. That is not good enough if you are an operator.

This is where some of the enforceability is a bit one-sided which I mentioned before. We can actually be in the position of having accreditation, meaning all of the Department of Transport's requirements travelling safely, and be denied - and have our current pathways terminated. They can be terminated because we have not met the rectification requirements set out in the agreement and/or undertaking. Again, a clause which we feel is particularly onerous, and there is really no need to it. The only - if we are unsafe on a network take the van off.

If the train is unhealthy put it to the back of the pack. If the train is overweight stop it. That is a pretty reasonable penalty, is it not, when you think about it. Stop the conveyancing of our business. What we object to is our whole business is stopped full stop without an independent assessment of why. In other words, if we don't rectify to the satisfaction of the ARTC then they may choose to terminate the agreement. So, sure, rectify in part, rectify the issue, rectify the train, but we would like the Department of Transport, as we believe they are today, to be - or the Department of Infrastructure Victoria, our lead auditor - we would like them to make the decision as to whether or not we can continue in business.

In particular when you consider that the ARTC have a profit motivation as well as a regulatory motivation; the two things don't go together. They really don't. Simple procedures which we all understand and simple protocols we will deal with - rectification problems. We do have some concerns about - or we did have some concerns about rectification measures that we can take if the ARTC do not fulfil their part of the agreement. David has indicated today that we can sue them for economic loss.

We have noted that and we will go back and have another read subject to agreed network principles. I guess, again, we want to emphasise another philosophical point with the type of relationship that exists here. And it is about power. Who has got the power. The apparent check and control mechanism that the access provider will not do anything to damage their potential actual income stream, in other words, trust us, we wouldn't do that, does not stop discrimination between operators. Two very different things. That if we can't satisfy the requirements the freight will stay on rail.

Somebody else will tow it. The income stream of the ARTC is not affected but we are. We are the ones that have to get the financing arrangements in place for 10 years plus and convince the banks to keep financing us. Therefore, issues that the ARTC say, that is okay we won't do that, might not necessarily be seen in the same way as an operator who

could suffer a far more unequal share of then risk of an outcome not turning out the correct way. As another point which we don't fully understand but we want to make anyway, is that we can't understand in Australia today where Governments are privatising, free enterprise is the catch phrase of the day, get on with it, self-fund yourselves, don't ask for handouts and all that - that we read in the newspaper every day - and yet the Commonwealth Government insists on taking 30 per cent of what we perceive to be our money out of the ARTC every year.

Just absolutely outstanding. I mean, there could be a good reason for it. We haven't been able to find it just yet. But isn't it odd, for everybody, that we sort ourselves out, we make money, the ARTC makes money, we don't look for too many handouts, if any, at all and they still want 30 per cent more out of it. Leave it alone, tell the Commonwealth Government to put it back, leave it in the pot so the ARTC can properly spend it on improving the industry or reducing the access charges. I guess, overall the comment I want to make is, let us keep it very, very simple.

We don't think it is simple enough at the moment. Let us keep the playing field level as it has been to create the industry to where it is today. That will mean no arguments and no need to arbitrate and we can all get on with life. Thank you.

THE CHAIRPERSON: Thank you, Martin. Well, we are certainly firing up towards the end. I think the next one is Gary Camp from Patrick, who is going to - - -

MR CAMP: Thank you, gentlemen. I think after Martin, Robert and Colin, they have covered just about all of the possible issues in this topic. So rather than try to go over that same sort of ground I will try and do what the brief is and get to something a bit different. As I said this morning, in terms of Patrick Rail, the key drivers for us are price and performance. This afternoon we are looking at, primarily, performance. As far as we are concerned the things that drive that for us are reliability. That is being on time. It is the transit time that takes us to get from point A to point B.

And part of that operation is the track standards and how the actual track itself operates. I think I mentioned this morning the difference between what ARTC is proposing, which is the 80 kilometres per hour average speed and what is being delivered, at least, for us, on the Melbourne Adelaide track, which is more in the order of 60 kilometres per hour. And certainly we hope that, through this undertaking and through their general forward thinking, that we can look forward to some of these corridors

increasing in terms of their quality and performance so we can attract more business to rail.

I am looking forward to the day when we do get to 80 kilometres per hour average on the Melbourne to Adelaide corridor. I would say, as the others have, that I only received the KPI letter in the last day or so and looking through that - I can't comment in great detail at this stage - but having a quick look through it, it certainly is covering, in terms of the key indicators that we are concerned about, in terms of reliability, transit time, track condition. Also the cost area of infrastructure, maintenance, train control and operations. In terms though of the various measures that are there I agree with an earlier speaker that we need to get some indication of what the parameters will be on those in terms of minimums, maximums, averages and so on.

And obviously that will vary by corridor and possibly even within corridors. I would suggest too that there needs to be some further discussion on these KPIs. We think it is a good starting point. Certainly there are some measures that possibly could be added. From my point of view, average transit time by corridor, average speed by corridor, would be something I would be interested in. And also in terms of track condition where you are talking about the overall track measurements. I would also be interested in the speed restrictions in terms of numbers and time delays that they might impose in the train running.

I know you can actually get those currently through various methods but I would like to see that as an indicator as well. I think as far as we are concerned - I have said before that the function of the ARTC in terms of providing track access is something that is fairly much out of our control. It is just a cost that we have to bear to be in this sort of business, and as Colin said before, about 30 cents in every dollar goes from the rail operator to maintain that function. So, to us, reliability of the infrastructure, and in terms of train paths and delivery of on-time running, is a key factor in terms of our own performance to our customers.

So, reliability is critical and it is a cost to us that we can't actually recover from anyone. So, if ARTC fails to perform, generally speaking, it just comes off our bottom line. So, certainly we would like to see any measures that can probably focus on how this is being measured and gives all rail operators an opportunity to come back to ARTC and discuss where there needs to be improvements made. And possibly go one step further and look at what those costs are to the rail operators and how there may be some way of - not, maybe compensating, but at least, considering, that impact on the rail operator. Thank you.

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THE CHAIRPERSON: And finally, John Fullerton from National Rail is going to discuss this session.

[2.45pm]

MR FULLERTON: Just building on, I guess, on the comments of the previous speakers, I think it is relevant that this agenda item is last, because I think it really cuts to the core of the issues, because once we are - the operators, I should say, are happy about the price and we are not, I might add, is one thing and once we are happy about the escalation process, and again we are not, it is another thing. But once we get to a stage of actually paying for access, the question that it gets back to is are happy with what we are getting for our money in an ongoing sense.

I think Robert picked up this point a bit earlier, that once we starting paying for it, are we happy about what we are getting. And I think there are flaws in the undertaking and the access regime in providing to operators that level of confidence. Price is one thing, cost of access is another, and I think if you do work with the operations in this industry on a day to day basis, there is one thing you can guarantee is, on a monthly basis you get your invoices for track access.

There is another thing you can guarantee; the cost that you pay out for access is much higher than often the price you pay. And I guess the best way I guess I can reflect on that, really, is look at some other areas where you purchase access electricity and gas and whatever that if we as operators put a train on the network on time - so let us try and rule out at this stage a default by the operator - there is still probably 15 to 20 per cent likely that that train will not exit the national grid on time.

It is a bit like coming into this room, actually, and turning the lights on and saying that every fifth time you turn the lights on they are not going to work. But interestingly enough you will be still paying for the electricity. And I think that is the sort of thing that as an industry in terms of paying for access and particularly addressing, I guess, this point on service standards, is that we are not at all confident that we get what we pay for.

We believe that access on the network is still a lottery in terms of being able to deliver that freight on time. When trains are delayed they cost. You know, you are still paying for the train crew, you are still paying for the assets and so on. We have always - we have had experiences on the east coast of Australia whereby we had to tell customers, particularly in about April and May that every five trains out of six going into Brisbane are late.

We still pay the same flag fall, the same GTK cost of running those trains for those months. The bills still arrived, but the cost of delivering access on that east coast was far greater than what we were paying out to access providers. And I think some of the issues there is the relationship between delivering a standard, the track owner delivering a standard consistently and I hear David's words when he said that as a management organisation ARTC are committed to maintaining standards.

And I would have to say we have reasonable experience. They have made significant changes, but I think it is vitally important that any access undertaking or any access regime has a linkage between the service standards and the price you pay on an ongoing basis. Because management can change, the company can change. We have seen that in other corridors whereby there has been an agreement in place, we pay our bills and some months have been terrible in terms of service standards.

Yet as I said from the beginning, we still pay the same flag fall and the same GTK rate for those trains. Yes, we have avenues for litigation and suing the companies in terms of damage to the business, but we all know what time that takes, the cost it involves and so on. So we just often have to grin and bear it because we do not have the choice, as to Colin Eggleston said, in running trains from Melbourne to Perth. We do not have a choice on who we use. We have to use the track provider.

Therefore, I think it is absolutely critical that any access regime, any access undertaking has a commitment to service standards on an ongoing basis and it is linked to the price that you pay. We have no difficulty - and I think that is reflected in the comments a bit earlier - in terms of the list of those service quality indicators that have been circulated. I think they are comprehensive. They cover all the performance standards that we would seek to have measured. But the reality is, so what.

What happens if there is a month where those standards are not achieved? We would still pay our access invoices every month to the flag fall and the GTK of those trains. So I am encouraging through this exercise that there is a strong linkage between track quality, trans-performance and so on to the price that we do pay. As I said at the beginning, and to summarise, I think, my final comments, is that price is one thing - and we have had that very important debate a bit earlier today - service standards are the things that drive our costs.

The cost of poor quality in track access in Australia is high. You add that on top of your access fees, you are talking about a serious impediment to how we can run our business. As operators we all know that if we do not deliver service we will lose the business. If I was a track owner under the

current regime, I would be confident, yes, we can have our bad couple of months. Our customers do not have a lot of choice, and they will still present their trains.

So I think it is that basis alone, that fact alone that there must be a linkage between service standards, the quality of that access to the price that we do pay. And I think that is where there is a serious weakness in the current undertaking and the access regimes. Thank you.

THE CHAIRPERSON: Thanks, John. Well, I think we have reached a stage in this session - and we are virtually, you know, we have made good progress - that we might stop for afternoon tea now. I am sure there may be some others who want to make some further comments. David may want to make some come-back comments, so we will return after tea to finalise - finish off this session and then go into the wrap up parts of the day which will involve certainly John Fullerton making some further comments and allowing me to sum up.

So we will stop for afternoon tea. I think we are sort of on schedule, but we have got a couple of extra carriages on board at the moment so we are actually ahead of time. So I do not know how to characterise it, but if we could all be back by about 3.15 and I would expect we might be able to wrap up the afternoon by 4 or 4.15. Thanks.

AFTERNOON BREAK [2.53pm]

RESUMED [3.20pm]

THE CHAIRPERSON: Well, welcome back everyone, it is being 3.20, we are - we will recommence and we are still formally in the session on service standards and other issues and just at the break somebody asked me - is going to make some comments from New South Wales, I think.

MR C. HUNTER: Thank you. Colin Hunter, Access Manager for the State Rail Authority of New South Wales. I have to say right at the beginning that the comments I am going to make are in relation to State Rail as an operator of XPT services in Victoria. I do not at all want to get into any discussion about any of the problems that I know you guys have in New South Wales. I will stay right out of that one, stay right out of that one.

MR .....: Very sensible move.

MR HUNTER: I could not help hear obviously that most of the discussions that you have been having today are all about the issues that you have got as freight operators and as commercial freight operators at that, I am very conscious of those, but I just had to say a few things about being a passenger operator, and a government passenger operator at that.

In terms of standards, the things that matter to us are speed, timeliness and the condition of the track. Speed does matter to us. We turn our trains around in - at Spencer Street in 45 minutes. So any way in which we are held up getting in to Spencer Street either makes us late getting out again or it means the train goes out dirty or the things that we need to do to the train at Spencer Street do not get done.

That train late back into Sydney has potentially only got an hour or so on the platform at Central Station before it heads off to Brisbane or Dubbo or somewhere like that. So a delay on one leg of any of our operations can last us 5000 kilometres. By the time we get to Brisbane and back and get to Grafton and back in another leg it can take that long to work it out.

So speed matters. As I say timeliness matters, particularly coming back into Sydney and no doubt any of you that operate up the southern corridor into Sydney have been caught up at various times by not getting the train path that you wanted. Sydney as an operator, Sydney commuter system as an operator works on three-minute time lines. If you are more than three minutes late at your point you are late and you cause a problem for anybody else. So we are operating to those sort of timeframes where we possibly can.

Track condition matters. Track condition matters to freight, too, but freight cannot fall over in the corridor with a cup of coffee in their hand. Freight cannot be standing at the buffet trying to be served and be thrown against the wall of the train, those sort of issues. We have got some special circumstances, passenger standards are different and in some respects are tighter.

We also cannot take advantage of the 1800-metre train capacity. GSR guys might - where is he - but he might get close. Typically, our trains are about 200 metres long. There is no way in the world we would ever fill an 1800-metre long XPT if we had enough rolling stock. Having said that, though, the XPT is capable of 160 kilometres an hour. We get to do that around Wagga in New South Wales. I understand the best speed we get in Victoria - and I am not the operations person so I am relying on information - I think it is 130.

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The discussion here today has talked about a desirable standard of 110. That is a significant under utilisation of our rolling stock. As well as - in terms of time sensitivity as well as I mentioned getting back into Sydney and getting our rolling stock turned around, our customers get fairly toey if we are more a few minutes late sometimes. It can mean missing a connection, for example, it can mean a person getting off the train in Brisbane can miss a tour bus connection to somewhere or getting of the train in Sydney can miss a plane to somewhere.

We have had a number of cases where we have been subject to damages claims due to delays where people missed the next part of their trip. The other issue I wanted to comment on which has had very little reference here today is not the day-to-day or the week-to-week standards of the infrastructure. We are particularly concerned about longevity.

Now, anybody that has followed the New South Wales experience will know - it is not giving any secret away - to know that there was some short term approaches taken to infrastructure which in the long term were not the right way to do it. By its nature track infrastructure degrades slowly over a matter of months or a year or two. Also by its nature it usually needs a lot of money to recover that condition once the condition is lost and when you are dependent on either revenue funding from your customers or funding from a sympathetic government, it can take a long while to get the funding to recover that condition again.

It seems to me to be a reasonable approach that in order to avoid those kind of cyclic variations in condition, which are easy to fall into, it would be extremely useful if ARTC had a regime in place where it was able to demonstrate to itself and to the industry in general that it had a program of maintenance works which met the long term requirements of maintaining the infrastructure to the standard that it needed to be at and that its program of possessions and planned works and all those kinds of things was proceeding in a general way in accordance with that agreed basic level of maintenance work, if you like.

The emphasis on a proactive looking forward to prove that we are doing what we need to do to maintain longevity rather than watching standards month by month waiting for them to start to fall off and then saying, well, is that just a local variation in time or does it indicate a trend. Those are the things that I had not heard anybody else much talking about today, so for - just to get them on the table. Thank you.

THE CHAIRPERSON: Well, thanks for that, Colin. It certainly reminds us that we are not operating in a freight vacuum here, that it is - and there are issues. I think to some extent when there was discussion about the

price, there was some comments from the industry that the issue of where funds were going was raised, but in terms of the actual discussion and the undertaking we are sort of reasonably confined to the areas we are going to cover.

But can we - we are getting towards the end of this session, it occurs to me that in relation to this whole issue of service standards, we have had some suggestion about the interests of the operators and the fact if service standards are not met, that just what sort of implications there are. Do people have comments? I do not think we quite got to the nub of - I think there was an inference that John was making or I was taking from what John said that he gets bill every month and it is the same whether he - or the standards or the service is met. Do people have a comment on that issue they would like to make? I mean, there was also a comment earlier about you're not that keen on penalties, so maybe - - -

[3.30pm]

MR SVIKIS: We would certainly like to reinforce the point that we are not keen on penalties. If we are late into Perth no penalty will recover the fact of a lost customer base or a bad reputation. We have just got to get mechanisms in place between each other, the operator and the access provider, to just make sure we get through on time, all the time. It is just - we do not support penalties against us or against the ARTC anyway and by the time we sue them, well, we have lost our goodwill anyway by the time that Court case comes through. So there has got to be better ways.

THE CHAIRPERSON: Thanks. Just for the record, that was Martin Svikis.

MR HALL: Yes. Bruce Hall from FreightCorp again. Just in terms of reliability, which as we said is critical to gaining, if not retaining customers, the condition of the infrastructure is - well it is only the one of the two things that the access owner presents to us. The other is his ability to control the network in a reliable fashion. So if we go to infrastructure condition and the criticality of it in terms of ultimate service reliability to our customers, I think it is worth reflecting on a little bit of history.

It is not that old, but if you look at the situation of opening rail up to access, the history of what happened to the infrastructure following that is not a pretty sight. Someone mentioned earlier in the piece the UK experience, which not only went - has fallen to a situation where, following access - opening the network up to access, not only is the service reliability appalling, but it has gone beyond that to quite tragic safety deterioration.

I am sure people, many people, certainly people in the rail industry are aware of that. I would simply point that position out to the ACCC.

In New South Wales we have had over the last two or three years a sad deterioration in the infrastructure condition, after five years of open access, two years of status quo, and then three years of rapidly accelerating deterioration of the access - of the infrastructure condition. To the extent that even in the Hunter Valley where an access owner can extract profits that we have 60 per cent of the network segments within the Hunter Valley are below RICs own engineering standards. And ARTC have had an audit recently as David has alluded to, and Gary Camp has indicated his experiences in terms of the service, the condition there on the Adelaide to Melbourne corridor.

So it is not a good look. It does go to the heart of service reliability. So when we come to the issue of performance indicators in this area, it is absolutely critical that these performance indicators are truly reflective, and preferably lead indicators of the condition of the network. So - and that will benefit both the operators who are trying to on-sell a service to customers. But I would suggest it also benefits the access owner for that to be so. Because I think it will allow a focused debate when it is going when it comes to these issue of the source of funding that is required to maintain the infrastructure in, what is loosely termed, the fit for purpose condition.

That too much of the debate to date has been sadly - lacks focus because it is generally around that very vague concept of fit for purpose of a whole network, be it New South Wales as a whole or be it the interstate track. As I said, unless you can get down to segmenting track into meaningful chunks with appropriate performance indicators, with appropriate targets on a network segment base there is - often the debate is rubbish. What is average network condition? So, it is easy to say. I just said it. Meaningless.

So again, just that the history is sad. We have to arrest it. I think the PI approach is the appropriate one. It has to be segmented and it has to target the type of PIs that will truly reflect and preferably give a lead as to the upcoming condition of the asset, not the condition we just measured that was - that has passed us. And then we can focus the debate, particularly on the issue of sourcing funding. It is not all going to come from above rail operators in this - it doesn't - that is the case right now in terms of passenger networks, and much of the New South Wales network and it will be the case in the interstate network.

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So unless you can focus that debate, everybody can wriggle out. Just one specific, in relation to the PIs, again I think it is a good start, what David has presented there. When I turn to infrastructure though I see only the PI related to track condition. I think we have got to get to the wider area of infrastructure. It is equally important that the signalling communications networks are in - are calibrated, such that we can measure accurately what fit for purpose means there. Not much joy in having a seriously reliable track if we haven't got the network controls, via the signals and the telecommunications, in that fit for purpose standard.

It is just the one specific. Yes, thank you.

THE CHAIRPERSON: Thanks for that. Any more comments?

MR RHODES: Ian Rhodes from Great Southern Railway. I think - I just would possibly like to differ slightly from some of my colleagues in terms of our views on service standards and penalties. I think, coming back to the issue of - we as an operator are paying for a service and we welcome the fact the ARTC have put some standards and KPIs on the table without being specific to say they are the right ones, the best ones or not. We haven't got time to look at those as yet. We - it seems - it is still to us, or to me at least, that there is a bit of an imbalance in practical terms in terms of the arrangement. If you could characterise the arrangement, it says we pay ARTC for the service and ARTC provides the service. If we don't comply with out part of the bargain, we don't pay the bill, ARTC have got a very short and effective remedy. They don't let us on the track.

If ARTC don't meet their side of the deal, and meet and provide the track according to the promised condition and KPIs, our remedy at the moment seems to us is we have to go to the Courts and get the Courts involved in the process. We haven't got the same simple level of effective remedy. I don't know what the solution to that is, but I see an imbalance there. In this - the second point I wish here to make, which is slightly different, is at the end of this process we, as a small operator I would like to reiterate, need a process that is robust and simple and effective.

Because quite simply we haven't got the resources to go through any of these detailed or time consuming arbitration mechanisms. I will give a bit of free advice. If anyone is in a legal dispute with us today, if you want to him, drag it out and drag it through the Courts, because at the end of the day we will compromise quicker than you will. Because on a size basis we won't be able to fight it forever and a day, but if we are talking a fair and equitable regime, I think you have got to build that into the consideration. Thank you.

THE CHAIRPERSON: Well, it may be timely then, given that we are towards the end of this particular session - David did you want to make some comments, given that there have been quite a range of points made, some of which have been positive and others have been reality checks.

MR MARCHANT: Chairman, the menu this afternoon and other issues has gone very broad and wide and to some degree they relate to issues much broader than ARTC and its undertaking. They relate to the rail industry across all jurisdictions and to a large degree they are not going to be remedied by ARTC or this undertaking, nor can this undertaking or ARTC solve some of them. For example, the ability to get trains in and out of Brisbane or otherwise, is really something that is pretty, pretty, you know, at least a thousand odd kms away from where ARTC can affect it and the service standard issue itself is a very complex one and we are first to concede that.

Putting that in some context, we have been measuring for a couple of years, as everybody is aware, healthy - these measurements on the table have been undertaken by us for some time and at the monthly review with operators, we actually have gone through healthy versus unhealthy. And it would indicate, that you know, in the last two years, healthy services have reliably exited ARTCs territory in 97 per cent plus of occasions, 97 per cent. It is true, that there are complications with regard to moving in and out of jurisdictions. It is true that there have been significant complications with regard to egress and ingress from New South Wales, where services are regularly hitting us. For example, out of Broken Hill three hours late and yet we have been able, with the operator, to get them exiting at Kalgoorlie on time, that is we have caught up three hours.

We offered KPIs in the discussions on the terms and conditions, two years ago and effectively, many of the ones on the table today, were the ones on the table then. We agreed with the operators, that it was premature to go into penalties and rewards because (a) we are not sure that the measurements are totally accurate, there is a lot of subjective exercise between healthy services, which will take time to resolve and the more we resolve them.

We have indicated in one operator's case that we would enter agreement where there are points provided on healthy versus unhealthy and on other performances to enable us at the end of the year to look at how a particular bonus or other scheme may or may not look in their case. And we are happy to enter that with other operators in access agreements as well. But the industry is immature with regard to measurement systems around those frameworks but we have been developing measures and going through them with operators on a monthly basis.

It is not possible for ARTC in this undertaking or as an entity to resolve the problems of access contracts in other jurisdictions not party to this undertaking, not controlled by ARTC and take responsibility in this undertaking with regard to their performance. Now, you know, if in fact other jurisdictions come in then obviously we will be seeking an undertaking attempt to deal with that. So we agree it is a difficult area. We have tried to put forward a proposal that would actually get transparent generic measures in place and would help us to work together then on how we can actually improve - from both sides including - I mean obviously including ARTC.

The track quality indexes - I am particularly referring to Bruce's comments near the end - we have been measuring track quality indexes since the day we started. Bruce, we have been very mindful of the track itself for a lot of reasons and we are happy to co-relate those back into these measures but I would indicate the National audit and Patrick's comments do not relate to the Melbourne Adelaide corridor deteriorating. They relate to what are the options for enhanced investment to get a better range of products out of it.

The Melbourne to Adelaide corridor has had a reduction in transit time for the passenger service of more than two hours and at no additional cost to enable a cycle that could have had two train operation day and night use in the same capital asset. A major infrastructure investment done in less than six months and which reduced the transit time for the passenger service by more than two and a bit hours and provided a massive opportunity for enhanced capital utilisation. The speed restrictions in the Victorian track have never been lower. The track quality index for the Victorian track, the configuration of the head, the settling of the track etcetera, even on DoI's indication through the performance reviews that we do part of our lease have never been lower.

The track quality in South Australia, an AN area which was in fact in excellent condition, AN did excellent maintenance, the track quality and index has never been lower. The speed restrictions in the AN territory have never been lower so although I totally accept there is a need for us to move towards service standards which are measurable and the rest I think the context on which ARTC is operating does not come from a benchmark as may be suggested in more generic terms that Bruce or others were referring to in other jurisdictions.

In fact the speed restrictions have got lower in percentage and in time. It doesn't mean that we want to stop at that and this is the whole issue of why people are looking in the undertaking to get service quality measures

properly embedded in it. We agree with that but we want to get measures that in fact are reliable, beneficial and do have long sustainability.

[3.45pm]

MR MARCHANT: The - the catch 22 though is that and raise that because a lot of things in this last hour and a bit have related to the rail industry across Australia, not to ARTC's area and would have been good before a Parliamentary enquiry into rail or the Australian Transport Council Minister's enquiry about what could be done, but didn't have a lot to do with what ARTC's undertaking was about in some regards.

The issue of the - of the inter-relationship between Parkeston and Kalgoorlie has been a difficult issue that all of us have been trying to resolve and we have got a general agreement to join in together to do master train planning to try and get inter-operable passes as best we can. The major hold up with that has been, it is driven by what happens with regard to the New South Wales, Sydney urban system and it then catapults upon everybody else, but there is an administrative arrangement to try and get those things happening together.

ARTC has actually assisted Western Australia, by investing and facilitating investment to make longer loops to enable the continuity of those things. I - you know, some - some of the issues there are not issues as simplified with regard to the ARTC part of the territory. Secondly, the wholesale agreement we had published and circulated, but I will make sure it is sent back out again, because operators do have an option of transferring their Western Australian contracts to us or staying with their contract with Westnet.

Many of the issues raised today are issues that you are able to contractually resolve with Westnet although you may have an option, if you wish to transfer across under the benefit of the wholesale agreement. I will make sure the thing is sent back out. As I understood it, every operator was written to by Westnet to see if they did want to assign their contract to ARTC for that territory. That - that wholesale agreement actually has in it - has in it a commitment to operability of paths between our territory in Western Australia and the condition around that which - which actually is enforceable but I am not taking - I am not taking those comments to say that there aren't things that need to be improved in inter-operability between areas and we are trying to work on that, but - but also it is also indicated some of - a that a large bulk of those issues actually don't relate to - to ARTC per se.

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The - there is quite a few issues there. The - the XPT issue of 130, I mean the service we have offered the XPT - where are you Colin? The service we have offered the XPT isn't 130 - the reason 110 is being used - is it is being used as an indicative service for that category. It is not, in any way, meant to - other services don't contract for more and have standards that have to relate to that. It is - it is just really - you go through a million different service types over time.

The - the longevity of the track infrastructure and the rest, we agree with you totally. I - I am very mindful that on-time arrival in Melbourne on our figures has improved in the last year and a half. On-time arrival at Albury into ours has deteriorated dramatically in the last 12 months and has given you a squeeze of turnaround. I understand that, but I am actually not sure that that is actually our problem, given you have got a contract in another territory which you should be able to enforce.

But - the service standard issues I hope will help to resolve that. The - the - I am also mindful that the generic - generic issues of the UK in contracting out are not necessarily reflective and have not much relevance to the history of the last two years in the territories that we have been looking at and the measures have gone on there. The - now on to some of the other issues. The term. The term of the access undertaking was proposed to be five years to give a bedding down to an access undertaking and give everybody a fresh shot at a new one, hopefully with better service quality measures that you can impact in the thing.

There - there is no restriction on ARTC contracting with operators for longer than the five years whatsoever and, in fact, some operators are looking at a longer contract than five years and some are about to execute contracts for longer. The - the protection exercise that you are seeking, that is, you know, if I sign a long term contract and then find that the same type of service as the one I have contracted for, is now getting it cheaper in the second round of access undertakings, is the like for like service provision. Again the arbitration provision etcetera, because effectively you would win that hands down, if in fact the second round had the same type of service but done cheaper. It would fall within the like for like.

Taking up Robert's point earlier today about changing - looking at the indicative access agreement at the back and then just making sure it is twigged - twigged between - to incorporate the arbitration on the CPA and other issues I think will actually help reinforce it if that is there. The - so certainly, there is not a prohibition on - on having to contract five years, you can contract for longer. However, I want to relate that term of contract to the next one - issue, which was termination.

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You see it is one thing to ask for a 10 year contract, but if in fact you want three months' termination you are really asking for a three month contract, repeated 310 times. So you know - the - the issue of termination without payment or recompense is actually a counter-intuitive issue to the same debate and that is, you know, I would like to contract long but I want to terminate my whole contract with three months' notice. Now there is a balance between those issues . What we attempted to do in this framework was provide that for a longer term contract, and you gave notice of - of a year or two years, there is a phasing-down period.

If you give us notice and you continue to operate then - then in fact the whole termination period actually comes back by the time - by the period you are operate, so we are net equal with regard to what would have been our revenue in that period. The - the - so, I mean, effectively it is a two edged sword, because just as some people are seeking finance from banks with regard to their access contracts, although I think their customer contracts will be more interesting to the banks than their access contracts, but getting it from the access contracts, we in the marketplace - when we go to finance they actually look at our contracts and if you have got a 10 year contract that actually has a three month termination the banks see that as a three month contract that may be rolled over for 110 times, so I mean it is a two-edged sword, that framework, and it is not easy but - but we have attempted to put a termination framework which does not rely on the term of the contract, it actually is a write-down termination framework where - where it whittles away.

The - the turnouts I would be happy for - on that for our lawyers, no problems, to go through that later. We actually don't think there is a conflict on the term capacity there. It is the difference between capacity and additional capacity, and putting a turnout in actually doesn't impede the - the capacity. It would only impede the absolute utilised capacity as defined there so I think - I think it is only a technical thing, it is not - it is not an issue I don't think, but we can go through that separately.

The liability provisions - you know - there is always tension in liability provisions between - between parties in a contract. The - as one party attempts to move its liabilities on to another and it is - it is a very difficult area. In this we have attempted to have a situation where - where those who best manage the source of the risk are therefore liable to the risk and it simply goes down to this, that if you have been rolling stock or others on to our track and it damages it, you pay and if you bring it on and we damage you by our track, we pay.

Obviously, it is more complex than that because the cause and contribution isn't that simple but that is the conceptual framework of this - of the

agreement and the issue then goes down to causation and the rest. You know, some - some would seek that that liability clause be extended that we take on a greater responsibility for the rolling stock framework and - and amortise that across operators. We see that as a cross subsidy between operators because what it means is an aberrant operator who has actually bad rolling stock constantly damaging the place actually gets subsidised by the other operators who are not doing that and doesn't create appropriate incentives for performance.

The last thing is the termination provisions. The termination provisions here have a rectification notice period with regard to breach of contract. ARTC is not setting itself up as a regulator anywhere in this contract. The breach of contract provisions and termination relate to the contractual conditions of the contract of access. There is a termination provision that comes back for - because you may lose accreditation. Well that is simply because our accreditation requires that we are only allowed accredited operators on our track, so it is actually a circular exercise.

The catch 22 we have though is that rail regulators in this country, and we are regulated by all of them except Queensland at the moment and Tasmania, the - the rail regulators have actually been putting it on us to actually put the codes of practice for operations through us and (b) - and so an operators has been happy with that too, at the moment but (b) they have actually been putting a condition on us that we police various aspects of the code of practice and that is part of the - part of the evolution of breaking the vertically integrated railways up and partly rail regulators trying to get other people to do their work for them.

We have - we have definitely moved 100 miles away from the New South Wales sort of concept where we check rolling stock and certify that sort of stuff. We accept that the rolling stock and the rest are, as presented to us, are good and safe. We don't want to go near it. We have never - we have never tried it - we don't want to do audits. We have made commitments about that a year ago, that we would not, but - and that that should be a matter between the regulator and the rest.

What we do have to ensure thought is that rolling stock fits our operating code for fitting through our piece of track, that is, height, dimension and the rest, because you know, not all rolling stock can fit across the nation for the very reasons that John raised and that is that the - the barriers in different parts of the national network are not similar for a whole range of reasons and that is what the national audit, Bruce, attempts to address with and how they advance those barriers further.

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The - the issue of train lengths - this is - this is a complex issue between it is a whole range of opportunity cost issues around train lengths and time on path. The train system as modern as it is, is based on signalling concepts coming from the 1850's etcetera and in Victoria until a matter of a few months ago it still had signals on a hook - on a - on an electric staff basis - they were actually put in in 1910, which we got rid of a few months ago, but you can only have one train in a signal area and some of these signal areas can be 20 kilometres long or - or whatever, so if you have got a train of 100 metres and that - as a distinct to a train of 1000 or 1200 metres you have got a huge amount of capacity, sunken infrastructure being used up which can only have one person near, so it has a huge, huge impact upon capacity upon the track and what is available for train paths, based on train lengths, based on the present configuration of the way the railways work.

We are actually looking at, and we will be doing a presentation to operators next month, on - on moving to safe working systems that actually may move away from signalling systems over the next - you know, over the five or six years and therefore add greater capacity to the system. So there are differences. Passengers are obviously charged more because they go at a much higher speed, but they also take up opportunity, cost and capacity because not only the speed, and the smoothness they require on the track but also their length framework means an opportunity cost is foregone for that use of the piece of the track.

One of my problems with train lengths in trying to work it through is this. If you are a train operators in the freight market wanting to be a - an intermodal super-freighter, and you are running at a 1200 metres or 1000 metres and you are competing with another operators who is able to run at 1500 metres, then obviously the operator of 1500 is going to have a lower overall unit cost than the one of 1000 metres, that is, in their price to their customers.

In their price to us, the flagfall represents about 30 per cent of the price, the rest is a variable GTK. Now, effectively, the competition between train operators is a competition to get the maximum yield for each train they operate. So if you equalise the price between 1000 metres and 1500 or 1600 metres, what you are really saying is that I am going to bring the operators down to a situation where the track owner and its charges will actually give an incentive charge to an operator who cannot fill his train up compared to an operator who can and it actually gives them a competitive advantage in the market brought about by the track operator's charge.

That - that is one of the consequences of not allowing the operators to work through their lengths and weight ratios and the rest. Now, it is more

complex than that but the issues are; there is signal capacity which limits the opportunity of space capacity for the system, we are selling opportunity space, there is the issue of different types of train lengths based on different types of service modes, fast or low speed passenger services. But when you get to freight trains and they are competing in intermodal markets and they want to go at x speeds and why then you have to be very carefully that inadvertently by not providing a price incentive for a small thing you are actually not equalising and actually creating a - a discriminatory base in the market with regard to those services.

That is a complex thing and it needs a lot of working through. The - the issue of incentives, disincentives is very important. What we have tried to do is we have tried to make our pricing enable operators to move from the 1100 metres, which they could run across for 1200 metres, they could run in the old AN territory, we have - we have tried to move that so that they are no worse - that they don't pay any more and in effect, flagfall and GTK rates actually fall in unit price by going to 1800 metres. We have not - we have not in this sought an extra charge.

At one stage we did look at a super - we did look at a surcharge for long trains which would, in fact, have got that price differential between short and long, but - but we were convinced not to do that by the operators and and we withdrew it during the two years of negotiations on moving through this stuff.

[4.00pm]

The second thing in the Melbourne-Adelaide corridor, where maximum train lengths under the root standards in Victoria prior to us taking over was 900 metres, you are now able to run trains of 1500 metres, at no additional charge and where it was 3300 tonnes maximum weight for the Adelaide Hills, 1 June, it went to 5000 tonnes. Now I recognise there is a difference between single-stack Melbourne to Adelaide and double-stack Adelaide to Parkeston but the issue is that ARTC doesn't have the money to double-stack between Melbourne and Adelaide, the cost is 190 to 200 something million and - but if operators wished to look at that, the additional framework can be looked at, it is more a political thing, I think, about operators lobbying for the money on that rather than SCT's undertaking.

But what I am trying to point out though, 1100 to 1500 metres change, no additional charge, but the issue that comes up, except the GTK rate, the addition that comes up is, that if an operator is able to fill their train up to 1400 metres and they are competing with an operator that can only get to 1100 metres, should we charge a different access fee because of their

position in the market-place. I think it is a very complex issue. I don't think it is one that is easily solved but I think you have to be very careful on that that you don't do the exact opposite of what our objective is and that is make the access provider basically neutral between operators competing in the above rail market and it a is a very, very careful balancing act and it needs to be looked at.

Lowering speeds against 110, we are happy to look at that, but you know, let us be careful in that area because there are effects on the market. If, for example, as Colin said, Toll would like look at, in some locations, going down to 80 because of their issues about travelling over that terrain at that speed, there is an effect on the market because effectively in the present past, if Toll does slow down, it becomes unhealthy, it slows down the trains behind it and they get very upset and therefore there is an effect on the market. If a train doesn't perform to its standard, whether it be wind-resistance or otherwise, but the trains behind it, in the same wind, can get through, then they are not going to be really very acceptable that somehow this train should be treated differently because it wasn't able to perform. Because the effect is that it slows them down.

Now conversely is someone wishes to contract for a lower train speed path, with all those contributions, we are happy to go through that, but recognise that it actually may cost a little bit more because they may actually take up the capacity that a train that could have done the speed could have got through there and therefore would have increased the capacity for both. There are very complex issues of trade-offs. They are not simply solved by an access undertaking and some wisdom in the regulator that somehow they are going to solve these trade-offs on this piece of paper because they are ongoing trade-offs that actually get dealt with by operators weighing up what their objectives are so we are certainly not against lowering the speed but there are trade-offs between paths and other operators on doing that.

There are some many other things raised in that other section that I am looking at my notes here and thinking I could go for another three hours and I don't think that is anybody's intention and I have got a feeling everybody would prefer I didn't. The remedies and imbalance in the GSR exercise comes down to - I could be trade - the remedies of, you know, getting a track condition at some billions of dollars down for a 24 hour cycle and then find that nobody contracts you for the 24 hour cycle, nobody has ever recompensed me for that.

That effectively - if, in fact, a train is unhealthy, it doesn't perform to the standard, it not only affects itself and its customers earned, it actually also affects the ones behind it, if it can't be put away. If, in fact, the track is unhealthy, it actually affects the market as a whole and we have tried to put

on the table, performance indicators that will help as an industry lead to getting to those sort of measure. We are not adverse in our performance in our individual contracts and in one case, you know, we are agreeing to it, working through over a year of penalty provision but it is two-way because when a train is unhealthy, regardless of the penalty to the customer, it actually stops us from selling another path to someone else if it is not on a continuous basis.

B - it also can impede the competitors in the market-place slowing them down. It is a two-way exercise that has actually always only presented in the way that "oh but if we are unhealthy, we will suffer because our customers will leave us" but the trains behind them also suffer and we also suffer because we can't necessarily sell train paths to those who may have performed and therefore held business in the rail market etcetera. So it is a two-way exercise. I am saying that, I am not trying to cast blame or otherwise but to say we do need to look, over a period a time at getting more sophisticated in these measures and working co-operatively as a industry on that not just on access undertakings.

In performance - in actual individual access agreements we have indicated, at least on one occasion, that we are prepared to look at point systems both ways but it is both ways.

THE CHAIRPERSON: Well, thank you, David, that is a very full and frank response and, I think, therefore we have probably now concluded unless anybody has any further issue to raise on the service standards and other issues session. I think, Mark -

MR McAVOY: Mark McAvoy from SCT. I would just like to refer to David's comment about shifting of roof under the liability clauses. I think it is very important for the ACCC to be aware that ARTC has been the one amending the clauses from the clauses which operators have been operating under since 1995. If not to shift risk to operators why amend the liability clauses, that is just my point - question.

THE CHAIRPERSON: Okay, any other comments. If not we will move on the wrap-up part of the day and John Fullerton is going to sort of wrap up on behalf of operators.

MR FULLERTON: I guess before I do just quickly summarise I guess today's proceedings from an operators perspective, I would just like to pick up on a couple of points that David has made. I think we all accept the fact that this undertaking only covers 50 per cent of the interstate network. We, as operators, have to operate over a 100 per cent of the network and I think it is those interface issues that continue to plague our businesses and

unless we are prepared to move Perth to Kalgoorlie and Brisbane and Sydney to Albury and to Broken Hill, we have those issues and pursuing and in that environment to look at each jurisdiction, themselves having their own rating structures and escalations formulas, you can understand our frustration, I guess, in comprehending that in an environment where those interfaces create costs to us.

So on one hand we have under pressure in terms of the rates that we do pay and the escalation of those rates and have a strong level of frustration because of the interface aren't being dealt with and sure could be - they have dealt with at Parliamentary inquiries but it is important that it is said here today that people recognise that this undertaking is 50 per cent of the interstate network and it starts at locations which are in the middle of nowhere and there, I think David, that it is a relevant point. I think the other point I wanted to make is that this is the first undertaking that - and it is really incumbent upon all of us to get it right because, you know, in years to come David won't be here, I won't be here, all of us in the room will be different and I think it is picking up on Martin's point that the interpretation and the clarify of the agreement must be very clear and very simple so that new players coming in, new managements of infrastructure are very clear about what their obligations are and that we just don't rely on management of the day providing the good practices and the activities to help build the business.
I think that is a very important point that we can translate in the agreement, practices that will endure, I think, over the term of this agreement and I think at the moment we are concerned that the circumstances that do exist in other jurisdictions in New South Wales, to do with track quality, transit performance, could in reality exist under
this access agreement and under this access regime. I think that is the concern we should, I think, recognise here today that, sure, good management could move on but this agreement doesn't address the reality that the circumstances in other jurisdictions could exist tomorrow because there isn't strong linkages between service standards.

There is an automatic escalation process that continues - will drive up the costs and there is an access regime that, in our view, is inferior to what road pay so, I think, they are some fundamental issues that I think remain with us. I think the important point now is in terms what do we do we do from here in going forward and right at the beginning I think I certainly made the comment and so has others that we were encouraged by this workshop being organised today by the ACCC. We do see this as a start to the process that still needs a lot of work to be completed. We would certainly encourage the ACCC to continue to be involved in resolving those issues that have emerged, not just today, but certainly in each of our deliberations when we have had a look at the access undertaking.

I also do note, David, that I guess the process of today there has been issues that you have recognised and have undertaken to go away and alter and change and we would like to think that is a positive sign so we can continue to move forward with the terms of the undertaking, the terms of the access regime to develop something that we, in all confidence, can pass onto the industry generally, not just our own personal views that will work and that can allow the access seekers to get fair and equitable treatment in terms of seeking access and those existing access users get equity and fairness in treatment in terms of the access charges to service quality and the equal level playing field in terms of other modes of the transport so I do really want to leave it at that.

I would, however, encourage that we do agree a process in the time that is remaining today on how we are going to deal with these issues and how we can continue to seek the support of the ACCC in working through, I guess, the fundamental issues that have been discussed here today and there is probably not a lot of them, I mean there is certainly a lot of noise issues, peripheral issues that can dealt through any process to finalise the documentation but there are some probably core issues that still need further work for us to feel comfortable with it. We can support an undertaking that is going to serve our industry and certainly going to serve our businesses into the future. So thank you, Mr Chairman.

THE CHAIRPERSON: Thank you, John. Well I will do something of a brief wrap-up but in doing so, thank you for those comments about the process. I think we have made progress today, it has certainly been a useful process for the Commission. We find that this sort of personal interaction that you gain through such a forum as this and the fact that everyone was prepared to be frank and at times forthright, which is what we like to see from the Commission's point of view, both in our competition and our access role. We like to feel we treat things without fear or favour and with the objection of achieving fair and informed markets and better competitive outcomes.

Today has been a good process from our point of view. Just to run over the or run through the day very briefly. Session 1, in the legal and interface issues session, John Fullerton in opening from the operators' point of view said that track access is the most important issue for operators and he also said that rail remains disadvantaged when compared to roads and that is certainly a fundamental issue that impacts on all of these questions.

Sean Riordan from the Commission set out the limits of the ACCC's role in this process. The ACCC cannot re-write the undertaking, nor can the ACCC make judgments about what part of the interstate rail network or that part of the interstate rail network that ARTC does not control[4.15pm]

Robert Jeremy of Toll said that issues that crossed regulatory jurisdictions were, however, critical giving the example of track damage to a train which in turn damages someone else's track. These are all - this sort of thing is a practical element that does add a dimension in terms of commercial realities must be taken into account. A number of operators also expressed concerns regarding clarity in the terms of the access undertaking and with the ability of access seekers to enforce the ARTC undertaking. So that was a very brief pen picture of where we - in the opening session.

We then went on in sessions 2 and 3 to cover access pricing and David Marchant leading off spoke of the certainty that the undertaking offers, saying that price increases are capped by the CPI minus X provision. David also put the view that the DORC value put forward by the ARTC was not as high as it otherwise may have been. For example, the value of land had not been included. Regarding the situation where two operators desire the one train path, David pointed out that no auction would take place.

Robert Jeremy of Toll questioned how rail access prices were determined prior to ATC's commencement. He argued that access prices are still the product of a black box and he also questioned the relevance of a DORC valuation to the prices proposed by ARTC. Operators expressed differing views regarding the appropriateness of a higher fixed flagfall fee and a lower variable charge. The - some encouraged - I am having trouble reading my writing here. Yes, that is real point and this encourages greater flexibility.

It was this whole question of greater flexibility in terms of train lengths and the way things are configured by the operators. We have had some subsequent discussion at the end of the day from David, in terms of putting a further point of view from ARTC on this matter. The session number 4 negotiation and dispute resolution, David Marchant once again opened the session saying that in the interests of expediting the dispute resolution process, ARTC is proposing to make the mediation stage voluntary.

A number of operators commented that the negotiate/arbitrate model was not appropriate in the rail industry because if there are delays in the process, customers choose another mode. Operators expressed support for the Commission to act as, or play some arbitration role at some stage in the dispute resolution process. The Commission does have some experience in assessing dispute resolution mechanisms and will assess ARTC's proposals with the benefit of this expertise. So that is that session.

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The final session, service standards, ARTC has indicated a commitment to publish peak performance indicators and referred to what was circulated prior to the meeting. Operators are concerned that while this is a positive step, other details need to be pursued, for example, what is the definition of an adequate standard, minimal or optional, and what happens if ARTC fails to meet the service level standards. There were comments that penalties would not necessarily solve the issue or it is the way to go, although there were various views.

ARTC differentiated between what is solvable by them under the undertaking, and other matters that are wider rail industry issues. As I say, I think it has been a useful process. I think we have taken a lot of things out of today's discussion. Some of the key changes that were - or possible variations or refinements talked about today, included amending the undertaking to include a new provision on service levels, clarifying the degree of transparency in some areas in terms of the like service issue. Also amending the undertaking to make mediation optional rather than compulsory.

ARTC also mentioned that it would look at the issue of the ACCC as an arbitrator and certainly from the Commission's point of view if this proposal is put to us, we will certainly consider it at the Commission. ARTC also said it will consider the consistency between the track access agreement and the undertaking in the application of the competition principles agreement to dispute resolution criteria. So there is probably a range of other issues and certainly we will pick them up from the record of discussion.

I would just like to mention the effort of the ACCC staff in pulling this thing together; Margaret and Renato and Sebastian and all the others who are here. We are certainly dedicated to keeping communication channels open, getting the maximum transparency that we can in these processes. What happens from here? We will be making an assessment of the undertaking. That will be continuing to do that. A draft report will be released by the Commission probably towards the end of September or into October and when that draft is released there will be the chance for everybody to provide further comment back to us.

So that is the process. Thank you all very much for attending today, and we are ahead of schedule, so it means that everybody - at least we have been able to let you catch planes and trains and things and thank you once again. We look forward to maintaining the dialogue. Thank you.

WORKSHOP CONCLUDED

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